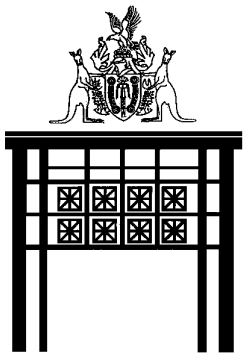
Chapter 1

DISCUSSION PAPER
ON A PROPOSED NEW STATE
CONSTITUTION
FOR THE
NORTHERN TERRITORY



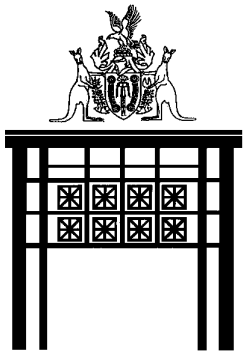
LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Select Committee on
Constitutional Development

DISCUSSION PAPER ON A PROPOSED NEW STATE CONSTITUTION FOR THE NORTHERN TERRITORY

JULY 1995

Second Edition



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Select Committee on Constitutional Development

Discussion Paper on A Proposed New State Constitution for the Northern Territory

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July 1995

Second Edition

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EDITOR'S NOTE

There has been no change to the content of the original Discussion Paper.

The only changes in the second edition refer to the following :

- the Summary of Recommendations and Endorsements have been listed numerically and cross-referenced to the respective paragraphs and pages within the second edition;
- Parts U to Y of the original document are now reflected as Appendices 1 to 5;
- the insertion of a new Appendix 6, listing the publications of the Committee; and
- due to reformatting, the original document page numbering has altered and cross-referencing within the second edition has been amended accordingly.

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I. SUMMARY OF SELECT COMMITTEE RECOMMENDATIONS AND ENDORSEMENTS

For the convenience of considering this Paper the recommendations and endorsements of the Committee are consolidated below:

II. INTRODUCTION

1. The Select Committee is of the view that [the Northern Territory (Self-Government) Act] could not serve as [a new State] constitution without substantial modification. (p.11: para 2(b)).

2. 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 (p.11: para 2(c)).

3. The view of all members of the Select Committee is that the new State constitution must be prepared by Territorians. (p.11: para 2(d)).

III. THE LEGISLATURE

4. The Select Committee is of the view that the new State Parliament should be given the same rights, powers and privileges as existing State Parliaments. (p.15: para (e)).

5. The Select Committee considers that the legislative powers of the new State Parliament in respect of the new State should be as extensive as possible, that is, that it should have the same powers as other State Parliaments, subject only to the limitations flowing from the Commonwealth Constitution and the Australia Act. (p.15: para (f)).

6. The Select Committee is unanimously of the view that the representative of the Monarch should at least have the function of assenting to legislation or withholding assent. The Committee differs as to whether that representative should have power to suggest amendments back to the new State Parliament. (p.15: para (h)).

7. The Committee is strongly of the view that the new State should be treated the same as existing States [with regard to reservation and disallowance], and that there should be no provision for reservation or disallowance of new State legislation by the Commonwealth Parliament or any other outside body. (p.15: para (i)).

IV. FORM AND COMPOSITION

8. The Select Committee considers that ... it is not necessary to define the Parliament of the new State in the constitution as including the Monarch or Her or His representative. (p.18: para 1(c)).

9. The Select Committee proposes that the new State Parliament should consist of one House only. (p.20: para 2(f)).

10. The Select Committee recommends that the number of members of the new State Parliament continue to be included in ordinary legislation. (p.20: para 3(b)).

11. [The Select Committee] does not at this stage recommend any change [to the provisions in the Northern Territory (Self-Government) Act relating to the qualifications of members] except the deletion of [residency in the Commonwealth for at least 6 months and in the Northern Territory for at least 3 months] and the substitution of a new single residential requirement of 6 months in the new State. (p.21: para 4(b)).

12. The Select Committee supports the exclusion from nomination of a candidate who is already a member of the Commonwealth or another State legislature and certain office holders such as the Governor and Judges. ... In all other cases, the Committee is of the view that ... a person in any other office or employment should not be disqualified from nominating for the new State Parliament. However if the person nominating holds an office of profit under the Crown (other than an office in relation to the new State Parliament), that office should automatically terminate upon that person's election (p.21: para 4(c)).

13. The Select Committee endorses [the] different treatment between [qualifications for] voting and nomination in the case of prisoners. (p.22: para 4(d)).

14. The Select Committee suggests that a member should only be disqualified if the member fails to attend the new State Parliament for 7 consecutive sitting days without permission. Otherwise it favours [the] provisions [relating to vacation of office by members in the Northern Territory (Self-Government) Act but] suggests ... that disqualification should not extend to a member who inadvertently receives remuneration in excess of his or her lawful entitlement and who repays the excess. (p.22: para 4(e)).

15. The Select committee favours a similar provision [that a member having an interest in a contract with the new State may not take part in the discussion or vote on the matter in the new State Parliament] in the new State constitution. (p.22: para 4(f)).

16. The Select Committee favours the inclusion of all provisions on Qualification and disqualification of members [in the new State Parliament] in the new State constitution ... (p.22: para 4(g)).

17. The Select Committee recommends retention of the existing term [4 years, for a new State Parliament.] (p.23: para 5 (c)).

18. The Select Committee is of the view that there should be a constitutional requirement that not more than 6 months pass between successive sittings of the new State Parliament. (p.23: para 5(d)).

19. The Select Committee prefers the partially fixed term option, whereby the Governor cannot dissolve the new State Parliament within the first three years of its term unless a vote of no-confidence in the Government has been carried by the Parliament or unless the Premier has resigned or has vacated office. In either of those events, the Governor should be able to invite another member to form a government. If the Governor is unable within a reasonable time to appoint a member who can form a government which would have the confidence of Parliament, the Governor should be able to dissolve the Parliament. (p.24: para 5(i)).

V. NEW STATE PARLIAMENT: ELECTORAL PROVISIONS

20. The Select Committee is of the view that most electoral provisions should not be contained in the new State constitution. (p.26: para 1(d)).

21. The Select Committee prefers the existing single-member electorate system, with Aboriginal Territorians participating in the same way as other Territorians on the basis of one person one vote and with no distinction on the basis of race. However it is of the view that the nature of electorates should not be prescribed in the new State constitution but should be left to ordinary legislation. (p.27: para 2(a)).

22. "The Select Committee" is divided as to it's views on this [electorate tolerance] matter. Some members favour a maximum 20 per cent rule for inclusion in the new State Constitution whilst others favour a maximum 10 per cent rule for inclusion. (p.28: para 2(e)).

23. The Select Committee is of the view that there should be a three month residential requirement in the new State for a person to be eligible to vote for the new State Parliament. Persons eligible to vote in Commonwealth elections anywhere in Australia immediately before the commencement of Statehood should be eligible to vote for the new State Parliament if meeting this residential qualification. Subject thereto, voting should be limited to Australian citizens. In other respects, the Committee favours similar provisions to those presently applying in the Northern Territory. These qualifications should be included in the new State constitution. (p.28: para 3(c)).

24. The Select Committee suggests that the new State constitution should contain provision enabling the Governor, on the advice of his or her Ministers, to issue writs for elections and to fix the date of elections. (p.28: para 4(a)).

25. The Select Committee also suggests that the new State constitution contain provisions as to casual vacancies and by-elections. Under this provision, an election (either a general election or a by-election) should be held within 6 months of any casual vacancy. (p.28: para 4(b)).

26. The Select Committee recommends that the principle of one person one vote, and the requirement that elections be by secret ballot, should also be contained in the new State constitution. (p.29: para 4(c)).

VI. OTHER LEGISLATIVE MATTERS

27. The Select Committee considers that because of the importance of the office of Speaker, the new State constitution should provide for that office in a similar way to the Northern Territory (Self-Government) Act. The Speaker of the new State Parliament should have the same voting power as the Speaker of the Legislative Assembly, namely, a deliberative vote and a casting vote. (p.30: para 2(b)).

28. The Select Committee envisages that entrenchment would generally comprise or include the requirement that any proposed change [to the new State constitution] be submitted to and be supported by a specified majority of new State electors at a referendum. This would necessitate certain minimal provisions dealing with referendums in the new State constitution. (p.30: para 3(b)).

29. The Select Committee is opposed to any method of entrenchment that would comprise or include the necessity of obtaining the prior approval of the Commonwealth Government or Parliament to any change. (p.31: para 3(c)).

30. Generally speaking, the Select Committee favours some degree of entrenchment of the whole of the new State constitution. (p.31: para 3(d)).

VII. GOVERNOR AND THE CROWN

31. "... 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." (p.36: para 3).

32. The Select Committee believes that [the existence of direct links with the Sovereign] 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. (p.36: para 3).

33. The Select Committee considers that there should be some constitutional guarantee of the Governor's remuneration (p.36: para 5).

VIII. POWERS OF THE GOVERNOR

34. 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. ... 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 (p.38: para 8).

35. The Select Committee recommends that the Governor should be given the express constitutional duty of upholding and maintaining the new State constitution as part of his or her wider general responsibility of administering the government of the new State (p.39: para 9).

36. Where it is clear that the government retains the confidence of the Parliament, the Select Committee considers that the Governor should have no power to dismiss his or her Ministers, or to dissolve the Parliament within the first 3 years of its 4 year term, nor any power to dissolve the Parliament in the last year of that term without the advice of his or her Ministers. (p.39: para 10).

37. 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. (p.39: para 11).

38. 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 (p.39: para 12).

39. The powers of the Governor outlined in Paragraphs [(d) and (e)] above should apply even within the first 3 years of the 4 year term of Parliament (p.39: para 13).

40. 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. (p.39: para 14).

IX. PREMIER AND OTHER MINISTERS

41. The Select Committee is of the view that the Premier and other Ministers of the new State should be chosen from the members of the new State Parliament (p.40: para 2).

42. The Select Committee is of the view that the choice of the Premier should be a matter for the new State Governor (p.40: para 3).

43. [The Select Committee believes] the choice of other Ministers should be also a matter for the new State Governor after having received the advice of the Premier (p.40: para 4).

44. In the Select Committee's opinion, the Premier and other Ministers should hold office in accordance with the views expressed in Part H above. (p.40: para 5).

45. The Select Committee considers that the new State constitution should provide that an appointment as Minister will automatically terminate if the Minister ceases to be a member of the Parliament. If a Minister loses an election, he or she should only be entitled to remain a Minister up to the declaration of the poll. (p.40: para 6).

46. The Select Committee is of the view that the number of Ministers and their respective functions, responsibilities and designations, should also be a matter for the new State Governor after receiving the advice of the Premier (p.41: para 7).

47. The Select Committee believes that the remuneration and other entitlements of Ministers should be left to new State legislation. (p.41: para 8).

48. The Select Committee is opposed to any limitations being placed in the new State constitution on the scope of the executive authority of the new State Governor and Ministers. (p.41: para 9).

X. EXECUTIVE COUNCIL AND CABINET

49. "... it is the view of the Committee that the membership of the Executive Council of the new State should be limited to the Ministers for the time being *of* the new State ... (p.42: para 2).

50. The Select Committee proposes that the Executive Council of the new State be presided over by the Governor or the Governor's nominee. Meetings should be convened by the Governor whenever requested by the Premier or acting Premier. Matters of procedure should be determined by the Executive Council itself (p.42: para 3).

51. The Select Committee sees no need to give express constitutional recognition to the institution of Cabinet ... (p.42: para 4).

XI. FINANCIAL MATTERS

52. The most significant [financial] provisions that the Select Committee suggests be included [in the new State constitution] are:

(i) a provision for the establishment of a consolidated fund into which moneys belonging to the new State must be paid;

(ii) a requirement that money can only be paid out of the consolidated fund in accordance with a statutory appropriation;

(iii) a requirement that all money bills introduced into Parliament should first be the subject of a recommendation by the Governor to the Parliament; and

(iv) a requirement that appropriation and taxation bills only deal with matters of appropriation and taxation respectively. (p.43: para 2).

53. The Select Committee is strongly opposed to any proposal for including any external controls over borrowing by the new State other than in accordance with the provisions and powers presently applicable to the existing States (p.43: para 5).\

XII. THE JUDICIARY - INDEPENDENCE

54. The Select Committee favours the existing system of appointment of judges by the representative of the Monarch but considers that there should be convention as to prior consultation with the Chief Justice and appropriate bodies representing the legal profession." (p.49: para 3(b)).

55. The Select Committee favours inclusion of provision for removal of judges in the new State constitution and, in the absence of a national scheme concerning the removal of judges, the existing method of removal, which leaves the question of a determination as to misbehaviour or incapacity to the legislature." (p.50: para 4(e)).

56. The Select Committee does not consider that any provision concerning court administration should be included in the new State constitution. (p.50: para 5(b)).

57. The Select Committee does not favour the inclusion of any provision concerning judges and non-judicial functions in the new State constitution. (p.51: para 6(c)).

58. The Select Committee favours inclusion in the new State constitution of a provision along the lines of section 159 of the Papua New Guinea Constitution which provides that nothing in the Constitution prevents a law conferring judicial authority on a person or body outside the Judiciary, or the establishment by or in accordance with law, or by consent of the parties, of arbitral or conciliatory tribunals, whether ad hoc or other, outside the Judiciary. (p.52:, para 7(g)).

XIII. THE JUDICIARY AND THE NEW STATE CONSTITUTION - ENTRENCHMENT

59. The Select Committee accepts that the Judiciary should be recognised in the new State constitution. An independent Judiciary is fundamental to our system of government and its position should therefore be entrenched in the constitution. (p.53: para (2)).

60. The Select Committee believes, however, that only fundamental principles should be entrenched, and not matters of detail. (p.53: para (3)).

61. The Select Committee recommends that, in respect of the Judiciary, the following provisions should be included in the new State constitution:

(a) the existence of the Supreme Court of the new State including the Court of Appeal;

(b) appropriate savings provisions to carry over the officers, functioning, proceedings, records etc. of the Supreme Court of the Northern Territory;

(c) provisions for the appointment of Supreme Court judges (see recommendation above) and a guarantee against any reduction in their terms ant conditions of service during their respective terms of office;

(d) provision for the removal of judges (see recommendation above); and

(e) provisions concerning the jurisdiction of the Supreme Court of that new State. (p.53: para (4)).

62. The Committee does not at this stage consider any further entrenched provisions [as to the Judiciary are necessary, although it invites comment. (p.53: para (e)).

XIV. LOCAL GOVERNMENT

63. "... the Select Committee favours some constitutional provisions for the recognition of local government in the State. (p.60: para 6).

XV. ABORIGINAL RIGHTS

64. In the absence of Commonwealth land rights legislation applying Australia-wide, the Select Committee in broad terms endorses [the] approach [that the Aboriginals Land Rights (Northern Territory) Act 1976 be patriated to and become part of the law of the new State upon the grant of Statehood by some agreed method and that the process of patriation should include appropriate guarantees of Aboriginal ownership. (p.61: para 1)

65. One option, favoured by the Select Committee, is to entrench these guarantees of Aboriginal ownership in the new State constitution, such that they can only be amended by following specified entrenchment procedures. (p.61: para 2).

A. INTRODUCTION

1. Terms of Reference[1]

(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 terms of reference were made when the Committee was reconstituted on 28 April, 1987 following the March 1987 election. The 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 the major aspect of the work of the Select 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.

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

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

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

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

(a) constitution for the new state and the principles upon which it should be drawing, including;

- legislative power
- executive powers, and
- judicial powers, and
- 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

[1] See Appendix 5 for current terms of reference.

2. The Need for a Constitution

(a) Section 106 of the Constitution of the Commonwealth of Australia clearly anticipates the existence of an appropriate constitution "at the admission or establishment of the [new] State". Moreover, there is a general concurrence of views that the existence of a constitution is a necessary pre-condition for Territory Statehood. This can either be the existing constitution of a political entity that is not yet a State, or it can be a new constitution specifically framed for the new State.

(b) The self-governing polity known as the Northern Territory of Australia derives its constitutional status from the Northern Territory (Self-Government) Act 1978. As an ordinary Commonwealth statute capable of being repealed or amended by normal legislative process, that Act does not have the higher legal status normally accorded to a constitutional enactment. The constitution of the new State of the Northern Territory will form part of the law of the new State and will be capable of being altered only in accordance with its own provisions for amendment. While many provisions of the Northern Territory (Self-Government) Act may be suitable or adaptable for the new State constitution, the Select Committee is of the view that it could not serve as that constitution without substantial modification.

(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. 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.

(e) In the Australian tradition, constitutions have been broadly concerned with the description of the major institutions - executive, legislative and judicial - of the political system and the relationship between them. They set out the basic structure but leave many of the dynamic aspects of government to unwritten conventions and practices. The traditional model does not include provisions about the manner and quality of the use of power nor does it place particular

stress on the limiting of that power. Whether the new State constitution follows Australian precedent or embraces wider concerns is a matter for Territorians to decide.

3. The Process of Constitution Making

(a) The Select Committee is in agreement on the process by which the new State constitution should be framed.

Three stages will be involved:

(i) The Select Committee on Constitutional Development will prepare a draft constitution for presentation to the Assembly. Options, where necessary, will be included.

(ii) The draft constitution will be put before a Territory Constitutional Convention. The Convention will be established by appropriate action of the Legislative Assembly and will include broad representation from across the Northern Territory Community. It will receive the recommendations of the Legislative Assembly following debate on the Select Committee's report, will discuss the proposals and ratify a final draft of the constitution.

(iii) The constitution as ratified by the Convention will be submitted to a referendum of Northern Territory electors for approval.

This three-stage process was endorsed by the Select Committee at its meeting of 3 November 1986.

(b) The Select Committee, empowered by its terms of reference, adopted at its meeting of 3 November 1986, the following procedure:

(i) Four draft discussion papers will be prepared for consideration by the Committee on the following subjects:

- the Legislature - Composition, Function and Power;
- the Executive and its relationship with the Crown and the Legislature;
- the Judiciary; and
- other entrenched provisions to be included in the constitution, including a possible Bill of Rights and possible special provisions relating to the Aboriginal citizens of the Northern Territory such as their individual rights and land tenure;

(ii) Following finalisation by the Committee of these documents, copies will be forwarded to appropriate communities, councils, groups and individuals throughout the Territory and the Committee will engage in a process of community consultation throughout the Territory to obtain the comments and views on the issues raised or alternative submissions.

Any person can, upon request, be put on the Committee's mailing list and may make oral or written submissions to the Committee.

(iii) Following such consultation, the Committee will prepare a draft constitution for inclusion in its Report to the Legislative Assembly, which draft shall contain, where necessary, other options; and

(iv) The Committee will prepare for inclusion in its Report to the Legislative Assembly recommendations on representation at the proposed Constitutional Convention.

(c) Membership of the Select Committee currently comprises Steve Hatton (Chairman), Terry Smith, Brian Ede, Wesley Lanhupuy, Mick Palmer and Rick Setter.[2]

4. Discussion and Information Papers[3]

(a) Following an examination of possible constitutional provisions, the Select Committee has directed that certain salient areas be addressed and that this be done in one consolidated paper rather than in four separate discussion papers. The areas selected for discussion were those which the Select Committee considered had more than one viable or acceptable option for inclusion in the constitution. Some were included because of divided opinions in the Select Committee itself, others, despite unanimous support for one option, because different courses of action might eventually be preferred. Where the Select Committee has a particular preference, it is clearly indicated.

(b) Irrespective of the Committee's preference, all options are discussed and treated as evenhandedly as possible. Each is deemed capable of forming part of the constitution. Any conclusions arising from these options are the task of the Select Committee and the Territory community.

(c) The Discussion Paper is directed to Territorians at large. Thus, it is written as concisely and non-technically as far as is practicable given the subject matter. The Select Committee hopes that it will generate interest and debate within the Territory community and be a useful basis for later consultation. Comments are invited, not only on matters discussed in the Paper, but also on any other matters relevant to the terms of reference.

(d) The Select Committee will also issue information papers as required to inform the public on specific issues arising from the terms of reference. The first information paper will deal with the options for granting Statehood, setting out the preferred option and steps and procedures to give effect to the grant.

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[2] Current membership of Committee is, Steve Hatton [Chairman], Maggie Hickey [Deputy Chairperson], John Bailey, Tim Baldwin, Wes Lanhupuy, Phil Mitchell.

[3] See Appendix 6 for list of publications prepared by the Committee.

B. THE LEGISLATURE

1. General

(a) Just as the necessity for a new State to have a constitution is recognised in the Constitution of the Commonwealth of Australia, so is the fact that there must be a Parliament of a new State - for example, Sections 9, 15, 41, 107, 108, 111 (although not all of these sections may apply to a new State that was formerly a Commonwealth territory) and see also the Australia Act 1986.

(b) The view in (a) above is supported by the definition of "the States" in section 6 of the Constitution Act to include new States and the definition of "State" in the Australia Act to also include new States.

(c) The Constitution contemplates that a State Parliament will be composed of one or more chambers (Section 15), one of which being described as "the more numerous House of the Parliament of the State" (Sections 10, 30, 31, 41). This is a reference to the Lower House of the State Parliament where a bicameral system has been adopted, although it is clear that unicameral system is constitutionally acceptable.

(d) The Constitution also contemplates that a State Parliament will be representative in nature, with at least an elected legislature. However the method of election is not specified and allows considerable scope for innovation. Possibilities that might be considered are single and multiple electorates, common rolls and separate rolls, single and plural voting, equality of electorates, special electorates, etc. The views of the Committee on some of these matters are discussed below.

(e) However it may be elected and constituted, the Select Committee is of the view that the new State Parliament should be given the same rights, powers and privileges as existing State Parliaments. Anything less would not comply with the view expressed in the first preamble to the terms of reference of the Select Committee requiring constitutional equality with the other States.

(f) The Select Committee considers that the Legislative powers of the new State Parliament in respect of the new State should be as extensive as possible, that is, that it should have the same owners as other State Parliaments, subject only to the limitations flowing from the Commonwealth Constitution and the Australia Act.

(g) 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.

(h) Given the monarchical system, and given the prerogative powers of the Crown with respect to the passage of legislation, it seems that the role of the representative of the Monarch in assenting to legislation enacted by the Parliament of a State (including that of a new State) cannot be dispensed with. This is implicit in Section 9 of the Australia Act 1986. The Select Committee is unanimously of the view that the representative of the Monarch should at least have the function of assenting to legislation or withholding assent. The Committee differs as to whether that representative should have power to suggest amendments back to the new State Parliament. One view is that the representative should have this power, in the same way as Governors of the existing States. The other view disagrees, based on the premise that the Parliament should have control over its own legislative processes and that it should not be possible for the executive to seek a reconsideration of legislation by referral back once it is passed. It should do so by following normal legislative processes.

(i) The passage of the Australia Act has also clarified the position as to disallowance and reservation of State legislation. Under Sections 8 and 9 of that Act, laws made by a State Parliament cannot be subject to disallowance by the Monarch nor can any Bill be the subject of a requirement for reservation to the Monarch. This may be compared to the present situation under the Northern Territory (Self-Government Act pursuant to which Territory legislation dealing with non transferred matters can be reserved for the Governor-General's pleasure, and any Territory legislation assented to by the Administrator can be disallowed by the Governor-General within a specified time. The Committee is strongly of the view that the new State should be treated the same as existing States in this regard, and that there should be no provision for reservation or disallowance of new State legislation by the Commonwealth Parliament or any other outside body.

(j) The question arises as to whether the new State Parliament should be so established as to provide for, or at least operate consistently with, the system broadly known as responsible Government. Under this system, the executive government is responsible to the Parliament, which in turn is responsible to the people. It is a system inherited from the Westminster Parliament, and in general terms it requires the leader of government, however described, to be the member of Parliament chosen by the Monarch or Her or His representative who can form a government from amongst the members which enjoys the confidence of the Parliament. Ministers of the government are chosen from and responsible to the Parliament, and the Monarch or Her or His representative acts with the advice of such Ministers. This is a question to be addressed more detail below.

2. Transitional Provisions

(a) There is a question whether the existing Legislative Assembly of the Northern Territory should be continued after the grant of Statehood as the Parliament of the new State, or whether a new State Parliament should be elected and commenced on and from the grant. It is to be recalled that upon the grant Or Self-government in 1978, the existing Legislative Assembly continued in existence by force of the transitional provisions in the Northern Territory (self-Government) Act 1978 and no election was held until some time after the grant. Similarly in the case of the Self-governing Australian colonies prior to federation, their existing colonial Parliaments continued in existence upon federation in accordance with their colonial constitutions and became the State Parliaments, with the powers of these Parliaments being preserved by Section 107 of the Commonwealth Constitution except insofar as the Constitution vested any powers in the Commonwealth Parliament or withdrew them from the State Parliaments.

(b) The nature and extent of the provisions dealing with the legislature of the new State in the constitution of that new State will be influenced, not only by the decision as to whether or not the Legislative Assembly is to be continued as the Parliament of the new State, but also by any decision as to the extent to which the constitution is to be given a special constitutionally entrenched status going beyond that of ordinary legislation. A constitution is said to be entrenched if it cannot be amended or repealed except after following certain defined procedures going beyond those required for ordinary legislation eg: by referendum. Insofar as such entrenchment is not considered necessary, appropriate provisions relating to the legislature of the new State (unless necessary to facilitate the first election of the new State Parliament) need not be included in the constitution but could be contained in ordinary legislation. The question of entrenchment is considered in more detail below.

C. FORM AND COMPOSITION

1. Constitution of Parliament

(a) The inclusion of the Monarch as part of the legislative process has an historical base in the evolution of the British (and Australian) constitutional system. Insofar as a monarchical system is to continue to operate within the Australian federation, it may be necessary for the representative of the Monarch in a State (including a new State) to be part of that legislative process, at least at the assent stage (see above). Some might argue that because the Monarch or Her or His representative retains such a role, however formal, that he or she should be included by definition as part of the Parliament itself. Others may contend that, as the above role is largely formal and out-of-date, the Parliament should be defined as being the elected chamber or chambers only.

(b) The definition of the Parliament varies among the Australian States. In the constitutions of NSW, Victoria, Queensland and WA, there is a specific

reference to the Queen or "Her (His) Majesty". Tasmania refers to the "Governor". Two States, NSW and Queensland, however, qualify the Monarch's position by the use of the words "with advice and consent" of the representative chamber or chambers. South Australia makes no mention of the Monarch or Her/His representative as part of the Parliament.

The Commonwealth Constitution states that the legislative powers of the Commonwealth shall be vested in federal Parliament consisting of the Queen, Senate and House of Representatives.

In the Northern Territory, under Section 13 of the Northern Territory (Self-Government) Act, there is no reference to the Monarch or Her or His representative.

(c) The Select Committee considers that even though the role of the representative of the Monarch may have to be retained in assenting to legislation enacted by the State Parliament, it is not necessary to define the Parliament of the State in the constitution as including the Monarch or Her or His representative.

2. Number of Legislative Chambers

(a) With the exception of Queensland, the Australian State and Commonwealth Parliaments have a bicameral structure i.e. they have two Houses. In the bicameral States, the "Upper House" is called "The Legislative Council" and the "Lower House" is "The Legislative Assembly" (or, in the case of SA, "The House of Assembly"). In the Commonwealth the two Houses are "The Senate" and "The House of Representatives". All the Houses are directly elected by persons qualified to vote.

(b) The Legislative Councils of the States and the Senate numerically have about half the membership of the State Assemblies and the House of Representatives. E.g. Victoria - 88, 44: SA - 47, 22: WA - 57, 34; Tasmania 35, 19; and the Commonwealth - 148, 76. The electorates of the former are generally larger geographically although there is wide variation between the State Commonwealth in the nature of Legislative Council/Senate electorates. Some Upper Houses like those of Victoria and WA, have multi-member constituencies. Others, like those of SA and the Senate, are elected on a State-wide basis, while that of Tasmania has single-member electorates. Tenure of office for members of Legislative Councils/Senate are also longer - usually about two terms of the "Lower" House. NSW has a three-term period. Elections for part of the membership of the Upper House, except for that of Tasmania which has annual elections, occur at every Lower House general election or at the effluxion of a fixed term.

(c) Apart from the provision requiring money bills to originate in the Lower House, the powers of both Houses are generally similar. All legislation is required to pass through both Houses.

(d) Advocates of a bicameral system argue that Upper Houses play a valuable role as "Houses of review". In their view, Upper Houses have the capacity, through greater time availability, less Ministerial involvement, better organisation and procedures, superior research and feedback facilities, a longer, more secure tenure and a less volatile membership, to study and improve legislation and to scrutinise financial and administrative processes. They are said to fulfil a "watchdog" function, providing safeguards against hasty or ill-conceived legislation and financial or administrative deficiencies as well as promoting additional community input into parliamentary processes. Moreover, depending on the electoral system used, regional representation can be provided. In Tasmania, most members of the Upper House are by tradition elected without formal political affiliations, and this is said to contribute to the House Review function.

(e) Critics of bicameral systems usually cite the extra cost of a second House and dispute the alleged advantages. They argue that Upper Houses in the States (and sometimes the Senate) perform no useful role and operate largely, as a second party chamber. Thus, where the same party controls both Houses, the Upper House tends to be no more than a "rubber stamp" and where different parties (or groups) are in control, the Upper House is frequently obstructive. Governments, it is contended, are made in the Lower House and they should not be forced from office or their performance impaired by actions of a second chamber. Conflicts between the two Houses is said to contribute to paralysis or instability of government and the frustrating of democracy. To unicameralists, Upper Houses are anachronistic and serve, no useful purpose in contemporary times.

(f) In the Northern Territory, leaving aside the period from 1863 to 1910 when it was part of South Australia there is no tradition of bicameralism; from 1947 to 1974, the single chamber was the Legislative Council (a partly elected body) and, after 1974 the fully-elected Legislative Assembly. During the lead-up to Self-Government, there was no advocacy of a bicameral system and none has come to the attention of the Select Committee since. The Select Committee proposes that the new State Parliament should consist of one House only.

(g) If a bicameral system is adopted for the Northern Territory, additional provisions will be needed in the new State constitution. They include provisions for the resolution of disagreements between Houses, consideration of a separate electoral system, determination of number of members and terms of office, powers and procedures of the second House.

3. Number of Members

(a) Assuming that the new State is to have a unicameral Parliament, it will be necessary to determine the number of members for that single chamber only. In five States, the number of members is specified in the constitution; in Queensland and the NT, they are contained in the appropriate electoral

legislation. Section 13(2) of the Northern Territory (Self-Government) Act states that "The Legislative Assembly shall consist of such number of members as provided by enactment". The NT Electoral Act Section 138(3) stipulates 25 members. It is interesting to note that all bicameral Parliaments have the number of members set out in constitutions while unicameral Parliaments do not.

(b) The Select Committee recommends that the number of members of the new State Parliament continue to be included in ordinary legislation. If the Legislative Assembly is to become the Parliament of the new State, the then current provisions of the Electoral Act can continue to apply. If a new Parliament is to be established, it may be necessary to specify the number of members of the first Parliament in the new State constitution, subject to later legislative variation. In that way, a change in the number of members can simply be achieved by amending an ordinary statute rather than the new State constitution. If the numbers were to be entrenched in the constitution, then, depending on the method of alteration of that constitution, it would be that much more difficult to make later changes. However the Select Committee considers that Statehood of itself would not justify any difference in the number of members from that of the Territory Legislative Assembly.

4. Qualifications of Members

(a) At present the provisions for qualification of members of the Legislative Assembly are contained in the Northern Territory (Self-Government) Act see in particular section 20 and 21. The required qualifications include that the nominee is entitled or qualified to be entitled to vote for the Legislative Assembly, which is primarily derived from a qualification to vote for the member of the House of Representatives from the Territory - see Section 14 of the Act and Section 93 of the Commonwealth Electoral Act. Upon a grant of Statehood, these provisions will cease to operate, and will be replaced by new provisions, either in the new State constitution or in new State legislation.

(b) Under Section 20 of the Northern Territory (Self-Government) Act, as at the "date of nomination" (presumably the date of close of nominations) a candidate for election to the Legislative Assembly must be an Australian citizen, at least 18 years of age, entitled or qualified to be entitled to vote for the Legislative Assembly (which picks up the voting requirement of soundness of mind in Section 93 of the Commonwealth Electoral Act), and a resident in the Commonwealth for at least 6 months and in the Northern Territory for at least 3 months. The Select Committee invites comments on each of these qualifications. It does not at this stage recommend any change except the deletion of the last qualification and the substitution of a new single residential requirement of 6 months in the new State.

(c) Under Section 21(1) a person is not qualified to be a candidate for election to the Legislative Assembly if at the "date of nomination" he or she holds an office or appointment under a Commonwealth, State or Territory law (other

than as a member of the Legislative Assembly or of the Executive Council or as a Minister, Speaker or Acting Speaker), or is employed by the Commonwealth, State or Territory or a public corporation, and in either case received remuneration or allowances (other than reimbursement of expenses reasonably incurred). This imposes a very strict test and requires candidates to resign from a wide range of positions and employment; including some that might be considered compatible with contemporaneous Parliamentary membership - for example, a part time public office.

The Select Committee supports the exclusion from nomination of a candidate who is already a member of the Commonwealth or another State legislature and certain office holders such as the Governor and Judges. Views differ on the Committee as to whether this should extend to membership of a local government body. In all other cases the Committee is of the view that the present operation of section 2l(l) should be reversed upon Statehood, such that a person in any other office or employment should not be disqualified from nomination for the new State Parliament. However if the person nominating holds an office of profit under the Crown (other than an office in relation to the new State Parliament), that office should automatically terminate upon that person's election.

(d) Further, under Section 21(1) a person, is not qualified to be such a candidate at the "date of nomination" if he or she is an undischarged bankrupt or has been convicted and is under a sentence of imprisonment for one year or longer. It should be noted that under the Electoral Act, Section 27, prisoners are no longer qualified from voting for the Legislative Assembly.

The Select Committee endorses this different treatment between voting and nomination in the case of prisoners, although it invites comment.

(e) Under Section 21(2) of the Northern Territory (Self-Government) Act, a member of the Legislative Assembly vacates office if the member comes within Section 21(1) (see above), ceases to be an Australian citizen, fails to attend consecutive sitting days without Assembly permission or ceases to be entitled or qualified to be entitled to vote or takes any remuneration for services in the Assembly except in accordance with his or her lawful entitlement. The Select Committee suggests that a member should only be disqualified if the member fails to attend the new State Parliament for 7 consecutive sitting days without permission. Otherwise it favours the above provisions but invites comment. It suggests, however, that disqualification should not extend to a member who inadvertently receives remuneration in excess of his or her lawful entitlement and who repays the excess.

(f) Under section 21(3) of the Northern Territory (Self-Government) Act, a member of the Legislative Assembly having an interest in a contract with the Territory is not thereby, disqualified, but may not take part in the discussion or

vote on that matter in the Assembly. The Select Committee favours a similar provision in the new State constitution.

(g) There is a view that as the provisions for qualification and disqualification of members of the new State Parliament are so fundamental to democratic values that they should not be capable of easy alteration and should be entrenched in the new State constitution. On the other hand, the rigidity thereby created would make difficult even minor changes that might be required after the constitution has operated for a while and any deficiencies have been revealed. The Select Committee favours the inclusion of all provisions on qualification and disqualification of members in the new State constitution but invites comment.

5. Term of Office

(a) Four Australian States - New South Wales, Victoria, South Australia and Tasmania - have a maximum four-year term for their Lower Houses. In the case of the first three States, the term was increased from three to four years during the 1980s. Tasmania reduced its term from five years in 1972. The remaining States - Queensland and Western Australia plus the Commonwealth have retained three-year terms. Queensland has its term entrenched (i.e. it can only be varied by way of a referendum). As with all other provisions of the Commonwealth Constitution, the term of the House of Representatives is subject to change only through the complicated procedure of Section 128 which in part also requires a national referendum

(b) In four States and the Commonwealth, the term is calculated from the first meeting day of the Lower House; in the others - Queensland and Tasmania from the return of electoral writs.

(c) The Legislative Assembly of the Northern Territory, by Section 17(2) of the Northern Territory Self-Government) Act, has a four year term calculated from the first meeting of the incoming Assembly. The Select Committee recommends the retention of the existing term. It believes that the four year term is a proper compromise between electoral accountability (i.e. more frequent recourse to the voters) and effectiveness of administration. (i.e. the longer electoral cycle allows government greater capacity to implement policies and programmes). Most political analysis in Australia concurs with the Select Committee's reasoning. However, the option of shorter terms (annual, biennial or triennial) or longer terms in excess of four years are still open for consideration.

(d) It is a normal constitutional provision in Australia that there at least be an annual meeting of the Parliament. That provision is not part of the Northern Territory (Self-Government) Act. The Select Committee is of the view that there should be a constitutional requirement that not more than 6 months pass between-. successive sittings of new State Parliament.

(e) No State (or Commonwealth) Lower House has a fixed term Parliament provision although there has been considerable academic and political discussion about its merits and demerits. Broadly, there are three options available for consideration.

(i) A prescribed maximum term but with full flexibility as to when an election can be held within that term. In practice, the government advises the Governor-General or the Governor (or the Administrator, in the case of the Territory) when an election should occur. (For a discussion of the gubernatorial role in dissolving parliaments, see Part H below).

(ii) A fixed-term parliament.

(iii) A partially fixed-term. Precedents exist in Victoria and South Australia. In both, the Lower House must ordinarily run for at least three years (of the four year term). Elections can only be called in that period in the case of any rejection of financial appropriation, a second rejection of other legislation the Upper House or if a lack of confidence motion in the government has been carried. In the final year, an election can be called at any time, following advice to the Governor to dissolve the Lower House.

(f) Supporters of fixed-term parliaments use several arguments:

(i) That the system. works successfully in other countries (e.g. USA);

(ii) That parliaments are elected for a certain term and that term should, in normal circumstances, be served out;

(iii) That the ability of the Premier (Prime Minister, Chief Minister) to call an election at any time endows that position with power to maximise his party's electoral chances, to disadvantage opposing parties, and, in some cases, to discipline his own party members;

(iv) That over-frequent elections destabilise the political system, are detrimental to good government and involve significant financial costs to the community; and

(v) That recent Australian experience has indicated possible cynical manipulation of the flexible term; fixed terms would remove arbitrary, partisan and capricious early elections.

(g) Defenders of the non-fixed term cite:

(i) The importance of flexibility to the "Westminster" System of government and despite any occasional abuse, its overall enduring success;

(ii) That fixed-terms are incompatible with ministerial responsibility, the role of the Governor and other conventions of the "Westminster" system;

(iii) That the fixed-term system can itself be manipulated in that early elections can easily be engineered by creating artificial conflicts in either bicameral or unicameral systems; and most importantly.

(iv) That the electorate can judge the propriety of the calling of an early election at the polls. On this view, elections, however frequent, are cornerstones of accountable, responsible and democratic regimes. Government leaders are constrained in calling early elections by the need to convince the Governor, their own party and the electorate that one is necessary.

(h) The South Australia/Victoria model of a partly fixed term is an attempt to balance the advantages of the two competing systems, combining elements of stability and flexibility. There is no doubt that it can be successfully adapted to a unicameral system. Such a provision could be entrenched in the new State constitution if considered necessary.

(i) The Select Committee prefers the partially fixed term option, whereby the Governor cannot dissolve the new State Parliament within the first three years of its term unless a vote of no-confidence in the government has been carried by the Parliament or unless the Premier has resigned or has vacated office. In either of those events the Governor should be able to invite another member to form a government. If the Governor is unable within a reasonable time to appoint a member who can form a government which would have the confidence of Parliament, the Governor should be able to dissolve the Parliament. This is an issue that is discussed further in Part H below.

D. ELECTORAL PROVISIONS

1. General

(a) The electoral provisions applicable to a new State Parliament are clearly of great importance in a representative and democratic political system. However, with the exception of some limited provisions, traditionally in Australia they have not been thought of as being of sufficient importance to be included in constitutions. Provisions now thought of as being reasonable, for example universal adult suffrage, secret ballot, one person one vote, reasonable parity of voting numbers in each electorate and redistribution whenever there is a marked lack of parity, are not always found in constitutional provisions and in some cases not even in legislative provisions.

(b) The extent to which electoral provisions are included in constitutional enactments varies widely in Australia. Victoria has comprehensive provisions in its constitution; New South Wales, South Australia, Western Australia and

Tasmania have far fewer provisions included and they relate largely to qualifications of electors and details of electorates; and Queensland has only fleeting references. In the five latter States, to varying degrees the remaining electoral provisions are in ordinary electoral legislation. Some provisions are entrenched in the constitutions of New South Wales and South Australia. The question of entrenchment is discussed further below.

The Commonwealth Constitution has few references to elections with only broad guidelines on timing, method and electoral divisions being cited. Again, the bulk of the provisions are detailed in electoral legislation.

(c) Most electoral provisions in the Northern Territory are contained in ordinary legislation, although certain electoral provisions are found in the Northern Territory (Self-Government) Act. They are

(i) Distribution of electoral divisions (S.13);
(ii) Qualifications of electors (S.l4);
(iii) Writs for and dates of elections (Ss.15, 17); and
(iv) Casual vacancies and by-elections (S. 19)

These provisions will have to be replaced on Statehood by new provisions, either in the new State constitution or in ordinary legislation.

(d) The Select Committee is of the view that most electoral provisions should not be contained in the new State constitution. The only exceptions to this that the Committee envisages are as follows:

(i) the maximum tolerance for electorates;
(ii) qualifications of voters;
(iii) writs for and dates of elections;
(iv) casual vacancies and by-elections; and
(v) one person one vote and secret ballots.

(e) If some or all electoral provisions are to be continued in ordinary legislation, one suggestion of the Select Committee is for an Electoral Bill to also be drafted for consideration at the same time as the new State constitution, to facilitate discussion on electoral matters. This may not be necessary if the existing Legislative Assembly is to become the new State Parliament, with the existing Territory Electoral Act being continued in force subject to later amendment.

2. Electorate Tolerance

(a) The Select Committee prefers the existing single member electorate system with Aboriginal Territorians participating in the same way as other Territorians

on the basis of one person one vote and with no distinction on the basis of race. However it is of the view that the nature of electorates should not be prescribed in the State constitution but should be left to ordinary legislation.

(b) On the other hand, the Select Committee favours the inclusion in the new State constitution of some maximum permissible tolerance in the numbers of voters in each electorate. The most common tolerance (i.e. the difference either above or below an average national figure for electorates) in Australian States and the Commonwealth is 10 percent. Queensland with four-zone division, each with a different quota, is the stark exception. Some of the tolerances are specifically included in constitutions. In Section 13 of the Northern Territory (Self-Government) Act, the tolerance is set at 20 percent but in recent redistributions, the extreme margins have not been often used.

(c) The use of tolerance is a departure from a strict adherence to the principle of "one vote, one value" but it has been accepted in Australia as a device to take account of the huge size of electorates in the rural or more remote areas and the concentration of population in certain small areas of the continent. What has been a divisive issue has been the appropriate size of the tolerance.

(d) There are three realistic positions which could be adopted for the Northern Territory. They are**:**

(i) Approximate equality of electorate numbers;

(ii) A 10 percent tolerance; and

(iii) A 20 percent tolerance.

(e) The Select Committee is divided as to its views on this matter. Some members favour a maximum 20 per cent rule for inclusion in the new State constitution whilst others favour a maximum 10 percent rule for inclusion.

In either event, it should be possible for this maximum to be reduced by ordinary legislation.

3. Qualifications of Voters

(a) As noted above, the qualifications of voters for the Legislative Assembly of the Territory are primarily derived from Section 14 of the Northern Territory (Self-Government) Act so as to ensure that persons who are entitled under the Commonwealth Electoral Act to vote for the member of the House of Representatives for the Territory are also entitled to vote in Legislative Assembly elections.

(b) The qualifications for voting in the Commonwealth Electoral Act are that the voter has attained 18 years of age, is an Australian citizen (with some

transitional arrangements for British subjects), is not of unsound mind or under sentence of imprisonment for 5 years or longer or has not been convicted of treason or treachery without a pardon. Prisoners have now been given a vote in Legislative Assembly elections by Section 27 of the NT Electoral Act.

(c) The Select Committee is of the view that there should be a three month residential requirement in the new State for a person to be eligible to vote for the new State Parliament. Persons eligible to vote in. Commonwealth elections anywhere in Australia immediately before the commencement of Statehood should be eligible to vote for the new State Parliament if meeting this residential qualification. Subject thereto, voting should be limited to Australian citizens. In other respects the Committee favours similar provisions to those presently applying in the Northern Territory. These qualifications should be included in the new State constitution.

4. Other Electoral Matters

(a) The Select Committee suggests that the new State constitution should contain provision enabling the Governor on the advice of his or her Ministers, to issue writs for elections and to fix the date of elections.

(b) The Select Committee also suggests that the new State constitution contain provisions as to casual vacancies and by-elections. Under this provision, an election (either a general election or a by-election) should be held within 6 months of any casual vacancy.

(c) The Select Committee recommends that the principle of one person one vote, and the requirement that elections be by secret ballot, should also be contained in the new State constitution.

E. OTHER LEGISLATIVE MATTERS

1. General

(a) There are of course a number of other matters relating to the new State legislature that will have to be included either in the new State constitution, in the standing orders of the new Parliament or in ordinary new State legislation. This will include revisions in place of a number of existing provisions in the Northern Territory (Self-Government) Act. The Select Committee does not intend in this Paper to discuss every one of these matters, although it invites comments and suggestions on provisions that should be so dealt with.

(b) There are two matters that the Select Committee would like to specifically direct attention to. These comprise:

* Voting in the new State Parliament, including by the Speaker; and
* Entrenchment of constitutional provisions.

2. Voting

(a) As a matter of general principle, it is clear that each member of the new State Parliament should be limited to one vote on each question, except perhaps in the case of the Speaker or Chairman (including an acting Speaker or acting Chairman).

(b) The Select Committee considers that because of the importance of the office of Speaker, the new State constitution should provide for the office in a similar way to the Northern Territory (Self-Government) Act. The Speaker of the new State Parliament should have the same voting power as the Speaker of the Legislative Assembly namely a deliberative vote and a casting vote.

3. Entrenchment

(a) Reference has been made in a number of paragraphs above to the possibility of entrenching certain provisions in the new State constitution. These would be provisions that were considered to be of such importance that they should not be lightly changed, such as by an ordinary Act of the legislature passed by a simple majority of members present and voting.

(b) The degree of entrenchment need not be the same for all provisions - some may be considered of greater importance than others. The Select Committee envisages that entrenchment would comprise or include the requirement that any proposed change be submitted to and be supported by a specified majority of new State electors at a referendum. This would necessitate certain minimal provisions dealing with referendums in the new State constitution. Specific matters for possible entrenchment are dealt with below.

(c) The Select Committee is opposed to any method of entrenchment that would comprise or include the necessity of obtaining the prior approval of the Commonwealth Government or Parliament to any change. Such a provision would be inconsistent with the principle of constitutional equality.

(d) Generally speaking, the Select Committee favours some degree of entrenchment of the whole of the new State constitution. The constitution should be a document that is accorded special status in the law and should only deal with those matters considered to be of vital importance in the functioning of the new State and its institutions. Matters of lesser importance should be relegated to ordinary legislation.

(e) The Select Committee accepts that the new State constitution may need to include some transitional provisions to facilitate the establishment of new State institutions after the grant of Statehood, and which could thereafter be dealt with by ordinary legislation. The extent of these provisions will in part depend on the extent to which existing institutions, for example, the Legislative

Assembly, are carried forward as part of the institutions of the new State (see above).

(f) Particular aspects that could be considered for entrenchment will be dealt with below. Matters that might be considered as being appropriate for entrenchment in relation to the new State legislature, being matters that could be regarded as being fundamental to the democratic system applicable in Australia, include**:**

(i) The existence of the unicameral new State Parliament and its fully representative nature;

(ii) The qualifications and disqualifications of members;

(iii) The maximum tolerance allowed between electorates;

(iv) The qualifications of voters;

(v) The power of the Governor to assent or withhold assent to legislation, to dissolve the Parliament (subject to restrictions within the first 3 years of the 4 year term, to issue writs for elections and to fix the date of elections;

(vi)) Casual vacancies and by-elections;

(vii) The principle of one person one vote and secret ballots;

(viii) The wide legislative powers of that Parliament;

(ix) The requirement that not more than 6 months pass between successive sittings of the Parliament; and

(x) The office of Speaker.

There may be other matters that should be included.

F. THE EXECUTIVE

1. Traditionally, the functions of government are divided on a simple tripartite basis. The three functions are legislative (or law-making), executive (or law-implementing) and judicial (or law-adjudicating and enforcing). In the earlier parts of this Discussion Paper, discussion focussed upon the legislative function within the new State constitution. This Part examines the form and role of the executive and, in addition, discusses the relationship which might exist between it and the legislature.

2. In its broadest definition, the "executive" comprises a group of formal governmental institutions including the Monarch, the Governor, the Premier (President, Prime Minister, Chief Minister), the Executive Council, the Cabinet, Ministers and the bureaucratic apparatus (i.e. the departments of the public service and statutory authorities). The constitutions of the Commonwealth and the Australian States include references to some of those institutions. Undoubtedly, the new State constitution will follow that pattern. But a central question will be to what degree their powers and

role, their inter-relationship and their interplay with the legislature, should be prescribed in that constitution.

3. As with all simple models of the political process, the tripartite division does not adequately reflect real-life politics. Specific institutions**,** be they executive, legislative or judicial, are not necessarily confined to one function; they are often multi-functional. For example, the "executive" may have significant legislative and judicial roles as well as its law-implementing function. Contrary to the strict doctrine of separation of powers, there is no constitutional systems, no clear division between the three arms of government, such that there may be some co-mingling of functions between them to various degrees.

4. Within the western democratic tradition, there are two dominant forms of government - the presidential, of which the American system may be the best known example, and the parliamentary, of which the British "Westminster" system may be the best known example. In the first, there is a considerable degree of independence between the executive and the legislature, with each having, fixed terms of office. Neither is able (with the exception of impeachment in some systems) to dismiss the other. The second is characterised by a high level of dependence between the two with the legislature having the power to cause the dismissal of the executive government, and the executive government having the power to cause the dissolution of the legislature (at least the Lower House).

5. In the American system the executive comprises the President and Vice-President, the Cabinet (the members of which are personally appointed by the President), the White House staff and the bureaucracy. The legislature is the bicameral Congress comprising the House of Representatives and the Senate, both of which are directly elected. The President and Vice-President have their own separate mandates from the people (mediated by the Electoral College). Although in theory the operative principle of the system is the separation of powers, in practical terms it is better described as "separated institutions sharing powers". No person can simultaneously be a member of the two arms of government (subject to the position of the Vice-President as President of the Senate but with only a casting vote) but the two arms do, in fact, share many functions. The separation is qualified by an elaborate constitutional system of checks and balances (like the Presidential veto and its possible overturning by Congress, the impeachment of the President by Congress, Senate confirmation of the President's senior appointments and joint making of treaties and Congressional enquires). Most of those checks and balances are specified in the federal constitution but some (like the role of political parties) are conventional structures and practices. Supremacy within the system fluctuates; sometimes the executive dominates, at other times, the Congress.

6. This very brief exposition of the American system is not to suggest that it should, either totally or partially, be integrated into the new State constitution; indeed, it is not likely that a radical departure from traditional "Westminster" norms and styles, such as would be involved by the adoption of the American system, will be accepted by the

Territory people or by the Commonwealth, assuming it is even constitutionally possible to adopt such a system.

Rather, it is to demonstrate the intricate and dynamic inter-relationship between the executive and the legislature in what is, in Australian terms, an unfamiliar system. Of particular interest is the extent to which the American constitution defines the respective roles of the President and Congress and the relatively lesser influence of conventions (unwritten customary practices which are generally agreed upon and applied).

7. There is in any event some doubt, arising from a number of comments *of* several High Court Judges in various cases, as to whether it is ever constitutionally possible for a State constitution to be based other than on the system broadly known as responsible government as derived from the "Westminster" system (see below).

8. The second model is the "Westminster" System which evolved through centuries of British political Practice. At its heart is the doctrine of parliamentary sovereignty, a doctrine which implies that Parliament (i.e. the legislature) is the supreme organ of government. In theory, the Parliament controls the executive. Unlike the American system where the President is chosen by and is responsible to the electorate, the executive government in the "Westminster" system is responsible to the representative legislature which, in turn, owes its responsibility to the people. That dual pattern of responsibility is the basis of "responsible government". There is no separation of powers; the executive (the Monarch, the Prime Minister, Cabinet Ministers) are part of the Parliament. The effective executive (which excludes the Monarch) comprises those members of Parliament who, in the opinion of the Monarch; or Her representative, command the confidence of a majority of members in that Parliament; they are the leaders of the dominant political party (or coalition of parties).

9. Notwithstanding the principle of the supremacy of Parliament, the executive in contemporary times has become the dominant arm in the "Westminster" system, largely through the extension and consolidation of the party system. While Parliament does retain a limited capacity to exercise control on the executive's activities, it has lost the ability (except in exceptional circumstances) to exert the ultimate sanction of dismissing the executive. Thus, one strand of responsibility (that of the executive to the legislature) has a considerable extent been rendered ineffective. Moreover, although the legislature retains its formal and legal terms the law making function, it is no longer in total control of that function. The control of that function lies to a large extent in the hands of the executive.

10. The Monarch's role in the British "Westminster" system is almost purely ceremonial and formal. The Monarch is only the nominal head of the polity and the exercise of most of the once considerable Royal prerogative powers of an executive nature have long since either been delegated to the executive government or been replaced by statutory powers. Although in law the Monarch still possesses some prerogative and reserve powers, in practical terms they are exercisable only on advice of the Prime Minister, at least in most cases. The Monarch's role is that of a constitutional Monarch

even though this position is not comprehensively set out in any constitutional document and relies on the force of convention.

11. In contrast to the American model, the "Westminster" system is, for the most part conventional. Many of its major operative principles and structures are not described or prescribed in a constitution. Political parties, the Prime Minister and Cabinet - prime dynamic agencies within the system - and the links between the executive and the legislature, are largely determined by convention.

12. At a fundamental level, there remain a number of similarities between the American system and the "Westminster" system. Both are based on democratic traditions with representative legislatures and both are "constitutionalist" (emphasising the limitations of political powers) in character. The composition of the executive at the highest levels in both is derived either directly or indirectly through democratic means. In both, the executive is dependent on the legislature for the passage of its legislative proposals and for the ongoing appropriation of funds necessary for the performance of governmental functions. The common law is at the foundation of both systems and affords access to a variety of restraints on any executive action that is unlawful under the common law. In legal theory at least, the common law can be altered by action of the legislature. The executive has no formal law making powers nor can it dispense with or suspend existing laws except insofar as those powers may be validly delegated to it by the legislature. The rule of law is said to prevail.

13. The "Westminster" system forms the basis of government in Australia in a structural sense and in its reliance on conventions, as grafted onto a federal system with a written constitution. But it must be noted that many of the devices integral to that system in the United Kingdom have been dispensed with in Australia. In particular, some of the checks on executive power and the extensive powers of the Westminster Parliament do not exist to the same extent in Australian practice. Here, the effective supremacy of the executive over the legislature is much more noticeable and comprehensive. For that reason, many commentators have preferred the use of the "Australian model" (or "variant") to the "Westminster" system. That is especially relevant to the operation of government in the States. In the Commonwealth, the executive supremacy has been tempered in recent years by its lack of control over the federal House, the Senate. That however, may not be a continuous restraint depending on the composition of that House from time to time.

14. 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.

15. The role of the Governor-General/Governor in Australia is not completely analogous to that of the constitutional Monarch in Britain. In the Commonwealth Constitution, the Governor-General is accorded powers of appointment and dismissal of Ministers of State which, while normally exercised on advice, can be used independently. The dismissal in November 1975 of the Whitlam administration was brought about by the use of the Governor-General's reserve powers on the basis of a view taken as to the extent to which those powers are free from constraints imposed by law or convention. Similar power exists, albeit not used since 1932, in the constitutional instruments of the States. A central concern of the following discussion on the executive's place in the new State constitution will relate to the reserve powers of the Governor and the extent to which their exercise should be left to convention or written into the constitution.

16. Finally, in the "Australian model" (like the "Westminster" system) no constitutional reference is made to important political offices and bodies like the Premier and the Cabinet. Whether (and to what extent) their role and powers should be included within the new State constitution is another question which needs consideration. Accordingly, that aspect is also treated in this Paper.

G. GOVERNOR AND THE CROWN

1. In Parts B and C above dealing with the legislature of the new State, the Select Committee noted the broad monarchical framework applicable to the federal Australian Commonwealth.

2. 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.

3. Under Section 7 of the Australia Act, it is implicit 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 the 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 which the Commonwealth has any legitimate role to play.

4. Some special arrangements may have to be made by the Commonwealth for the appointment of the first Governor of the new State to enable that appointment to take effect immediately upon the commencement of the new State. Provision for this first appointment by the Monarch might be made in the Commonwealth legislation granting Statehood. That appointment should be subject to receipt of advice from the Chief Minister of the Northern Territory. The Select Committee is of the view that this should in no way be taken as a precedent for future action relating to any such appointment or termination thereof.

5. 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 or her period of office. A number of State 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 or her continuance in office.

H. POWERS OF THE GOVERNOR

1. Generally speaking, the exercise of the powers of the representative of the Monarch in Australia (Governor-General, Governor) are not constrained by any express constitutional law. The powers are not required to be exercised in any specified way for example, in accordance with the advice of his or her Ministers. However, as a matter of convention, the representative of the Monarch generally follows the advice of his or her Ministers. Such reserve powers as that representative may still have are rarely exercised other than in accordance with such advice. The representative does, however, have the right to be consulted, to encourage and, to warn.

2. In the case of the former Royal Letters Patent (recently ceasing to have effect) applicable to the office of the Governor of NSW, the Governor was required to be guided by the advice of the Executive Council unless he had sufficient cause to dissent. A member of that Executive Council could require the grounds of the advice to the Governor to be recorded in the minutes of the Council. The Letters Patent of the other States do not even go this far in imposing any express restraints on the Governor's powers.

3. In some cases, powers of the Governor of a State have now been replaced or modified by provisions in State constitutions or legislation. For example, as mentioned in Part C above the limitations now contained in the constitutions of Victoria and South Australia on the power to dissolve the Lower House of State Parliament within the first three years of the four year term.

4. In many of the constitutions of newly emerged countries which broadly follow the "Westminster" system of government, the Head of State or its representative is specifically required to act in accordance with the advice of Executive Council or Cabinet or an authorised Minister, except:

a) where it is expressly provided otherwise by way of reference to some other person or body;

b) where the Head of State or its representative is expressly given a discretion; or

c) where the Head of State or its representative is under an obligation to take certain action upon the occurrence of specified events.

5. By way of example, the constitution of Barbados contains a provision similar to that outlined in paragraph 4 above and, in addition, the Governor-General is expressly given a discretion as to the appointment of the Prime Minister, being the person who in his or her opinion is best able to command the confidence of a majority of the members of the Lower House of Parliament. The Governor-General can only appoint other Ministers in accordance with the advice of the Prime Minister from among the members of either House of the Parliament. If the Lower House resolves that the appointment of Prime Minister should be revoked, and the Prime Minister does not within 3 days of the passing of that resolution resign or advise the Governor-General to dissolve the Parliament, the Governor-General must revoke the Prime Minister's appointment. If the office of Prime Minister is vacant and there is no prospect of making an appointment to that office within a reasonable time, the Governor-General can dissolve the Parliament without prior advice. Where there is a Prime Minister, the Governor-General can only dissolve the Parliament in accordance with the Prime Minister's advice.

6. The constitutions of some countries go ever further. For example, the Constitution of Papua New Guinea provides that the Prime Minister is appointed by the Governor-General acting in accordance with the decision of the Parliament. The Prime Minister must be dismissed from office by the Governor-General if the Parliament passes a motion of no confidence in him or her or in the Ministry except during the last year of the 5 year term of Parliament, in which event a general election must be held. If an absolute majority vote of the Parliament so decides, or if the Parliament; continues into the last 3 months of the maximum 5 year Parliamentary term, a general election must be held.

7. These various constitutional provisions prescribe the circumstances in which the Head of State exercises his or her most important constitutional powers, thereby limiting (with some exceptions) the scope of his or her discretion. To the extent that the discretion is limited there is greater certainty. It also limits the potential for abuse by the Head of State of his or her powers and requires that person to respond more precisely to the will of the elected Parliament and the responsible Ministers. It incorporates into law that which is presently dealt with by convention. It has the deficiency that it creates a degree of rigidity and removes a possible check on proposed action that might be unconstitutional.

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.

9. The Select Committee has some concern about the inflexibility that would be introduced by the view it has expressed in the preceding paragraph in cases involving unconstitutional governmental action. On one view the representative of the Crown has ultimate responsibility to ensure that the government of the day does not take any such action, although he or she should not act contrary to advice except in the most extreme and clear cut cases as a matter of last resort. On this basis, the Select Committee recommends that the Governor should be given the express constitutional duty of upholding and maintaining the new State constitution as part of his or her wider general responsibility of administering the government of the new State.

10. Where it is clear that the government retains the confidence of the Parliament, the Select Committee considers that the Governor should have no power to dismiss his or her Ministers, or to dissolve the Parliament within the first 3 years of its 4 year term, nor any power to dissolve the Parliament in the last year of that term without the advice of his or her Ministers. In cases of doubt, the Premier or the government should be able to obtain a vote of confidence from the Parliament

11. 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 then sitting) for the sole purpose of considering whether the government, has its confidence.

12. 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 has the confidence of Parliament, the Governor should be free to dissolve the Parliament.

13. The powers of the Governor outlined in Paragraphs 11 and 12 above should apply even within the first 3 years of the 4 year term of Parliament (see Part C above).

14. 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.

15. It should be noted that the above approach goes considerably further than any existing Australian constitutions. However, the Select Committee believes that it is an approach that accords more closely with contemporary practices and expectations.

I. PREMIER AND OTHER MINISTERS

1. Having regard to the terms of Section 7(5) of the Australia Act, it is necessary to have a Premier of a new State to advise the Sovereign. The Premier, as the political head of the government of the new State, will be the most senior Minister. He or she will be assisted by other Ministers.

2. The Select Committee is of the view that the Premier and other Ministers of the new State should be chosen from the members of the new State Parliament, in the same way as Ministers of the Territory are presently required to be members of the Northern Territory Legislative Assembly. In taking this view, the Committee in broad terms is advocating the adoption of the "responsible" system of government on the "Westminster" pattern whereby there is a direct relationship between the executive and the legislature. This is the method best understood and accepted in Australia and the Committee sees no good reason for departing from it. Notwithstanding the dominance of the executive arm of government over the legislature in contemporary times, the Committee sees considerable merit in having Ministers as members of the Parliament, given the wide range of powers that they exercise and the need for accountability in the exercise of those powers. In the Committee's view, the legislature does still play an important role in relation to the exercise of ministerial powers, a role greatly assisted if Ministers are also members of the legislature. The Committee does not favour any alternative whereby some or all of the Ministers are not required to be members of the Parliament.

3. Further, the Select Committee. is of the view that the choice of the Premier should be a matter for the new State Governor. In accordance with convention, the person chosen will be the person who, in the opinion of the Governor, is best able to form a government that commands the support of a majority of the members of the new State Parliament.

4. The choice of other Ministers should be also a matter for the new State Governor after having received the advice of the Premier. The Committee does not favour any other alternative, for example, for the Ministry to be elected by the Parliament.

5. In the Select Committee's opinion, the Premier and other Ministers should hold office in accordance with the views expressed in Part H above. If the Premier and other Ministers lose the confidence of Parliament, they should be removed from office by the Governor unless they resign. Individual Ministers should be removed from office by the Governor when advised by the Premier.

6. The Select Committee considers that the new State constitution should provide that an appointment as Minister will automatically terminate if the Minister ceases to be a member of the Parliament. If a Minister loses an election, he or she should only be entitled to remain a Minister up to the declaration of the poll. This is to be compared with the position under the Northern Territory (Self-Government) Act, Section 37(d), which allows the defeated Minister to continue to sit up to the first meeting of the Legislative Assembly after the election.

7. The Select Committee is of the view that the number of Ministers and their respective functions, responsibilities and designations, should also be a matter for the new State Governor after receiving the advice of the Premier.

8. The Select Committee believes that the remuneration and other entitlements of Ministers should be left to new State legislation.

9. The Select Committee is opposed to any limitations being placed in the new State constitution on the scope of the executive authority of the new State Governor and Ministers. There should be no list of matters in respect of which they are to have executive authority, such as is presently contained in the Northern Territory (Self-Government) Act and Regulations. Rather, they should have a general grant of executive authority in respect of the new State, including as to the exercise of the Royal prerogative powers, thus placing the new State in effect in the same position as the existing States.

J. EXECUTIVE COUNCIL AND CABINET

1. As noted above the Commonwealth Constitution contemplates that there will be an Executive Council of a State to advise the Governor. It follows that it is not possible to dispense with an Executive Council in the new State even though its functions are not deliberative as are those of Cabinet.

2. The Executive Council should be the formal channel of advice to the new State Governor except where, in particular cases, advice can be tendered by the Premier or otherwise in accordance with the law of the new State. In the Select Committee's view, it is desirable that advice should only be tendered by Ministers who are members of and are responsible to the Parliament. Accordingly, it is the view of the Committee that the membership of the Executive Council of the new State should be limited to the Ministers for the time being of the new State in much the same way as the Executive

Council of the Northern Territory is presently constituted by the Ministers of the Territory.

3. The Select Committee proposes that the Executive Council of the new State be presided over by the Governor or the Governor's nominee. Meetings should be convened by the Governor whenever requested by the Premier or acting Premier. Matters of procedure should be determined by the Executive Council itself**.**

4. The Select Committee sees no need to give express constitutional recognition to the institution of Cabinet but would welcome comments on this aspect. Such recognition has not been found to be necessary, in other Australian constitutions, it being sufficient to rely on the force of convention.

5. If Cabinet is not to be established or recognised by the constitution of the new State, it is not necessary to consider what its functions, procedures and membership should be. The Committee sees it as desirable to retain a substantial degree of flexibility in relation to such matters to permit the evolution of a system of government best suited to the needs of the new State. The Ministers who would normally comprise the membership of Cabinet should be free to adopt the system of collective decision-making which they consider to be the most effective in the circumstances.

K. FINANCIAL MATTERS

1. Most written constitutions contain some basic provisions dealing with the financial affairs of government. The Select Committee envisages that some such provisions would be included in the constitution of the new State although it considers that matters of detail should be left to new State legislation.

2. The most significant provisions that the Select Committee suggests be included are:

   a) a provision for the establishment of a consolidated fund into which moneys belonging to the new State must be paid;

   b) a requirement that money can only be paid out of the consolidated fund in accordance with a statutory appropriation;

   c) a requirement that all money bills introduced into the Parliament should first be the subject of a recommendation by the Governor to the Parliament; and

   d) a requirement that appropriation and taxation bills only deal with matters of appropriation and taxation respectively.

3. Additional financial provision be required if the new State was to adopt a bicameral legislative system.

4. Other matters that might be dealt with in a new State constitution, but which the Select Committee does not at this stage consider essential, include a provision for the audit of government accounts. Adequate provision for the latter could be included in new State legislation.

5. The Select Committee is strongly opposed to any proposal for including any external controls over borrowing by the new State other than in accordance with the provisions and powers presently applicable to existing States. This would exclude a Commonwealth veto as is contained in the Northern Territory (Self-Government) Act. Such a proposal would be inconsistent with the principle of constitutional equality. The new State would, however, be subject to the requirements of the Commonwealth Constitution as to borrowing by States.

L. THE JUDICIARY - EXISTING TERRITORY PROVISIONS

1. General

a) The judicial arm of government in the Northern Territory presently comprises a superior court of general civil and criminal jurisdiction known as the Supreme Court of the Northern Territory, together with inferior courts comprising the local court and a court of summary jurisdiction, as well as certain other courts of special jurisdiction.

b) The appellate structure in broad terms is from inferior courts to the Supreme Court, from a single judge of the Supreme Court to the Court of Appeal or the Court of Criminal Appeal of the Supreme Court, and from there to the High Court.

c) Federal Courts (Federal Court of Australia, Family Court) also exercise jurisdiction in the Northern Territory.

d) The Supreme Court was previously constituted by the Northern Territory Supreme Court Act 1961 of the Commonwealth. As such, it was recognised in the third recital to the Northern Territory (Self-Government) Act 1978 of the Commonwealth. The Supreme Court is also recognised in various other Commonwealth Acts. The transfer of executive responsibility for the Court to the Northern Territory in 1979 occurred at the same time as the enactment by the Legislative Assembly of the Supreme Court Act in that year.

e) Territory courts have been held not to be federal courts for the purposes of the Commonwealth Constitution. Thus, there is no constitutional guarantee of security of tenure for Judges of the Territory Courts, as there is for Judges of the High Court and Judges of other federal courts (section 72 of the Commonwealth Constitution - see Part V below). Judges of the Supreme Court of the Northern Territory have security of tenure under the Supreme Court Act only.

2. Supreme Court of the Northern Territory

a) The Supreme Court Act creates the Supreme Court of the Northern Territory. The Act sets out in detail provisions concerning the Court. The most important provisions relate to:

(i) its establishment and constitution (Sections 10 to 13);

(ii) its jurisdiction (Sections 14 to 20) (see also Part IXA of the Judiciary Act 1903 of the Commonwealth);

(iii) appointment by the Administrator of the Chief Justice, judges and additional judges (Section 32);

(iv) a judge not to accept, without the approval of the Attorney-General, another judicial commission or an office of profit under the Crown (Section 36);

(v) automatic retirement of judges on attaining the age of 70 years (Section 38);

(vi) removal of judges from office on an address from the Legislative Assembly on the ground of proved misbehaviour or incapacity (Section 40);

(vii) remuneration of judges and prohibition on any detrimental alteration of their remuneration (Section 41); and

(viii) the appellate jurisdiction of the Court in non-criminal matters to be exercised by the Court of Appeal, constituted by not less than 3 judges (Sections 50A to 60).

b) Further conditions of service of judges are set out in the Supreme Court (Judges Long Leave Payments) Act and the Supreme Court (Judges Pensions) Act.

c) The Criminal Code Act provides that there shall be a Court of Criminal Appeal, to be constituted by an uneven number of not less than 3 judges.

M. OTHER AUSTRALIAN PROVISIONS

1. Commonwealth Provisions

Section 71 of the Commonwealth Constitution provides that there shall be a High Court of Australia and permits the establishment by the Parliament of other federal courts. Detailed provisions are contained in Chapter III as to High Court Judges, High Court jurisdiction and other matters. Ancillary provisions are contained in the Judiciary Act 1903, High Court of Australia Act 1979 and other Commonwealth legislation. The Family Court of Australia was created by the Family Law Act 1975 and the Federal Court of Australia was created by the Australia Act 1976. These provisions are summarised in Part V below.

All the Australian States have their Supreme Court, as does the Australian Capital Territory. The constitutions of Queensland, South Australia, Victoria and Western Australia all recognise the judiciary to varying degrees but the constitutions of New South Wales and Tasmania do not. Only Victoria constitutionally entrenches its provisions as to its Supreme Court, and then only to a limited degree. There are legislative provisions concerning the judiciary in all Australian jurisdictions. Provisions as to the Supreme Courts of the States, in State constitutions and legislation, are summarised in Part W below.

2. State Provisions

All the Australian States have their Supreme Court, as does the Australian Capital Territory. The constitutions of Queensland, South Australia, Victoria and Western Australia all recognise the judiciary to varying degrees but the constitutions of New South Wales and Tasmania do not. Only Victoria constitutionally entrenches its provisions as to its Supreme Court, and then only to a limited degree. There are legislative provisions concerning the judiciary in all Australian jurisdictions. Provisions as to the Supreme Courts of the States, in State constitutions and legislation, are summarised in Part W below.

N. JUDICIAL INDEPENDENCE

1. Introduction

(a) An independent judiciary has been defined by Sir Ninian Stephen as

> "... a Judiciary which dispenses justice according to law without regard to the policies and inclinations of the government of the day" (13 Melbourne University Law Review, at 336).

(b) The independence of the Judiciary from the executive is, of course, a fundamental principle of the constitutional arrangements of the Westminster system as it operates in Australia. It requires that the Judiciary be able to exercise its functions and to administer justice in accordance with the law in an unbiased manner without fear or favour and totally free from government or official influence or threat of interference.

(c) The recently retired Chief Justice of the Supreme Court of the Northern Territory has stated that judicial independence is a subject of fundamental importance when considering the creation of a new State. According to the Chief Justice, judicial independence is necessary as an essential guarantee of liberty under our system of government. Similar views to the latter comment have been expressed by many commentators, both in Australia and internationally.

(d) Judicial independence, according to Sir Ninian Stephen, cannot be taken for granted:

> "... an independent Judiciary, although a formidable protector of individual liberty, is at the same time a very vulnerable institution, a fragile bastion..." (at 338).

2. Standards of Judicial Independence

(a) The need for judicial independence, the basic principles of judicial independence, and the appropriate mechanisms of achieving judicial independence have been asserted not only in Australia, but also internationally, including by the International Commission of Jurists, Lawasia, the International Bar Association and the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders. The minimum standards of judicial independence adopted by the International Bar Association (IBA) in October 1982 included the following:

(i) the need for "substantive independence", defined to mean that in the discharge of his judicial function a judge is subject to nothing but the law and the commands of his conscience;

(ii) "collective independence" of the judiciary from the executive, by providing the Judiciary with adequate financial resources to allow for the due administration of justice; and

(iii) "personal independence", defined to mean that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control.

(b) The IBA minimum standards in respect of the personal independence of judges, envisage that:

(i) judicial salaries and pensions should be adequate and should be regularly adjusted to account for price increases independent of executive control;

(ii) the position of judges, their independence, their security and their adequate remuneration should be secured by law;

(iii) judicial salaries should not be decreased during the judges services except as a coherent part of an overall public economic measure; and

(iv) the grounds of removal of judges should be fixed by law and should be clearly defined, and all disciplinary actions should be based upon standards of judicial conduct promulgated by law or in established rules of court.

(c) The Chief Justice has expressed the view that the new State constitution should ensure that the Judges enjoy personal independence and collective independence in accordance with the IBA minimum standards.

(d) The extent to which such provisions should be incorporated in the constitution itself, left to ordinary legislation, or be formulated by the courts themselves, is a matter for consideration.

3. Appointment of Judges

(a) A further matter for consideration is the method of choosing persons for appointment as judges. There are a number of options.

(i) The constitutions of a number of countries provide for appointment as judges by a constitutional commission.

(ii) The Courts (Federal) Committee of the Law Council of Australia has proposed that there should be a Judicial Commission which should submit a short list of names of persons for appointment to the High Court and to the Federal Court outside which the Federal Government should not go without public explanation of the reason for doing so.

(iii) The Constitutional Commission's Advisory Committee on the Australian Judicial System in its 1987 Report, has proposed that, while the existing process of consultation with the States should apply to that appointment of a Justice or Chief Justice of the High Court, there should not be a judicial commission established to advise upon the appointment of judges. It believes, however, that there should be a recognised practice that, before appointing a judge to a federal court other than the High Court, the federal Attorney-General should consult on a confidential basis with the Chief Judge of the court concerned and with the leaders of the most appropriate legal professional organisation or organisations to obtain their advice as to the persons eligible for appointment who are qualified to do the work of the court and who appear to have the necessary qualities.

(iv) The existing method of appointment which does not involve any formal requirement for consultation by the executive.

(b) The Select Committee favours the existing system of appointment of judges by the representative of the Monarch on the advice of Executive Council but considers that there should be a convention as to prior consultation with the Chief Justice and appropriate bodies representing the legal profession.

4. Removal of Judges

(a) A matter of considerable controversy in recent years has been the question of what kind of behaviour on the part of a judge constitutes "misbehaviour" such as to enable removal under section 72 of the Commonwealth Constitution.

(b) The Constitutional Commission's Advisory Committee on the Australian Judicial System in its 1987 Report, has expressed the view that there should be a Judicial tribunal established by Commonwealth legislation to determine questions of fact on which the removal of a judge may depend. It expressed the view that the Constitution should have a provision to the effect that a judge of a federal court of a State or Territory Supreme Court should not be removed unless the Judicial Tribunal has first found that the conduct of a Judge is capable of amounting to misbehaviour or incapacity warranting removal. In the case of federal judges, an address for removal must then be made by both Houses of the Parliament no later than the next session after the report of the Judicial Tribunal. It would be left to the Parliament of the States and the legislature of the Territories to determine whether a judge of that State of Territory should be removed. Only an Attorney-General could institute proceedings for removal.

(c) Attention is drawn to the Judicial Officers Act 1986 of New South Wales which introduced into Australia for the first time a standing Judicial Commission, the prime function of which is to receive and consider complaints against judicial officers. A summary of the provisions of the Act is at Part W below. The New South Wales legislation is an example of option (i) in paragraph (d) below.

(d) The matters for consideration are, whether provisions for the removal of judges should be included in the new State Constitution and, if so, the form those provisions should take. The two basic options are:

(i) a determination of "misbehaviour or incapacity' by some form of judicial tribunal, followed by an address in the legislature for removal; or

(ii) the existing method of removal, which leaves the question of a determination as to misbehaviour or incapacity to the legislature.

(e) The Select Committee favours inclusion of provision for the removal of judges in the new State constitution and, in the absence of a national scheme concerning the removal of Judges, retention of the existing method of removal, which leaves the question of a determination as to misbehaviour or incapacity to the legislature.

5. Court Administration

(a) There has been some debate as to the extent to which the courts should be able to manage their own administration, buildings, personnel and finances. In addition to the traditional model, such as the present arrangements in the Territory, there is the High Court model. Under the High Court of Australia Act 1979, the High Court is given considerable measure of independence in managing its own affairs (see Part V below).

(b) The Select Committee does not consider that any provision concerning court administration should be included in the new State constitution. The appropriate arrangements are matters for the Government, the legislature and the Judiciary to determine.

6. Judges and Non-judicial Functions

(a) There is concern about the growing practice of governments to involve the judiciary in political controversies by appointing judges to chair committees and commissions to investigate highly controversial affairs of a non-judicial nature.

(b) Some commentators have expressed the view that judges ought to be left free to perform their judicial duties and that neither the executive nor the legislature should involve them in duties or assign them tasks which in any way impinge on the performance of their proper role.

(c) The Select Committee does not favour the inclusion of any provision concerning Judges and non-judicial functions in the new State constitution.

7. Separation of Powers Doctrine

(a) The separation of powers doctrine seeks to separate the three traditional arms of government, namely the legislature, the judiciary and the executive with a view to preventing one arm from encroaching into the province of the others. This doctrine is particularly well developed in the Constitution of the U.S.A.

(b) The principle of separation of judicial from non-judicial powers has been held to be constitutionally entrenched in the Commonwealth Constitution in that:

(i) a Commonwealth tribunal cannot be given a combination of judicial and non-judicial functions without satisfying the tenure requirements of section 72; and

(ii) a judicial body established by the Commonwealth, properly constituted, cannot be given non-judicial functions that are not ancillary or incidental to the Judicial functions. [4]

(c) A justification for the strict application on of the doctrine is that it enables one arm of Government to act more effectively as a "check" or "balance" as against the other arms and, therefore, serves to limit and excesses or abuses of power and assists to protect the independence of the courts. However, it can be criticised in that it leads to excessive subtlety and technicality in the operation

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[4] (R v. Kirby; ex parte Boilermaker's Society of Australia (1956) 94 CLR 254; Attorney-General (Commonwealth) v. R; ex parte Boilermaker's Society of Australia (1957) 95 CLR 529)

of the constitution and of the law, resulting in unnecessary litigation and expense, often without any compensating benefit.

(d) The doctrine, however, is considered to be not relevant to the constitutions of the Australian States. This view is recently re-confirmed by the New South Wales Court of Appeal (Building Construction Employees and Builders' Labourers Federation. v, Minister for Industrial Relations and Anor, 31 October 1986). Depending on the nature and extent of the provisions in the new State constitution dealing with the Judiciary, it may be that the new State could be in a different position from the existing States in this respect

(e) The Constitutional Commission Advisory Committee on the Australian Judicial System in its 1987 Report saw no need to abrogate the doctrine as presently applying to the Commonwealth. On the other hand, it saw no need to extend the doctrine to matters of State or Territory jurisdiction.

(f) The options for a new State are either to expressly adopt doctrine, to leave the matter to be worked out by the courts by implication from the new State constitution, or to expressly exclude the doctrine.

(g) The Select Committee favours inclusion in the new State constitution of a provision along the lines of section 159 of the Papua New Guinea Constitution which provides that nothing in the Constitution prevents a law conferring judicial authority on a person or body outside the Judiciary, or the establishment by or in accordance with Law, or by consent of the parties, of arbitral or conciliatory tribunals, whether ad hoc or other, outside the Judiciary.

O. THE JUDICIARY AND THE NEW STATE CONSTITUTION ENTRENCHMENT

1. As indicated in Part E above, the Select Committee favours some degree of entrenchment of the whole of the new State constitution.

2. The Select Committee accepts that the Judiciary should be recognised in the new State constitution. An independent Judiciary is fundamental to our system of government and its position should therefore be entrenched in the constitution.

3. The Select Committee believes, however, that only fundamental principles should be entrenched, and not matters of detail.

4. The Select Committee recommends that in respect of the Judiciary, the following provisions should be included in the new State constitution:

(a) the existence of the Supreme Court of the new State including the Court of Appeal;

(b) appropriate transitional provisions to carry over the officers, functions, proceedings, records etc., of the Supreme Court of the Northern Territory;

(c) provisions for the appointment of Supreme Court Judges (see recommendation above) and a guarantee against any reduction in their terms and conditions of service during their respective terms of office;

(d) provision for the removal of judges (see recommendation above); and

(e) provisions concerning the jurisdiction of the Supreme Court of the new State.

5. The Committee does not at this stage consider any further entrenched provisions are necessary, although it invites comment.

6. The Committee anticipates that the Commonwealth will legislate to continue existing appellate rights from the Supreme Court to the High Court.

P. ENTRENCHED PROVISIONS GENERALLY

1. General

(a) As discussed in broad terms in Part E above, a decision must be made as to the extent to which the constitution of the new State is to be given a special constitutionally entrenched status. A constitution is said to be entrenched if it cannot be amended or repealed except after following certain defined procedures going beyond those required for ordinary legislation. One example of entrenchment is to make a successful referendum a prerequisite to any such change.

(b) Entrenchment is an option where the provisions to be entrenched are considered to be of such importance that they should not be lightly changed. The degree of entrenchment need not be the same for all provisions - some may be considered of greater importance than others.

(c) The Select Committee stated in Part E above, and adheres to the view, that it is opposed to any method of entrenchment that would comprise or include the necessity of obtaining the prior approval of the Commonwealth Government or Parliament to any change. Such a provision would be inconsistent with the principle of constitutional equality.

(d) The Select Committee further stated in Part E above, and adheres to the view, that generally speaking it favours some degree of entrenchment of the whole of the new State constitution. The constitution should be a document that is accorded special status in the law and should only deal with those

matters considered to be of vital importance in the functioning of the new State and its institutions. Matters of lesser importance should be relegated to ordinary legislation.

(e) The Select Committee also stated in Part E above, and adheres to the view that entrenchment would comprise or include the requirement that any proposed change be submitted to and be supported by a specified majority of new State electors at a referendum. It may be considered appropriate that for certain provisions, any change may require more than a simple majority of voters in any referendum. Certain minimal provisions will be necessary dealing with referendums in the new State constitution.

2. Position Elsewhere in Australia

(a) The Select Committee acknowledges that apart from the Commonwealth Constitution, constitutions in Australia are not generally given a constitutionally entrenched status except for certain limited matters. Apart from these matters, State constitutions can be changed in the same manner as ordinary legislation.

(b) The Commonwealth Constitution can be described as a "rigid" constitution in that it is relatively difficult to alter. The mechanism provided in Section 128 of the Constitution requires that any proposed alteration must first be passed by an absolute majority of each House of the Commonwealth Parliament. Within a limited time thereafter it must be submitted to a referendum of State and Territory electors qualified to vote in House of Representatives elections. A majority of electors in a majority of States as well as a majority of all electors voting, is required before the proposed law can be given assent.

(c) The Australia Act 1986, on the other hand, as well as the Statute of Westminster 1931, can only be amended or repealed by an Act of the Commonwealth Parliament passed at the request or with the concurrence of the Parliaments of all of the States (including any new States).

(d) Some State constitutions have provisions that are of an entrenched nature.

These are as follows.

(i) New South Wales, South Australia and Western Australia have entrenched the position of their Upper House of Parliament by requiring a referendum for abolition.

(ii) Queensland, on the other hand, has entrenched the position of its Legislative Assembly, such that any change, from the unicameral system applicable in that State requires a referendum.

(iii) New South Wales and South Australia have entrenched some electoral provisions, including redistribution requirements, by requiring a referendum for change.

(iv) The position of Governor and his powers has been entrenched in Queensland and Western Australia.

(v) The term of office of the Lower House has been entrenched in New South Wales (referendum) and Tasmania (two thirds majority vote of Assembly), as has the term of office of the Legislative Assembly of Queensland (referendum).

(vi) The Victorian constitution requires an absolute majority of both Houses for any change to certain provisions, including those as to local government and the Supreme Court.

(e) The Northern Territory, (Self-Government) Act 1978 and Regulations thereunder, under which the Self-governing Northern Territory is established, only has the status of ordinary Commonwealth legislation, and arguably can be amended or repealed by the Commonwealth Parliament as it sees fit. Seen from the perspective of the Northern Territory Legislative Assembly, it can be regarded as an entrenched provision in the sense that that Assembly cannot legislate inconsistently with or repugnantly to that Act. Such a position would clearly be inconsistent with the status of a new State.

Q. LEGISLATURE, EXECUTIVE AND JUDICIARY

1. Legislature

(a) The Select Committee, in Part E above, outlined those matters that might be considered as being appropriate for entrenchment in relation to the new State legislature, being matters that could be regarded as being fundamental to the democratic system applicable in Australia. These included:

(i) The existence of the unicameral new State Parliament and its fully representative nature;

(ii) The qualifications and disqualifications of members;

(iii) The maximum tolerance allowed between electorates;

(iv) The qualifications of voters;

(v) The power of the Governor to assent or withhold assent to legislation, to dissolve the Parliament (subject to restrictions within the first 3 years of the 4 year term), to issue writs for elections and to fix the date of elections;

(vi) Casual vacancies and by-elections;

(vii) The principle of one person one vote and secret ballots;

(viii) The wide legislative powers of that Parliament;

(ix) The requirement that not more than 6 months pass between successive sittings of the Parliament; and

(x) The office of the Speaker.

(b) It is unnecessary in this Paper to expand upon these matters further, although public comment is invited; as to the extent to which provisions relating to the new State legislature should be entrenched in the new constitution and the degree of entrenchment.

2. Executive

(a) The Select Committee, in Parts G, H, I, J and K above, outlined a number of recommendations and endorsements relating to the Governor and the executive government of the new State, including their relationship with the legislature of the new State, for inclusion in the new State constitution. These included retention of the Westminster system of responsible government, with Ministers chosen from the members of the Legislature and appointed by the Governor. The Governor in turn would be required as a general rule to act in accordance with the advice of his or her Ministers. The Governor would be appointed and his or her appointment terminated by the Monarch following receipt of advice from the new State Premier.

(b) It is unnecessary in this Paper to further expand upon these matters, although public comment is invited as to the extent to which provisions relating to the new State executive should be entrenched in the new State constitution and the degree o£ entrenchment.

3. Judiciary

(a) The Select Committee, in Part N above, accepted that the Judiciary of the new State should be recognised in the new State constitution. An independent Judiciary is fundamental to our system of government and its position should therefore be entrenched in the constitution.

(b) The Select Committee stated in Part O above that only fundamental principles relating to the Judiciary should be entrenched, and not matters of detail.

(c) The Select Committee recommended in that Part that the following provisions should be included in the new State constitution:

(i) the existence of the Supreme Court of the new State, including the Court of Appeal;

(ii) appropriate savings provisions to carry over the officers, functions, proceedings, records etc., of the Supreme Court of the Northern Territory;

(iii) provisions for the appointment of the Supreme Court judges and a guarantee against any reduction in their terms and conditions of service during their respective terms of office;

(iv) provision for the removal of judges; and

(v) provisions concerning the jurisdiction of the Supreme Court of the new State.

(d) The Select Committee does not consider any further entrenched provisions relating to the Judiciary are necessary for inclusion in the new State constitution, although it invites public comment as to the extent to which provisions relating to the new Judiciary should be entrenched in the new State constitution and the degree of entrenchment.

R. LOCAL GOVERNMENT

1. Arguments have been advanced in the Northern Territory proposing the constitutional entrenchment of the position of local government. At present, local government derives its existence, powers and status from the Local Government Act of the Territory and has no such entrenched position. The self-governing Northern Territory has both legislative power (through the Legislative Assembly) and executive authority (through Ministers of the Territory Government) in relation to all aspects of local government in the Territory.

2. Previous attempts to have local government recognised in the Commonwealth Constitution through the Constitutional Convention have so far brought no results, although the matter is presently under consideration by the Constitutional Commission. However four States have proceeded to recognise local government in their own constitutions - New South Wales, Victoria, South Australia and Western Australia.

3. Of these States, only the Victorian provision goes further than merely providing for formal recognition. The constitution of Victoria requires the existence of a general system of local government throughout the State (with some exceptions). Local government bodies are to be elected and are protected from dismissal except by Act of Parliament. Limitations are placed on suspension of local government bodies. The constitutional provisions have a limited degree of entrenchment (see discussion above) but subject thereto, ultimate control remains with the Victorian Parliament and Government.

4. The Northern Territory Local Government Association has previously indicated that any provision for constitutional recognition should be in accordance with the following principles:

(a) general competence and autonomy for each local government body to act for the peace, order and good government of its area;

(b) secure financial basis;

(c) proper recognition of the elected member role;

(d) protection from dismissal of individual local government bodies without public inquiry; and

(e) due consultation prior to any changes to powers, functions, duties, responsibilities and financial resources.

These principles have been adopted from the policy of the Local Government Association and Shires Association Executives, endorsed by the Australian Council of Local Government Associations. They were considered in the 1984 Local Government Report of the Structure of Government Sub-Committee to the Australian Constitutional Convention.

5. The Select Committee notes the special situation of the Northern Territory, where vast areas are not within any local government area. Other areas are covered by community government schemes. Any decision to extend local government or community government is appropriately a matter for the new State in consultation with the local residents. Constitutional recognition of local government must take into account the special situation of the Territory and the associated difficulties of administration.

6. Subject to these considerations, the Select Committee favours some constitutional provisions for the recognition of local government in the new State. It invites public comment on the nature of those provisions.

S. ABORIGINAL RIGHTS

1. Comprehensive Commonwealth legislation in the form of the Aboriginal Land Rights (Northern Territory) Act 1976 presently applies in the Northern Territory. In the Option Paper entitled "Land Matters Upon Statehood" dated November 1986, it was advocated that this Act be patriated to and become part of the law of the new State upon the grant of Statehood by some agreed method. That Paper suggests that the process of patriation should include appropriate guarantees of Aboriginal ownership. In the absence of Commonwealth land rights legislation applying Australia-wide, the Select Committee in broad terms endorses this approach.

2. One option, favoured by the Select Committee, is to entrench these guarantees of Aboriginal ownership in the new State constitution, such that they can only be amended by following specified entrenchment procedures. The extent of these guarantees and the degree of entrenchment are matters upon which public comment is invited.

3. There is a question whether the new State constitution should go further in its reference to Aboriginal citizens of the new State. One possibility is to include in the constitution some fundamental principles of a non-enforceable nature in the form of a preamble which would give particular recognition to the place of those citizens in contemporary society (and see Part T, paragraph 9 below).

4. Such a preamble could take many forms. It might, for example, recognise that the new State is now a multi-racial and multi-cultural society in which Aboriginal citizens are fully entitled to participate with other citizens on an equal, non-discriminatory basis under the Law. Where special provisions are provided under new State law for any particular class or group of citizens, they should only have effect for so long and in so far as they are necessary to redress any continuing lack of equality of opportunity or other disadvantages.

5. In an address by Ms. L. Liddle to the 1986 Law Society Conference on Statehood, she indicated that the new State constitution should go further and recognise not only the current place of Aboriginal citizens in the new State, but also their historical rights, including their traditional ownership of the land and the usurpation of those rights by European settlement.

6. There is undoubtedly some merit in recognising the pre-existing circumstances of Aboriginal citizens of the new State, including as to their language, social, cultural and religious customs and practices. Having regard to the desirability of maintaining harmonious relationships within the new State, it is preferable that any such recognition should be in a form acceptable to the broader new State community and compatible with its multi-racial, multi-cultural nature and the principles of equality and non-discrimination. The exact form this recognition should take is a matter for discussion.

7. The Select Committee makes no specific recommendation on these proposals but invites public comment.

T. HUMAN RIGHTS

1. The question arises as to whether the new State constitution should contain any provisions dealing with human rights - for example, freedom of speech, freedom of religion, freedom of assembly, etc. The Universal Declaration of Human Rights, adopted by the United Nations in 1948, conveniently summarises the main human rights of interest and is contained in Appendix 4 below.

2. No Australian constitution contains any comprehensive provisions of this nature. The Commonwealth Constitution contains some limited provisions which could be described as coming within this category, but the courts have in most cases given them a fairly limited application. The constitution of Tasmania contains a provision dealing with religious freedom. The Constitutions of other States are silent on any matters pertaining to the citizen's rights.

3. By way of contrast the Constitution of the USA and the constitutions of the States of the USA contain comprehensive bills of rights. The constitutions of many countries have similar guarantees of civil and political rights, of the nature contained in the International Covenant on Civil and Political Rights. Relevant extracts, from the

Constitutions of USA and Canada are also attached in Appendix 4 below by way of example.

4. The constitutions of some countries go further and provide for other rights of the nature contained in the International Covenant on Economic, Social and Cultural Rights. However not all of these countries have an independent Judiciary, and the real value of some of these statements of rights is questionable.

5. The question whether Australia should have legally enforceable guarantees of civil and political rights has been hotly debated in recent years. Australia is a signatory to the International Covenant on Civil and Political Rights and various other international human rights instruments, and has legislated to implement in part these instruments in the Human Rights and Opportunity Commission Act 1986, the Racial Discrimination Act 1975, and the Sex Discrimination Act 1984. However attempts to pass a comprehensive Human Rights Act in the Commonwealth Parliament have not succeeded. As a consequence, generally speaking it is not possible to found a cause of action or a defence in an Australian court based solely on an internationally recognised human right.

6. The Constitutional Commission's Advisory Committee on Individual and Democratic Rights in its 1987 Report has recommended that the Commonwealth Constitution be amended to expand and entrench specified human rights. These include rights relating to trial by jury and the criminal process, freedom of religion, movement, expression and assembly, equality before the law, acquisition of property on just terms, voting and citizenship rights and other matters, not limited in operation to matters over which the Commonwealth has jurisdiction. The report proposes the insertion of a new preamble in the Constitution.

7. There are arguments for and against the adoption of an enforceable statement of human rights in the new State constitution. Those arguments for such a proposal rely both on moral arguments and on the view that this is a desirable form of "check" against possible abuses by government or against undesirable legislation. Those arguments against the proposal stress the undesirability of the legislature abdicating its authority in these matters to the courts, the costs and delays potentially arising, the alleged adequacy of the common law as supplemented by legislation where found necessary or desirable in particular cases, and the fact that by prescribing some rights it may in some cases unduly limit other rights.

8. An enforceable statement of human rights entrenched in the new State constitution might or might not be expressed to be subject to express change in specific matters by later ordinary legislation.

9. An alternative may be to include in the new State constitution a preamble setting out basic human rights or goals for the new State and its citizens, that preamble not giving rise of itself to enforceable legal rights but merely acting as an aid to the interpretation of new State legislation and its administration.

10. The Select Committee invites public comment on this issue.

APPENDIX 1

SELECTED CONSTITUTIONAL PROVISIONS

SELECTED CONSTITUTIONAL PROVISIONS

1. The Constitution of the Commonwealth

"9. The Parliament of the Commonwealth may make laws prescribing the method of choosing senators, but so that the method shall be uniform for all the States. Subject to any such law the Parliament of each State may make laws prescribing the method of choosing the senators for that State.

The Parliament of a State may make laws for determining the times and places of elections of Senators for the State."

"15. If the place of a senator becomes vacant before the expiration of his terms of service, the Houses of Parliament of the State for which he was chosen, sitting and voting together, or, if there is only one House of that Parliament, that House, shall choose a person to hold the place until the expiration of the term. But if the Parliament of the State is not in session when the vacancy is notified, the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until the expiration of fourteen days from the beginning of the next session of the Parliament of the State or the expiration of the term, whichever first happens.

Where a vacancy has at any time occurred in the place of a senator chosen by the people of a State and, at the time when he was so chosen, he was publicly recognised by a particular political party as being an endorsed candidate of that party and publicly represented himself to be such a candidate, a person chosen or appointed under this section in consequence of that vacancy, or in consequence of that vacancy and a subsequent vacancy or vacancies, shall, unless there is no member of that party available to be chosen or appointed, be a member of that party.

Where -

a) in accordance with the last preceding paragraph, a member of a particular political party is chosen or appointed to hold the place of a senator whose place had become vacant; and

b) before taking his seat he ceases to be a member of that party (otherwise than by reason of the party having ceased to exist),

he shall be deemed not to have been chosen or appointed and the vacancy shall be again notified in accordance with Section twenty-one of this Constitution.

The name of any senator chosen or appointed under this section shall be certified by the Governor of the State to the Governor-General.

If the place of a senator chosen by the people of a State at the election of senators last held before the commencement of the Constitution Alternation (Senate Casual Vacancies) 1977 became vacant before that commencement and, at that commencement, no person chosen by the House or Houses of Parliament of the State, or appointed by the (Governor of the State, in consequence of that vacancy, or in consequence of that vacancy and a subsequent vacancy or vacancies, held office, this section applies as if the place of the senator chosen by the people of the State had become vacant after that commencement.

A senator holding office at the commencement of the Constitution Alteration (Senate Casual Vacancies) l977, being a senator appointed by the Governor of a State in consequence of a vacancy that had at any time occurred in the place of a senator chosen by the people of the State, shall be deemed to have been appointed to hold the place until the expiration of fourteen days after the beginning of the next session of the Parliament of the State that commenced or commences after he was appointed and further action under this section shall be taken as if the vacancy in the place of the senator chosen by the people of the State had occurred after that commencement.

Subject, to the next succeeding paragraph, a senator holding office at the commencement of the Constitution Alteration (Senate Casual Vacancies) 1977, who was chosen by the House or Houses of Parliament of a State in consequence of a vacancy that had at any time occurred in the place of a senator chosen by the people of the State shall be deemed to have been chosen to hold office until the expiration of the term of service of the senator elected by the people of the State.

If, at or before the commencement of the Constitution Alteration (Senate Casual Vacancies) 1977, a law to alter the Constitution entitled "Constitution Alteration (Simultaneous Elections) 1977" came into operation, a senator holding office at the commencement of that law who was chosen by the House or Houses of Parliament of the State in consequence of a vacancy that had at any time occurred in the place of a Senator chosen by the people of the State shall be deemed to have been chosen to hold office -

a) if the senator elected by the people of the State had a term of service expiring on the thirtieth day of June, One thousand nine hundred and seventy-eight - until the expiration or dissolution of the first House of Representatives to expire or be dissolved after that law came into, operation; or

b) if the senator elected by the people of the State had a term of service expiring on the thirtieth day of June, One thousand nine hundred and eight-one - until the expiration or dissolution of the second House of Representatives to expire or be dissolved after that law came into operation or, if there is an earlier dissolution of the Senate, until that dissolution."

"41. No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be

prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth."

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

"107. Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be."

"108. Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State."

"111. The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth."

"12l. The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit."

"122. The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit."

2. The Australia Act 1986

"7.(l) Her Majesty's representative in each State shall be the Governor.

(2) Subject to subsections (3) and (4) below, all powers and functions of Her Majesty in respect of a State are exercisable only by the Governor of the State.

(3) Subsection (2) above does not apply in relation to the power to appoint, and the power to terminate the appointment of, the Governor of a State.

(4) While Her Majesty is personally present in a State, Her Majesty is not precluded from exercising any of Her powers and functions in respect of the State that are the subject of subsection (2) above.

(5) The advice to Her Majesty in relation to the exercise of the powers and functions of Her Majesty in respect of a State shall be tendered by the Premier of the State."

"8. An Act of the Parliament of a State that has been assented to by the Governor shall not, after the commencement of this Act, be subject to disallowance by Her Majesty, nor shall its operation be suspended pending the signification of Her Majesty's pleasure thereon."

"9.(l) No law or instrument shall be of any force or effect in so far as it purports to require the Governor of a State to withhold assent from any Bill for an Act of the State that has been passed in such manner and form as may from time to time be required by a law made by the Parliament of the State.

(2) No law or instrument shall be of any force or effect in so far as it purports to require the reservation of any Bill for an Act of a State for the signification of Her Majesty's pleasure thereon."

APPENDIX 2

SELECTED COMMONWEALTH PROVISIONS AS TO THE JUDICIARY

SELECTED COMMONWEALTH PROVISIONS AS TO THE JUDICIARY

1. Chapter III of the Constitution of the Commonwealth of Australia is concerned with the Judicature. Section 71 provides:

> "71. The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes."

Other provisions provide for judges appointment, removal, retirement age, resignation and remuneration (section 72); the appellate jurisdiction of the High Court (section 73); appeal from the High Court to the Queen in Council (section 74); matters in which the High Court shall have original jurisdiction (section 75); matters in which the Parliament may make laws conferring original jurisdiction on the High Court (section 76); the power of the Parliament to define jurisdiction (section 77); proceedings against the Commonwealth or a State (section 78); federal jurisdiction to be exercised by such number of judges as the Parliament prescribes section 79); and for the trial on indictment of any offence against any law of the Commonwealth to be by jury section 80).

2. The Judiciary Act 1903 was enacted to make provision for the exercise of the judicial power of the Commonwealth. The Act includes provisions concerning the jurisdiction and powers of the High Court generally (sections 15 to 29), the original jurisdiction of the High Court (sections 30 to 33A), the appellate jurisdiction of the High Court (sections 34 to 37), inclusive and invested jurisdiction (sections 38 to 39B), removal of causes (sections 40 to 45), enforcement of certain orders concerning court proceedings (sections 46 to 51), legal practitioners (sections 55A to 55E), suits by and against the Commonwealth and the States (sections 56 to 67), suits relating to the Northern Territory (sections 67A to 67F), criminal jurisdiction (sections 68 to 77), the procedure of the High Court (sections 77A to 77R), appeals to the High Court (sections 77S to 77V) and supplementary provisions (sections 78 to 88).

3. The High Court of Australia Act 1979 includes provisions concerning the constitution and seat of the High Court (sections 5 to 16), administration of the High Court (sections 17 to 29), the Registry of the High Court (sections 30 to 34), the financial administration of the High Court (sections 35 to 44) and miscellaneous provisions concerning the High Court (sections 45 to 48). Of particular interest are the provisions:

- requiring consultation with the Attorneys-General of the States before an appointment to the High Court is made (section 6);
- which provide that the High Court shall administer its own affairs (section 17);
- concerning the Clerk and other officers and employees of the High Court (sections 18 to 29); and

. enabling the High Court to administer, its own finances, which are appropriated by the Parliament for the purposes of the Court (sections 35 to 44).

4. The Family Law Act 1975 created the Family Court of Australia and made provision for the jurisdiction of the Family Court.

5. The Federal Court of Australia Act 1976 created the Federal Court of Australia and made provision for the jurisdiction of the Federal Court.

6. The Australian Capital Territory Supreme Court Act 1933 provides for the constitution and jurisdiction of the Supreme Court of the Australian Capital Territory, officers of the Court, and general matters of procedure. In particular, the provisions relating to judges provide for their appointment and tenure (section 7), arrangement of the business of the Court by the Chief Justice (section 7B), exercise of jurisdiction of the Court (sections 8 to 8AC), holding of other judicial offices by judges (section. 8A), salary and allowances of judges (section 8B), the taking of an oath or affirmation of allegiance by judges (section 10), the jurisdiction of the Court (section 11) and the jurisdiction of the Court in Chambers (section 12).

APPENDIX 3

SELECTED STATE PROVISIONS AS TO THE JUDICIARY

SELECTED STATE PROVISIONS AS TO THE JUDICIARY

1. New South Wales

a) The Constitution Act 1902 of New South Wales does not include any provisions concerning the Judiciary.

b) The Supreme Court Act 1970 includes provision concerning judges, the powers and procedures of the Court, and officers of the Court. In particular there are provisions providing for the composition for the Court (section 25), appointment and qualifications of the Chief Justice and judges (section 26), the commissions of judges to continue and remain in force during their good behaviour, and for their removal upon the address of both Houses of Parliament (section 27) and remuneration of judges (section 29).

c) The Judicial Officers Act 1986 provides that:

. a judicial officer remains in office "during ability and good behaviour", and may not be suspended or removed from office except by or in accordance with that Act or another Act of Parliament (section 4);

. "judicial officer" is defined to mean a judge, Master of the Supreme Court, member of the Industrial Commission, or magistrate (section 3);

. the Judicial Commission of New South Wales is constituted by the Act, comprising the Chief Justice of the Supreme Court, the President of the Industrial Commission, the Chief Judge of the Land and Environment Court, the Chief Judge of the District Court, the Chief Judge of the Compensation Court, the Chief Magistrate and two members appointed by the Governor on the nomination of the Minister (section 5);

. the functions of the Commission are to assist courts to achieve consistency in imposing sentences by monitoring sentences imposed by courts and disseminating information and reports on sentences imposed by courts (section 8), organise and supervise an appropriate scheme for the continuing education and training of judicial officers (section 9), formulate guidelines to assist the Conduct Division in the exercise of its functions and monitor the activities of the Conduct Division (section 10) and give advice to the Minister and liaise with persons or organisations in connection with its functions (section 11);

. there shall be a Conduct Division of the Commission (section 13) with functions to examine and deal with complaints referred to it by the Commission (section 14);

- any person may complain to the Commission about a matter that concerns or may concern the ability or behaviour of a judicial officer (section 15) and the Minister may refer any matter relating to a judicial officer to the Commission (section 16);

- the Commission shall conduct a preliminary examination of a complaint (section 18) following which the Commission shall summarily dismiss the complaint, classify the complaint as minor, or classify the complaint as serious (section 19);

- the grounds for summary dismissal are set out in (section 20);

- if a complaint is not summarily dismissed, it shall be referred to the Conduct Division or to the relevant head of jurisdiction (section 21);

- the Commission shall appoint a panel of 3 persons, who shall be judicial officers but one of whom may be a retired judicial officer, for the purpose of a complaint referred to the Division (section 22);

- the Conduct Division shall conduct an examination of a complaint, or may initiate investigations, which shall as far as practicable take place in private (section 24);

- the Conduct Division may hold a hearing in connection with a serious complaint which shall take place in public unless the Division directs that hearing take place in private, or a hearing connection with a minor complaint which shall take place in private (section 24);

- for the purposes of a hearing in connection with a serious complaint, the Conduct Division and the Chairperson have the functions, protections and immunities conferred by the Royal Commissions Act 1923 on commissioners and the chairman of a commission appointed under that Act and that Act applies to witnesses before the Division (section 25);

- the Conduct Division shall dismiss a complaint on any of the grounds on which the Commission may summarily dismiss complaints, or if it is of the opinion that the complaint has not been substantiated (section 26);

- if the Conduct Division decides that a minor complaint is wholly or partly substantiated, it shall so inform the judicial officer complained about or decide that no action need be taken (section 27);

. if the Conduct Division decides that a serious complaint is wholly substantiated, it may form an opinion that the matter could justify parliamentary consideration of the removal of the judicial officer (section 28);

. in relation to a serious complaint the Conduct Division shall present to the Governor a report setting out the Division's conclusions, and the Minister shall lay the report before both Houses of Parliament as soon as practicable after the report is presented to the Governor (section 29);

. in relation to a minor complaint, the Division shall furnish a report to the Commission setting out the action taken by the Division (section 29);

. if the Conduct Division is of the opinion that a judicial officer about whom a serious complaint has been made may be physically or mentally unfit to exercise efficiently the functions of a judicial office, the Division may request the officer to undergo such a medical examination as the Division specifies (section 34);

. a judicial officer may be suspended by the "appropriate authority", being the relevant head of jurisdiction, but in relation to a member of the Commission, the Governor acting on the recommendation of the Commission (sections 40, 42 and 43);

. if a report of the Conduct Division presented to the Governor sets out the Division's opinion that a matter could justify parliamentary consideration of the removal of a judicial officer, the Governor may remove the officer on the address of both Houses of Parliament (section 41); and

. judicial officers shall retire on reaching specified ages (section 44).

2. Queensland

a) The Constitution Act 1867 of Queensland provides for the commissions of judges to be continued during their good behaviour (section 15); removal of judges upon the address of Parliament (section 16); salaries of judges (section l7); and pensions payable to judges section 38).

b) There is a number of Supreme Court Acts in Queensland which deal with various matters concerning the court. One of those Acts is the Supreme Court Act of 1867 which includes provisions concerning qualification of judges (section 8), the commissions of judges to be during their good behaviour and subject to removal upon the address of "both Houses" (section 9), judges'

salaries (section 10), judges not to hold other office (section 12), and constitution of the Court (sections 15 to 18).

3. South Australia

a) The Constitution Act 1934 of South Australia provides for the commissions of judges to remain in full force during their good behaviour (section 74) and for the removal of judges upon the address of both Houses of the Parliament (section 75).

b) The Supreme Court Act 1935 includes provisions concerning the constitution of the Supreme Court, jurisdiction and powers of the Court, the procedure of the Court, and the Master and officers of the Court. The provisions concerning the constitution of the Court with the qualifications of judges (section 8), appointment of judges (section 9), salaries of judges (sections 12 and 13), the retiring age for judges (section 13a) and long leave of absence of judges (section 13h).

4. Tasmania

a) The Constitution Act 1934 of Tasmania does not include any provisions concerning the Judiciary.

b) The Supreme Court Act 1887 includes provisions concerning the appointment of judges (sections 2 and 5) the qualifications for appointment of judges (section 4) and the retirement age of judges (section 6A). The Supreme Court Act 1959 includes provisions concerning the appointment of a person to be Master and Registrar (section 4) and provisions concerning sittings of the Court (section 6). The Supreme Court (Judges' Independence) Act 1857 provides that it shall not be lawful to suspend or remove a judge except upon the address of both Houses of Parliament (section 1). The Supreme Court Civil Procedure Act 1982 includes provisions concerning the civil jurisdiction of the Court and the procedure and practice relating to the exercise of that jurisdiction.

5. Victoria

a) The Constitution Act 1975 of Victoria continues the existing Supreme Court (section 2) and provides for the appointment of judges, the Prothonotary, the Registrar of Probates and the Masters of the Court (sections 75 and 80) the removal of judges upon the address of Parliament and a retirement age for judges (section 77); the appointment of the Chief Justice (section 78) and an acting Chief Justice (section 79); the appointment of temporary judges (section 81); salaries, allowances and pensions of judges (sections 77(2), 82 and 83) judges not to hold other offices of profit section 84); powers and jurisdiction of the Court (section 85) power of judges to award habeas corpus (section 86);

and the Court not to be required to exercise jurisdiction where jurisdiction is conferred on other bodies (section 87).

b) The Supreme (Court Act 1986, which repealed the Supreme Court Act 1958, amended and consolidated the law relating to the Supreme Court in Victoria. It includes provisions concerning sittings, powers, procedures and officers of the Supreme Court, and other matters.

6. Western Australia

a) The Constitution Act 1889 of Western Australia provides for the commissions of judges to continue in full force during their good behaviour (section 54).

b) The Supreme Court Act 1935 includes provisions concerning constitution of the Supreme Court, its jurisdiction, sittings and distribution of business, enforcement of judgments and orders, and Rules of Court. In particular there are provisions concerning the constitution of the Court (section 7), qualifications of judges (section 8), tenure of judges and oaths of office (section 9), the appointment of an Acting Chief Justice (section 10), acting judges section 11) and masters (sections 11A to 11E).

APPENDIX 4

EXAMPLES OF HUMAN RIGHTS

EXAMPLES OF HUMAN RIGHTS

There are numerous examples of comprehensive statements of human rights. Set out below are three such examples, namely the Universal Declaration of Human Rights, the Bill of Rights of the U.S.A. and the Canadian Charter of Rights and Freedoms.

1. Universal Declaration of Human Rights

This Declaration was adopted by the General Assembly of the United Nations on 10 December 1948, with Australian support. It is not a legally binding instrument as such, although it can be regarded as being part of the law of the U.N. It is one of the best known and most influential documents of all in the area of human rights, having inspired the preparation of a number of national and international human rights instruments. It is regarded by many as a yardstick by which to measure respect for, and compliance with, international human rights standards. It is set out below.

"Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

Whereas it is essential to promote the development of friendly relations between nations.

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of Universal respect for and observance of human rights and fundamental freedoms.

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realisation of this pledge.

Now, Therefore,

THE GENERAL ASSEMBLY

proclaims

This universal declaration of human rights as a common standard of achievement for all people and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and security of person.

Article 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had the guarantees necessary for his defence.

2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the Law against such interference or attacks.

Article 13

1. Everyone has the right to freedom of movement and residence within the borders of each state.

2. Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes from acts contrary to the purposes and principles of the United Nations.

Article 15

1. Everyone has the right to a nationality.

2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society, and is entitled to protection by society and the State.

Article 17

1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property.

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in

community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

1. Everyone has the right to freedom of peaceful assembly and association.

2. No one may be compelled to belong to an association.

Article 21

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

2. Everyone has the right of equal access to public service in his country.

3 The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

2. Everyone, without any discrimination, has the right to equal pay for equal work.

3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

4. Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

l. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

3. Parents have prior right to choose the kind of education that shall be given to their children.

Article 27

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.

Article 29

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and general welfare in a democratic society.

3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."

2. Bill of Rights ,USA

The Constitution of the U.S.A. was drawn up in 1787 and became operational in 1789. It has subsequently been amended a number of times, the first ten amendments being known as the Bill of Rights, adopted in 1791. These are an early and influential example of the constitutional recognition of human rights. The interpretation and application of these amendments by the courts has had a far reaching influence on the U.S.A. The Bill of Rights plus a few later amendments of relevance are set out below.

ARTICLE [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE [II]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

ARTICLE [III]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE [IV]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE [VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favour, and to have the assistance of counsel for his defence.

ARTICLE [VII]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

ARTICLE [VIII]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE [IX]

The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE [X]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE [XIII]

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce the article by appropriate legislation.

ARTICLE [XIV]

Section 1. All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARTICLE I [XV]

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, colour, or previous condition of servitude.

[Later amendments omitted.]"

3. Canadian Charter of Rights and Freedoms

The Canadian Charter of Rights and Freedoms is part of the Constitutional Act 1982 of Canada. Prior to the introduction of that Act, there was no general statement of a constitutional nature as to human rights in Canada, although there has been a Bill of Rights in legislative form since 1960. The Constitution Act 1982 was scheduled to the Canadian Act 1982, an Act of the U.K. Parliament, and which patriated and amended the Constitution of Canada following agreement between the Government of Canada and the governments of most of the Canadian provinces.

"PART I

Whereas Canada is founded upon principles that recognise the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

2. Everyone has the following fundamental freedoms:

a) freedom of conscience and religion;

b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

Democratic Rights

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members.

(2) In time of real. or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.

Mobility Rights

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(a) to move to and take up residence in any province; and

(b) to pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(b) any laws providing for reasonable residency requirements as a qualification of the receipt of publicly provided social services.

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Legal Rights

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search or seizure.

9. Everyone has the right not be to arbitrarily detained or imprisoned.

10. Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right; and

(c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

11. Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

(c) to be compelled to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(e) not to be denied reasonable bail without just cause;

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognised by the community of nations;

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing to the benefit of the lesser punishment.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Official Languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published, in English and French and both language versions are equally authoritative.

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from any court established by Parliament.

(2) Either English or French may be used by any person in, or in any pleading or process issuing from, any court of New Brunswick.

20. (l) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament, or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(a) there is a significant demand for communications with and services from that office in such language, or

(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

2l. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any, other provision of the Constitution of Canada.

22. Nothing in section 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Minority Language Educational Rights

23. (1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their Primary school instruction, in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the rights to have them receive that instruction in minority language education facilities provided out of public funds.

Enforcement

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognised by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

30. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories or to the appropriate legislative authority thereof, as the case may be.

31. Nothing in this Charter extends the legislative power of any body or authority.

Application of Charter

32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

(2) Notwithstanding subsection (l), section 15 shall not have effect until three years after this section comes into force.

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Citation

34. This part may be cited as the Canadian Charter of Rights and Freedoms.

PART II

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA.

35. (1) The existing aboriginal treaty rights of the aboriginal peoples of Canada are hereby recognised, and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada."

APPENDIX 5

TERMS OF REFERENCE

TERMS OF REFERENCE

(AS CONTAINED IN THE RESOLUTION OF THE LEGISLATIVE ASSEMBLY 27 JUNE 1994)

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

AND WHEREAS insofar as it is constitutionally possible the equality should apply as on the date of the grant of statehood to the new State;

AND WHEREAS it is necessary to draft a new State constitution;

(1) during the present session of this Assembly - 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;

(b) the issues, conditions and procedures pertinent to the entry of the Northern Territory into the Federation as a new State;

(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 and Australian populations;

(3) unless otherwise ordered, the Committee consist of Mr Bailey, Mr Baldwin, Mr Hatton, Mrs Hickey, Mr Mitchell and Mr Rioli[5];

(4) the Chief Minister and the Leader of the Opposition, although not Members of the Committee, may attend all meetings of the Committee; may question witnesses; and may participate in the deliberations of the Committee, but shall not vote;

(5) the Chairman of the Committee may, from time to time, appoint a Member of the Committee to be the Deputy Chairman of the Committee and that the Member so appointed shall act as Chairman of the Committee at any time when there is no Chairman or when the Chairman is not present at a meeting of the Committee;

(6) in the event of an equality of voting, the Chairman, or the Deputy Chairman when acting as Chairman, shall have a casting vote;

(7) the Committee have power to appoint subcommittees and to refer to any such subcommittee any matter which the Committee is empowered to examine;

(8) four Members of the Committee constitute a quorum of the Committee and two members of a subcommittee constitute a quorum of the subcommittee;

(9) the Committee or any subcommittee have power to send for persons, papers and records, to adjourn from place to place, to meet and transact business in public or private session and to sit during any adjournment of the Assembly;

(10) the Committee shall be empowered to print from day to day such papers and evidence as may be ordered by it and, unless otherwise ordered by the Committee, a daily Hansard shall be published of such proceedings of the Committee as take place in public;

(11) the Committee have leave to report from time to time and any Member of the Committee have power to add a protest or dissent to any report;

(12) the Committee report to the Assembly as soon as possible after 30 June each year on its activities during the preceding financial year;

(13) unless otherwise ordered by the Committee, all documents received by the Committee during its inquiry shall remain in the custody of the Assembly provided that, on the application of a department or person, any document, if not likely to be further required, may, in the Speaker's discretion, be returned to the department or person from whom it was obtained;

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[5] Mr Rioli discharged from the Committee on 28 February 1995 and Mr Lanhupuy appointed on the same date.

(14) members of the public and representatives of the news media may attend and report any public session of the Committee, unless otherwise ordered by the Committee;

(15) the Committee may authorise the televising of public hearings of the Committee under such rules as the Speaker considers appropriate;

(16) the Committee shall be provided with all necessary staff, facilities and resources and shall be empowered, with the approval of the Speaker, to appoint persons with specialist knowledge for the purposes of the Committee;

(17) nothing in these Terms of Reference or in the Standing Orders shall be taken to limit or control the duties, powers or functions of any Minister of the Territory who is also a Member of the Sessional Committee;

(18) the Committee be empowered to consider the minutes of proceedings, evidence taken and records of similar committees established in the previous Assembly; and

(19) the foregoing provisions of this Resolution, so far as they are inconsistent with Standing Orders, have effect notwithstanding anything contained in the Standing Orders.

APPENDIX 6

COMMITTEE PUBLICATIONS

INFORMATION AND DISCUSSION PAPERS PREPARED

BY

THE SESSIONAL COMMITTEE ON

CONSTITUTIONAL DEVELOPMENT

1. Information Paper No. 1 - *Options for a Grant of Statehood* - September 1987.

2. Information Paper No. 2 - *Entrenchment of a New State Constitution* - October 1989.

3. Discussion Paper on *A Proposed New State Constitution for the Northern Territory* - October 1987.

4. Discussion Paper on *Representation in a Territory Constitutional Convention* - October 1987.

5. *Proposals for a new State Constitution for the Northern Territory - Have your Say!*- October 1988.

6. Discussion Paper No. 3 - *Citizen's Initiated Referendums* - August 1991.

7. Discussion Paper No. 4 - *Recognition of Aboriginal Customary Law* - August 1992.

8. Discussion Paper No. 5 - *The Merits or Otherwise of Bringing an NT Constitution into Force before Statehood* - March 1993.

9. Discussion Paper No. 6 - *Aboriginal Rights and Issues - Options for Entrenchment* - July 1993.

10. Discussion Paper No. 7 - *An Australian Republic? - Implications for the Northern Territory* - March 1994.

11. Interim Report No. 1 - *A Northern Territory Constitutional Convention* - February 1995.

12. Discussion Paper No. 8 - *A Northern Territory Bill of Rights?* - March 1995.

13. Discussion Paper No. 9 - *Constitutional Recognition of Local Government* - June 1995.

14. Exposure Draft - Parts 1 - 7 : *A new Constitution for the Northern Territory* - June 1995.

Chapter 2

DISCUSSION PAPER ON REPRESENTATION IN A TERRITORY CONSTITUTIONAL CONVENTION

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

SELECT COMMITTEE ON CONSTITUTIONAL DEVELOPMENT

DISCUSSION PAPER ON REPRESENTATION IN A TERRITORY CONSTITUTIONAL CONVENTION

OCTOBER 1987

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Select Committee on Constitutional Development

Discussion Paper
On Representation in
A Territory Constitutional Convention

October 1987

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

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A. BACKGROUND

1. In the Chief Minister's policy statement, Towards Statehood, (28 August 1986), a three-stage process was proposed for the making of the new State constitution. The three stages were:

   (i) The preparation of a draft constitution by the Select Committee on Constitutional Development;

   (ii) The development and adoption of a proposed constitution by a Northern Territory Constitutional Convention for submission to a referendum; and

   (iii) A referendum of Northern Territory electors to approve the constitution as ratified by the Convention.

   The Chief Minister stressed the condition that the Convention must represent "a broad cross-section of community interests and opinions".

2. The Select Committee on Constitutional Development has also considered the constitution-making process and, in November 1986, endorsed the Chief Minister's proposal. It also undertook "to prepare for inclusion in its report to the Legislative Assembly [before June 1988] recommendations on representation at the proposed Constitutional Convention. To that end, discussion has taken place within the Committee but except for a decision that the preferred Convention size should be between fifty and sixty, the Committee has not yet determined its attitude to representation. Before any recommendation is made, the Committee wishes to receive public comment on the issue. This paper addresses the salient questions to be resolved.

B. REPRESENTATION

1. There are three basic ways to constitute the Convention membership. They are:

   (i) Wholly-elected;

   (ii) Wholly-nominated; and

   (iii) Partly elected/partly nominated.

   To the extent that it is elected, the question arises as to the electoral and voting systems which will be most appropriate. To the extent that it is nominated, salient questions are how the nomination process should be conducted and who should do the nominating.

2. (i) Wholly-elected conventions are the rule in the U.S.A. constitutional experience. Because of the electoral system devised (a combination of at-large and precinct contests) and the deliberate avoidance of overt partisanship, the outcome usually produced an adequate representational profile and thus a broad political legitimacy and community acceptance. As opposed to the 1891 Convention which was wholly nominated by the respective colonial

parliaments, the Australian Constitutional Convention (which substantially drafted the federal constitution) was also directly elected.

(ii) Advantages:

a) Most "democratic" option;

b) Confers political legitimacy and acceptability;

c) May be required by Commonwealth government; and

d) Depending on electoral system used, a fair representation could be achieved.

(iii) Disadvantages:

a) Costly and time-consuming;

b) If turnout low, representation may not be adequate;

c) If electoral system ill-chosen, representation again may be deficient; and

d) Suitable candidates may not offer for election.

3. The electoral system and voting procedure used will have to be chosen with the view of providing "a broad cross-section of community interests and opinion". It is unlikely that single-member constituencies would achieve that result as minority interests do not fare well under such circumstances. They would certainly do better at an "at-large" election using the Territory as one electorate (as with Senate elections) but it would probably, given the weight of "urban" voters and Darwin voters in particular, not produce a reasonable regional balance. Thus, the most appropriate system would be a series of multi-member electorates (of varying sizes) covering regional areas. Assuming a Convention of fifty-five members, Greater Darwin would return twenty-two members, Alice Springs eleven, Katherine four, Tennant Creek and Nhulunbuy two each, northern "rural" and southern "rural" seven each. A single transferable voting procedure [i.e. the full Senate variant] would enable a wide range of community opinion to be represented.

4. i) A wholly-nominated convention also presents a number of advantages and disadvantages.

(ii) Advantages:

a) Less costly to convene than a fully-elected convention;

b) Allows for a deliberate choice of candidates thereby ensuring reasonable representation;

c) May ensure participation of best-suited and qualified representatives; and

d) Could allow involvement of "non-Territorians".

(iii) Disadvantages

a) Lacks the same legitimacy as a fully-elected Convention;

b) May be unacceptable to Commonwealth Government;

c) Likely to be criticised as "rigged" or unintentionally unrepresentative;

d) Difficulty of ensuring places and balance for the myriad of Territory interests; and

e) members may see themselves as "delegates" rather than "trustees" and represent their "sponsors" rather than .he wider Territory concerns. In that circumstance, agreement on sensitive issues may be hard to reach and the resultant constitution could follow "the lowest common denominator" approach which may prejudice its acceptance at a referendum.

(iv) The Select Committee believes that, if the Convention is to be nominated, the final choice of nominees should be made by the Legislative Assembly on advice from the Select Committee. Nominations could be sought from designated groups or specific individuals. Public advertisement could also be employed to elicit nominations from the general community. It is important that all significant bodies of opinion (whether organised or not) obtain some degree of representation. To enable the Select Committee to identify all parties deserving or desirous of representation (and the extent of that representation) on the Convention, it seeks expressions of interest from such parties. Comment is also welcomed on the desirability and practicability of having non-Territorians or Territory parliamentarians as members. So too is the proportion of "specialists" (those nominated for their particular expertise, qualifications and experience) to "generalists" (those who have some broad appreciation of constitutional subjects).

(v) The type of membership should relate to the form in which the Convention operates. If it undertakes most of its business in plenary session, the membership appropriate-or such a style will be different from that of a Convention which conducts most of its business in specialist committees. A paper prepared by a Select Committee member is based around "specialist" membership. He proposed a structure of four committees to deal with legislative, executive, judicial and "other matters" aspects respectively. The Convention Chairman and the Committee Convenors are to be selected on the grounds of national eminence, capacity and acceptability. Committee membership which is to include two M.L.As, is to be chosen for its particular qualifications and a minority could come from outside the Territory. Any scheme which gives prominence to a strong committee structure will tend to require similar "specialist" members. Public comment on the form which the Convention should take is also sought. Particular attention should be given to the roles of committees and plenary sessions.

5. The third approach - the mixed model - offers a range of membership possibilities. At one extreme, there could be a predominance of elected members, at tile other a predominance of nominated. As a hybrid model, the mixed option has a combination

of the advantages and disadvantages pertinent to the wholly-elected and wholly-nominated models. But, it does have the additional benefit, if the majority of members are elected, of allowing participation of key groups (such as the Legislative Assembly, land councils, local and community government organisations, or any other major body of opinion demonstratively excluded in the electoral process). In that way, nomination of a certain proportion of the Convention can ensure an adequate representation of Territory interests.

Chapter 3

DISCUSSION PAPER NO. 3

CITIZENS' INITIATED REFERENDUMS

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

SESSIONAL COMMITTEE ON CONSTITUTIONAL DEVELOPMENT

DISCUSSION PAPER NO. 3

CITIZENS' INITIATED REFERENDUMS

AUGUST 1991

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

DISCUSSION PAPER NO. 3

CITIZENS' INITIATED REFERENDUMS

AUGUST 1991

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

CONTENTS

A. INTRODUCTION

1. 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 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 it terms and references.

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:

"(l) ...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 and Australian populations."

2. Discussion Papers

(a) The Committee has already issued a number of papers, including two 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".

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 third in the series, and deals with the question whether there should be provision in the new State constitution for citizens' initiated referendums for any purpose, including a method of changing that constitution.

(c) The Committee has already given some consideration to the use of referendums in relation to the new State constitution. It took the view in its first Discussion Paper that the proposed new State constitution, once it had been ratified by the Territory Constitutional Convention, should be submitted to a referendum of Northern Territory electors (see Appendices 1 and 2).

(d) The same Discussion Paper dealt in variety of matters that could be included in the new State constitution, including the enactment of new State legislation and the method for changing that constitution once it was in force. Inherent in the Committee's thinking was the view that any new State constitution must reflect sound democratic principles. The Committee recommended that there be a new State Parliament, elected on a representative basis, with the same rights, powers and privileges as existing State Parliaments, including as to the enactment of legislation (see Appendix 3). The representative of the Crown in the new State was to be given the function of assenting or withholding assent to new legislation enacted by that Parliament (see Appendix 4), but no other requirements were contemplated for effective law making.

The Committee also took the view that, generally speaking, there should be some degree of entrenchment of the whole of the new State constitution. Entrenchment should comprise or include the requirement that any proposed change to the constitution should be supported by a specified majority of new State electors at a referendum, with certain minimal provisions dealing with referendums in the constitution itself (see Appendix 5).

(e) The Committee did not, in that Discussion Paper, deal in detail with the mechanics for enacting new State legislation or the requirements of such a referendum. It did not expressly raise the possibility of having citizens' initiated referendums for any purpose.

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. It 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 1989/90. The consultations will continue into the future as circumstances permit.

(c) In the course of its earlier proceedings, the Committee received eight submissions which dealt with the subject of citizens' initiated referendums-

(i) Mr Patrick Gough, in a written submission dated 28 March 1989 expressed the view that a petition signed by 20% of the voters on the electoral roll should be sufficient to veto existing laws by way of referendum.

(ii) Mr de Sachan at the public meeting held at Batchelor on 31 March 1989 orally submitted that there was a need for citizen initiated referendums to recall elected members of Parliament. He considered that a percentage from anywhere between 10% to 50% of the total electors by way of petition should be required to initiate the recall.

(iii) Mr Marshall also orally submitted at the above meeting in Batchelor supporting Mr De Sachan's view but wanted it extended to appointed and public service officials.

(iv) Mr Alistair Wyvill representing the Northern Territory Bar Association on 3 April 1989 submitted in respect of constitutional change that there be a "right of a certain percentage of voters to require by petition that a referendum be held in respect of the amendment the subject of the petition".

(v) Mr Bain, at the public meeting held at Tennant Creek on 17 April 1989, orally submitted that the Swiss concept of should be included in the new State constitution. He proposed that there be three different categories. One would one would be to initiate new laws, one would be to veto existing laws, and one would be to recall officials. He expressed the view that because of the political party system, members of a legislature were no longer true representatives of the people but representatives of the party hierarchy.

He therefore concluded that there was a need for citizens' initiated referendum to enable citizens express their views. He also considered that only a small percentage of petitioners should be required to initiate such a referendum, although he would accept that a majority of electors would have to vote in favour of it to give it legal effect.

(vi) Mr David Shannon in a written submission dated 20 June 1989 advocated citizen referendums for constitutional change, voter recall on elected members of Parliament and legislative veto.

In respect of constitutional amendment he considered that 20% of the electors as petitioners would be required to initiate a referendum. However, if a petition had more than 50% of the electors, the proposed amendment would become law without having to go to a referendum.

(vii) Mr Colin Gray, of People's Law, in a written submission dated April 1991, argued that the new State constitution should only be able to be amended if the Parliament or if 5% of the residents qualified to vote request the amendment, to be followed in either case by a referendum.

(viii) Independent member of the House of Representatives, Mr Ted Mack, has also advocated citizen's initiative to propose constitutional amendments and the making of legislation. Further detail on Mr Mack's submission is outlined on page 15 of this paper.

(d) The Committee has considered these submissions and the procedures and proposals that have been adopted or made elsewhere. The possible options for such a system in a new State and their respective merits and disadvantages are canvassed in this Discussion Paper. The Committee invites public comment on these and related issues.

4. What are Citizens' Initiated Referendums ?

(a) The principles of democracy are based on the right of the citizen to play an active role in the government of his or her own community. How this is to be achieved will vary from community to community. There is no absolute concept in terms of secular thought as to what constitutes the ideal form of democracy.

(b) Dissatisfaction with decision-making in government by elected or appointed officials is sometimes reflected in the demands for more direct forms of citizens' participation in the business of government. There are a number of ways in which this might be achieved. There are both merits and disadvantages with all such ideas.

(c) Although in most democratic systems, generally speaking the right to initiate and pass legislation is exercised by some representative form of legislature, in some foreign jurisdictions the right to initiate legislation is also granted to their

citizens. This may also extend to the initiation of constitutional amendments. Alternatively, the right to veto legislation that has already been passed by the legislature may also be given to the citizens.

The method generally used to express the opinions of the citizens on these matters is by way of a referendum consequent upon a petition of a specified number of citizens. All these methods for citizen participation are, for the purposes of this Paper, described as citizens' initiated referendums.

(d) In Australia, there is already some provision for citizens' referendums. Under the Commonwealth Constitution section 128, proposed changes to that Constitution, once they have been passed by the Commonwealth Parliament, must be approved at a national referendum of a majority of electors in a majority of States as well as a majority of electors Australia-wide.

There is debate as to whether a constitutional amendment proposed by the Senate, but twice rejected by the House of Representatives, must still be put by the Governor-General to the electorate at referendum or whether the Governor-General, on the advice of his/her Ministers, has a discretion to put it. Some State constitutions also provide for some forms of constitutional change by way of a State referendum. However, the electors in Australia have no power to directly initiate proposals for constitutional or legislative change.

(e) No Australian law presently provides for a citizens' right of veto of ordinary legislation. Referendums on specific proposals outside of constitutional change are rare.

(f) Some foreign jurisdictions also provide for the use of citizens' initiated referendums for the removal from office of specified public officials. For example, in the USA, this procedure, known as recall, is available in some 15 States as well as in some counties/municipalities. The signature requirements for citizens to initiate a recall are generally much more than for citizens' initiated referendums as to legislation.

B. THE POSITION ELSEWHERE

Provisions exist for citizens' initiated referendums in a number of countries. For example, in Austria, Italy and Liechtenstein, the electorate has the right to initiate legislative proposals. Switzerland and a number of States of the USA also have relevant provisions. This Paper will concentrate on these last two countries.

1. Switzerland

(a) The use of the referendum extends back to the end of the Middle Ages in several Swiss Cantons. It re-emerged at the beginning of the Nineteenth Century upon a vote for the Swiss federal Constitution, but was initially restricted to a total revision of that Constitution. In 1874 the referendum

system was extended to allow optional referendums on federal laws or decrees. In 1891, this system was further extended to any partial revision of the Constitution.

(b) Under Articles 118-121 of the Swiss federal Constitution, 100,000 Swiss voters may demand a total revision of that Constitution. In that event, the question must be submitted to a referendum. In the case of a majority vote, both legislative bodies are to be re-elected anew to undertake the revision. This procedure has rarely been used.

(c) Under Article 89 of the Swiss federal Constitution, 50,000 Swiss voters, or eight Cantons, may require that a new federal law or decree be submitted to a referendum. The 50,000 signatures must be collected within 90 days of the decision. Many Cantons also have referendum provisions for the approval of their legislation. However, at a federal level, there is no power in citizens' to initiate new federal legislation, only to veto it. If citizens wish to enact new laws, it can only be done by initiating changes to the federal Constitution (see (d) below). The result has been that that Constitution has become a lengthy document.

(d) Under Article 121, 50,000 Swiss voters may initiate proposed changes to the existing Swiss federal Constitution. Each proposal must be the subject of a separate initiative request.

If the federal Assembly agrees with the proposal to change the Constitution, it may prepare a specific partial revision and submit it to referendum. If the Assembly does not agree with it, the general proposal must still be submitted to a referendum. If successful, the Assembly must undertake a revision of the Constitution in accordance with the proposal.

If the proposal to change the Constitution contains a specific draft amendment and the Assembly agrees with it, it must also be submitted to referendum. If the Assembly disagrees with it, the draft must still be submitted to referendum, but the Assembly may also prepare and submit its own draft at the same time.

(e) The referendum to revise or change the federal Constitution, to be successful, requires a majority of Swiss citizens casting a vote in favour and also a majority of Cantons in favour (Article 123).

(f) There have been over three hundred referendums in Switzerland, and generally speaking, they have had a good success rate. Proposals by the legislature have been more successful than those demanded over parliamentary proposals. Proposals to veto legislation or decrees have almost always failed, although the threat of referendum remains a potent force. The system is said to enjoy great popularity, although there is some opposition. The referendum campaigns themselves, and the methods employed in them, have raised some doubts about direct democratic methods.

The large number of proposals and the frequency of voting, the complicated nature of some proposals, the pressure of vested interests and the tensions that can sometimes be aroused are said to be some of the negative features of the system.

2. United States of America

(a) Although there is no provision for citizens' initiated referendums at a federal level, the constituent States of the federation have from an early time used citizens' referendums, firstly to approve their own State constitutions, and since then by way of a variety of experiments. Many States now have entrenched provisions for citizens' initiated referendums. The methods used vary, and include the "direct initiative", by which a specified number of electors can require a proposal to be put to referendum, and the "indirect initiative", by which - a specified number of electors must first send their proposals to the State legislature, and only if that legislature fails to act within a specified time does the proposal go to referendum.

(b) Nearly one-half of the States, as well as several territories, provide for the citizens' initiative to veto new State laws or the citizens' initiative for the making of new laws. The procedure to make new laws, for example, is generally that the proponents file a copy of the proposal with a government official to give it a title and short description. Petitioners then have a specified time to collect the required number of signatures. The time varies from between 75 days to four years and the required number of signatures varies from between 2% and 20% of the electors or of the voters at the last election.

(c) Some 17 States permit amendment of their State constitutions by citizens' initiative. The procedure is very similar to that for citizens' initiated legislation, except that the signature requirements for constitutional initiatives is higher in a number of the States than it is for legislative initiatives. In at least one State, the topics that can be subject of the constitutional initiative are limited (basically taxation on property).

(d) In no case is a successful State initiative subject to veto by the State Governor, but in most States the legislature can amend or repeal a successful statutory initiative, in some cases only by a special majority. In practice, this rarely occurs, at least in the first few years after the initiative succeeds.

(e) The procedure for verifying the authenticity of the signatures on a citizens' petition varies. Some States require verification of all signatures, others employ a random sampling method. One State presumes the authenticity of the signatures unless there is reason to believe otherwise.

(f) Proposals have been made for a federal citizens' initiative in the USA, but none have so far been adopted.

(g) A case often cited as an example of the use of citizens' initiated referendums is that of the State of California. To amend that State's Constitution, the

signature of 8% of the total voters for all candidates for Governor at the last election is required on the initiative petition. The referendum must be carried by a majority vote. To initiate proposals for new State legislation or to veto State legislation, the signature of 5% of the voters cast in the last general election for Governor are required on the citizens' petition. The initiative is of the direct type, no legislative intervention being required. Initiatives must deal with a single subject. California also has provision for recall of all elected officials.

(h) The most famous initiative in California was Proposition 13, a constitutional initiative, which was approved at the polls on 6 June 1978 (Article XIIIA). It stipulates that the maximum amount of any ad valorem tax on real property shall not exceed 1% of the full cash value of the property. State legislative changes to increase revenues require the approval of 2/3rds of all members of each House. No new real property tax or property sales transaction taxes may be levied. Cities, counties and special districts are also restricted in their taxing powers.

The validity of Proposition 13 was upheld by the California Supreme Court, although various special taxes and fees have also since been upheld without violating that Proposition. There has also been more levying of new user charges and increased existing user charges.

Some examples of other subjects that have been raised in citizens' petitions include electoral re-apportionment, environmental controls (including nuclear power plants) and the death penalty.

(i) There are views for and against the use of citizens' initiative in USA. The degree of use has been influenced by constitutional theory based on the sovereignty of the people. Hence citizens' participation in the business of democratic government is generally given a high value. The citizens' initiative apparently remains popular and in common use. The use of the indirect initiative is an interesting variation which many consider has merit. However, there is understood to be wide political opposition to the use of the initiative.

C. PROPOSALS IN AUSTRALIA

1. Early Proposals

(a) The Australian Labor Party, not long after its formation in the late l9th Century, proposed the adoption of the initiative and referendum, and there was some support for the idea beyond that Party. A Popular Initiative and Referendum Bill on the indirect model was introduced by a Labor Government into the Queensland Parliament in 1915, but was blocked in the Upper House. It was finally dropped in 1919. Leave was also given to introduce an Initiative and Referendum Bill into the federal House of Representatives in 1914, but interest waned with the Great War.

(b) Labor support for the proposal continued after the Great War. However, interest gradually faded and the policy was finally removed from the Labor platform in 1963.

2. Recent Interest and Proposals

(a) Interest in the citizens' initiative was revived in Australia during the late 1970's. In 1978, Senator Mason of the Australia Democrats raised the idea of a citizens' initiative. In 1979, Senator Mason circulated a petition for a federal constitutional amendment to permit the initiative. He followed this with a private bill, the Constitution Alteration (Electors' Initiative) Bill 1980 in the Senate, designed to give power, by petition with the signatures of 250,000 electors, to require an Australia-wide referendum to be held on a proposed law, including by way of amendment of the federal Constitution.

(b) Senator Mason reintroduced the Bill in 1981 and 1982. He received support from Senator Macklin, but the Bill was defeated in 1983.

(c) A proposal in similar terms was placed on the agenda for the 1983 Australian Constitutional Convention, but was referred to the Standing Committee of the Convention for consideration and report to the next Plenary Session.

(d) Then followed a paper by Dr Colin Hughes entitled "Commonwealth Constitution: Methods of Initiating Amendments" (October 1983), which included a lengthy discussion of the popular initiative. Senator Macklin subsequently prepared a paper for the Constitutional Amendment Sub-Committee of the Convention entitled "The Case for a Popular Initiative" (May 1984). The Constitutional Amendment Sub-Committee, in its June 1984 Report to the Standing Committee, recommended that a similar proposal be listed on the agenda for the Brisbane meeting of the Constitutional Convention in 1985. The proposal was defeated at that Convention.

(e) In 1985, the Queensland National Party recommended the adoption of a voter initiative at federal level.

(f) In 1987, Professor Walker of Queensland University published his book "Initiative and Referendum: The People's Law" (The Centre for Independent Studies) in which he advocated the need for direct legislation as a supplement to the representative institutions of liberal democratic societies. He saw this as an opportunity to revitalise the idea of democracy in the minds of ordinary people so that they would remain fit for, and capable of, self-government. Professor Walker has continued to advocate the idea in his other writings.

(g) Also in 1987, the Advisory Committee to the Constitutional Commission on Individual and Democratic Rights recommended an amendment to the federal Constitution to provide for further amendments thereof by referendum on a petition of 500,000 voters. It advocated deferral of the idea of voter initiated legislation until there had been an opportunity to consider the operation of its voter initiated constitutional referendums.

(h) The federal Liberal Party in the same year also pledged itself to examine the possibility of introducing a voter initiated referendum. A proposal to similar effect was supported by Shadow Minister for Employment, Training and Youth Affairs, Mr Peter Shack.

(i) In 1987, Senator Macklin introduced a package of bills into the Senate, including the Constitution Alteration (Electors' Initiative) Bill. That Bill required a petition signed by not less than 5% of the total number of Australian electors. Senator Macklin supported his proposals with a media campaign. The Bill was debated, but on the motion of Senator Puplick it was resolved not to proceed with it at that time.

(j) In April 1988, Shadow Attorney-General, Mr Peter Reith issued a green paper on voter-initiated laws. His proposal was to amend the federal Constitution to allow voters, on their petition of at least 5% of the number of formal votes at the last federal election, to propose legislation. The Parliament was to be given time to examine it and propose an alternative. It was then to be put to referendum. He did not favour extending this to amendments to the Constitution.

(k) The Constitutional Commission, in its Final Report in 1988, recommended by a majority against any citizens' initiative to alter the federal Constitution by referendum, and unanimously recommended against any citizens' initiative to legislate by referendum.

(l) In 1989, Senator Macklin introduced the Constitution Alteration (Electors' Initiative) Bill and the Legislative Initiative Bill, which together comprised a more detailed proposal for the citizens' initiative for federal legislation or to alter the Constitution. The Bills were not passed. However, on 9 May 1990 the Bills were restored to the Notice Paper.

(m) Independent member of the House of Representatives, Mr Ted Mack, has recently advocated an amendment of the federal Constitution to permit citizens' initiated referendums for both legislation and constitutional change. He has introduced the Constitution Alteration (Alteration of the Constitution the Initiative of the Electors Bill 1990 and the Constitution Alteration (Making of Laws on the Initiative of the Electors) Bill

(n) This year, Mr Neil Robson MHA, a member of the Tasmanian State Liberal Party, put before the Tasmanian Parliament the Citizen - Initiated Referendum (Elector Initiated Repeals) Bill 1991.

The purpose of the proposed Act was to reserve the right of the people to initiate referendums by way of petition to veto legislation.

In order to call for a referendum, a petition signed by at least 18 000 electors of which 20% or more are enrolled to vote in each of 3 electoral divisions of the

House of Assembly, Tasmania's Lower House of Parliament, would be required.

The Bill failed by one vote to pass.

(o) The Litchfield Shire Council in the Northern Territory has recently announced a scheme to allow local electors to raise issues for submission to a community vote, either with support of 250 electors at a public meeting or with the signatures of 750 electors on a petition. This would be the first such scheme to operate in the Northern Territory.

(p) The proposals for citizens' initiated referendums have now attracted a ground swell of support throughout Australia, ranging from supporters of the far right of the political spectrum to those of the opposite political persuasion.

D. ADVANTAGES AND DISADVANTAGES

1. Advantages:

Some of the arguments in favour of having citizens' initiated referendums are -

(a) it gives the citizen a real and direct say in the business of government;

(b) it enables the citizen to exercise a real degree of control over the members of Parliament between elections and hence enhances accountability;

(c) it encourages the citizen to take an interest in public issues and reduces the alleged sense of alienation;

(d) it can be used to overcome legislative inertia and the discipline resulting from party politics;

(e) it provides a mechanism for open debate based on policies rather than personalities, dealing with issues that might not otherwise be adequately considered on their merits; and

(f) it gives laws passed by the process a form of legitimacy not otherwise applicable.

2. Disadvantages

Some of the disadvantages of citizens' initiated referendums are -

(a) it tends to undermine the system of representative government;

(b) it devalues the role of the legislature and can result in a loss of respect for democratic institutions;

(c) it is inflexible and lacks the deliberative aspect of representative democracy;

. (d) it tends to over-simplify issues;

(e) it may serve sectional interests and can be manipulated by special interest, single interest or ideological groups, media, etc;

(f) it can result in confusion between multiple proposals;

(g) it can result in excessive numbers of ballots, with the associated effect on electors and high costs;

(h) Some issues put to referendum may be too complicated or technical for the average voter to sensibly express a view on;

(i) it may threaten unpopular minority groups; and

(j) it may produce defective constitutional provisions or legislation.

E. OPTIONS

1. It would appear that there are a number of options for consideration in the context of a new State constitution. These range from mandatory referendums for constitutional change, legislative change or veto, government policy change or for recall of elected and appointed public officials. Each could follow a citizens' petition, either on the direct or indirect model, as discussed below. The alternative is to have no provision for citizens' initiative at all.

2. The option on the direct model is to require a referendum to be held on a citizens' initiated petition, without any intervention or participation by the Parliament.

3. Alternatively, on the indirect model, such a petition could be required to be considered by the Parliament and only if that Parliament takes no action within a specified time need it be referred to a referendum.

4. As a further variation to 3 above, the Parliament could also be given the option of putting its own alternative proposal to the referendum.

5. An alternative, considered but rejected by the Constitutional Commission in its Final Report (see Part C, para 2(k) above), was for mandatory referendums following the report of a standing convention or commission where certain conditions are satisfied. This option, as applied to the new State, could be akin to the proposed constitutional convention advocated by the Committee as part of the procedure for the adoption of a new State constitution (see Discussion Paper on "Representation in a Territory Constitutional Convention", October 1987).

6. Another suggestion would be to establish a small Committee, to which citizens' petitions and also proposals from the Parliament could be referred.

This Committee could take the following form:

(a) A standing expert committee; or

(b) A standing parliamentary committee; or

(c) An ad-hoc committee appointed by the parliament from time to time.

This Committee could consider and invite public comments on proposals before reporting back to the Parliament with any recommendations. Such a Committee would not of itself be able to initiate referendums.

The alternative to all the above options is to not have anything in the new State constitution giving citizens any direct role as to legislation or constitutional change. The initiative would remain in all cases with the Parliament, which could either legislate or call a referendum for constitutional change as it thought fit. The public would continue to have access to individual members of Parliament or could petition Parliament directly, but could not compel action to be taken.

If provision is to be made in the new State constitution for citizens' initiated referendums, a number of subsidiary questions arise for determination, including the following:

(a) Who may sign?

(b) How many signatures are required?

(c) What must they sign?

(d) How are signatures to be authenticated?

(e) During what period must signatures be collected?

(f) Must issues be kept in separate proposals?

(g) May any part of the new State constitution be amended by initiative?

(h) May any legislation be enacted by initiative?

(i) Should there be any restriction against repeating unsuccessful initiatives?

(j) Should there be provision for withdrawing an initiative?

(k) Should there be provision for an unformulated proposal?

(These questions are adapted from those in the paper by Dr Colin Hughes entitled "Commonwealth Constitution: Methods of Initiating Amendments" - October 1983).

9. Another question raised in respect of citizen initiatives is to the timing of holding a referendum.

In the case of California, for example, a citizen's initiated referendum to alter its Constitution or to veto legislation, must be put at the same time as a general election, unless the Governor decides to hold a special referendum. However, an election on a recall petition must be held not less than 60 and not more than 80 days from the date of certification of sufficient signatures on the petition.

F. THE COMMITTEE'S TENTATIVE VIEWS

1. The Committee has carefully weighed the competing arguments as to citizens' initiated referendums in the context of the proposed new State constitution.

   The four subject matters that could be dealt with by a Citizens' Initiated Referendum as stated in Part E, paragraph 1 above, are:

   (a) Constitutional change;

   (b) Legislative change or veto;

   (c) Government policy change;

   (d) Recall of elected and appointed public officials.

   The purpose of this paper is to stimulate debate on the form and conduct of Citizens' Initiated Referendums and whether they should be included in a new State Constitution.

   At this stage, whilst the Committee accepts that there is some merit in these various options, it is not convinced that their advantages outweigh their disadvantages. It welcomes comment.

2. The Committee considers it to be of greater importance to try to enhance the status of Parliament and the representative parliamentary process, with a view to achieving effective and responsible government in the new State. It is not convinced that this is totally compatible with citizens' initiatives which can compel the holding of referendums.

3. Further, in the particular situation of the Northern Territory, with its vast area and limited population, there may well be a number of difficulties with a system that enabled any small group of citizens to require the holding of frequent new State referendums.

4. Although the Committee favours the use of a Constitutional Convention to frame the new State constitution prior to its submission to a Territory referendum and the grant of Statehood, it does not see this as an appropriate or necessary mechanism for on-going constitutional change. To convert such a large body into a standing body as referred to in Part E, paragraph 5, would neither be practical nor cost-effective. It could be perceived as undermining the role of the new State Parliament.

5. The Committee does, however, see some merit in a system which facilitates, at reasonable intervals, public involvement and debate in proposals for constitutional review, providing that the final decision as to whether any proposal for constitutional change is to be put to a referendum is left with the new State Parliament.

6. One alternative raised in Part E, paragraph 6 is to establish a small committee of expert to examine and evaluate proposals for change from either the Parliament or the public.

It would be required to consider and report on references from the Parliament and could also consider proposals for change from the public. It would conduct public hearings and submissions.

If it was to take the form of a standing committee of experts or an ad-hoc committee appointed by Parliament from time to time, it could include persons from outside the Parliament as well as within.

If it was a standing parliamentary committee, it would comprise members of Parliament only.

It would be necessary to decide whether it should deal with proposals for constitutional change only or with proposals for legislative change, legislative veto, government policy change or recall of elected or appointed public officials.

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APPENDIX 1

RELEVANT EXTRACT FROM

DISCUSSION PAPER:

"Proposed New State Constitution for the Northern Territory"

- PART A, 3(b)

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Part A, 3(b) Discussion Paper: Proposed New State Constitution for the Northern Territory

"(b) The select Committee, empowered by its terms of reference, adopted at its meeting of 3 November 1986, the following procedure

(i) Four draft discussion papers will be prepared for consideration by the Committee on the following subjects:

. the Legislature - Composition, Function and Power;

. the Executive and its relationship with the Crown and the Legislature;

. the Judiciary; and

. other entrenched provisions to be included in the constitution, including a possible Bill of Rights and possible special provisions relating to the Aboriginal citizens of the Northern Territory such as their individual rights and land tenure;

(ii) Following finalisation by the Committee of these documents, copies will be forwarded to appropriate communities, councils, groups and individuals throughout the Territory and the Committee will engage in a progress of community consultation throughout the Territory to obtain the comments and views on the issues raised or alternative submissions. Any person can, upon request, be put on the Committee's mailing list and may make oral or written submissions to the Committee.

(iii) Following such consultation, the Committee will prepare a draft constitution for inclusion in its Report to the Legislative Assembly, which draft shall contain, where necessary, other options; and

(iv) The Committee will prepare for inclusion in its Report to the Legislative Assembly recommendations on representation at the proposed Constitutional Convention.

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APPENDIX 2

RELEVANT EXTRACT FROM INFORMATION PAPER N0.2:

"Options for a Grant of Statehood"
-PART C, 5(iii)

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"(iii) the constitution as ratified by the Convention will be submitted to a referendum of Northern Territory electors for approval. This will be a subsequent referendum to that mentioned in paragraph 2 above.

The ability to legally adopt a new State constitution is dependant upon a specific grant of powers by the Commonwealth".

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APPENDIX 3

RELEVANT EXTRACT FROM DISCUSSION PAPER:

"Proposed New State Constitution for the Northern Territory"

- PART B(d) and (f)

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"(d) The Constitution also contemplates that a State Parliament will be representative in nature, with at least an elected legislature. However, the method of election is not specified and allows considerable scope for innovation. Possibilities that might be considered are single and multiple electorates, common rolls and separate rolls, single and plural voting, equality of electorates, special electorates, etc. The views of the Committee on some of these matters are discussed below.

(f) The Select Committee considers that the legislative powers of the new State Parliament in respect of the new State should be as extensive as possible, that is, that it should have the same powers as other State Parliaments, subject only to the limitations flowing from the Commonwealth Constitution and the Australia Act."

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APPENDIX 4

RELEVANT EXTRACTS FROM DISCUSSION PAPER:

"Proposed New State Constitution for

the Northern Territory'

- PART B (h)

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PART B (h) - Discussion Paper : "Proposed new State Constitution for the Northern Territory"

"(h) Given the monarchical system, and given the prerogative powers of the Crown with respect to the passage of legislation, it seems that the role of the representative of the Monarch in assenting to legislation enacted by the Parliament of a State (including that of a new State) cannot be dispensed with. This is implicit in Section 9 of the Australia Act 1986. The Select Committee is unanimously of the view that the representative of the Monarch should at least have the function of assenting to legislation or withholding assent. The Committee differs as to whether that representative should have power to suggest amendments back to the new State Parliament.

One view is that the representative should have this power, in the same way as Governors of the existing States. The other view disagrees, based on the premise that the Parliament should have control over its own legislative processes and that it should not be possible for the executive to seek a reconsideration of legislation by referral back once it is passed. It should do so by following normal legislative processes".

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APPENDIX 5

RELEVANT EXTRACT FROM DISCUSSION PAPER:

"Proposed New State Constitution for

the Northern Territory

- PART P(d) and (e)

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"(d) The Select Committee further stated in Part E above, and adheres to the view, that generally speaking it favours some degree of entrenchment of the whole of the new State constitution. The constitution should be a document that is accorded special status in the law and should only deal with those matters considered to be of vital importance in the functioning of the new State and its institutions. Matters of lesser importance should be relegated to ordinary legislation.

(e) The Select Committee also stated in Part E above, and adheres to the view, that entrenchment would comprise or include the requirement that any proposed change be submitted to and be supported by a specified majority of new State electors at a referendum. It may be considered appropriate that for certain provisions, any change may require more than a simple majority of voters in any referendum. Certain minimal provisions will be necessary dealing with referendums in the new State constitution".

CHAPTER 4

Discussion Paper No. 4

Recognition of Aboriginal Customary Law

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Sessional Committee on Constitutional Development

Discussion Paper No. 4

Recognition of Aboriginal Customary Law

AUGUST 1992

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Sessional Committee on Constitutional Development

DISCUSSION PAPER No. 4

Recognition of Aboriginal Customary Law

August 1992

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

CONTENTS

A. EXECUTIVE SUMMARY

(a) This paper considers the question of whether Aboriginal Customary Law should constitutionally be recognised in some way in the Northern Territory and the option for doing this.

(b) The Committee stresses that it does not wish at this stage to advocate any particular view on the constitutional recognition of Aboriginal customary law. The purpose of this paper is to stimulate debate and invite comments and suggestions.

(c) Particular issues on which comment and suggestions are sought, and which are discussed in more detail in Item H below, include:

(i) Should Aboriginal customary law be legally recognised in the Northern Territory?

(ii) Should any such recognition be given constitutional force in a new Northern Territory constitution?

(iii) Should the recognition be by way of a non-enforceable preamble to that constitution?

(iv) Alternatively, should any such recognition be in the form of an enforceable source of law?

(v) If recognised as an enforceable source of law, should there be an exclusion of customary law that is inconsistent with fundamental human rights?

(vi) Should any recognition be limited to Aboriginal people who still have a traditional lifestyle?

(vii) Should any recognition be limited geographically to areas under the jurisdiction or control of appropriate Aboriginal institutions?

(viii) Should any recognition be subject to any overriding Territory statute law? If so, should it be subject to appropriate constitutional guarantees of customary rights?

(ix) If customary law is recognised, how should it be applied and enforced? - By the existing general courts, by a new system of Aboriginal courts or by some other flexible scheme designed in consultation with each Aboriginal community? Alternatively should it be left to traditional methods of enforcement?

(x) Whether or not customary law generally is recognised, should there be some ongoing study to consider further legislative incorporation of selected aspects of customary law by reference, or the adjustment of the general law to take into account selected aspects of customary law?

(d) The Committee would welcome comments and suggestions on any other matters relevant to customary law that any person may wish to make.

B. INTRODUCTION

1. 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 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 and references.

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 and Australian populations."

2. Membership

The membership of the Committee presently comprises equal numbers of Government and Opposition members and includes one Aboriginal member of the Legislative Assembly from a traditional background.

3. Discussion Papers

(a) The Committee has already issued a number of papers, including three 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".

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 fourth in the series, and deals with the question whether the new State constitution should recognise in any way any aspect of Aboriginal customary law as practised in the Northern Territory; that is, whether that customary law should be constitutionally recognised as one of the sources of new State law, at least amongst those Aboriginal citizens of the new State who already accept it as binding on them. As a corollary, further questions as to the manner in which that customary law, if so recognised, could be enforced, and the extent to which any methods of enforcement of that customary law could be specified in a new State constitution, are also dealt with in this Paper.

(c) The Committee does not wish to engage in a detailed examination of particular aspects of Aboriginal customary law in this paper and exactly how they could be recognised by or incorporated into the general law. Rather it is more concerned with the more limited question of possible constitutional recognition of customary law as a source of law.

(d) It is of course a fundamental principle that the citizen should be able to ascertain with some degree of certainty what are the laws that are applicable to that citizen within a given community. The rule of law is premised upon this principle. It is not unreasonable to expect that a new written constitution might, in general terms at least, specify the sources of law applying to the community which is to be subject to that constitution.

(e) As will be seen below, except in certain specific situations, Aboriginal customary law does not presently constitute a source of law recognised as such in the Northern Territory.

(f) The Committee recognises that the subject of customary law cannot realistically be divorced from the other issues affecting Aboriginal people in the Northern Territory. There are a number of inter-related issues presently the subject of considerable discussion and debate in national and international forums and in various publications. This includes issues concerning the grant of land rights, the protection of sacred sites and matters of self-management.

(g) The Committee has, however, had strong representations made to it in the course of its community consultations (see below) that the matter of recognition of customary law is of particular importance to Aboriginal people in the Territory. Accordingly, it has decided to deal with this subject by way of this separate Discussion Paper. This paper will not at this stage deal specifically with the matters of Aboriginal land rights and sacred sites, even though these matters raise aspects of customary law. This is because of the special nature of these topics and the particular issues arising from the existing land rights legislation. This is not to suggest that these other issues of concern to Aboriginal people are unimportant. It is noted that the Australian Law Reform Commission, in its Report on the Recognition of Aboriginal Customary Law, took a similar approach (Vol. I, paras 212-3).

(h) The Committee has already briefly considered the question of the constitutional recognition of Aboriginal rights in its Discussion Paper on a Proposed New State Constitution for the Northern Territory of October 1987. Apart from land rights, that Paper raised the question of recognising the pre-existing circumstances of Aboriginal citizens of the new State, including as to their language, social, cultural and religious customs and practices. A copy of Part S of that Paper entitled "Aboriginal Rights" is set out in Appendix I to this Paper.

(i) The matter of Aboriginal rights was further dealt with in the Committee's illustrated booklet "Proposals for a New State Constitution for the Northern Territory" at pages 10 and 11.

(j) However, none of the Committee's previous publications have specifically dealt in detail with the recognition of Aboriginal customary law.

(k) This Paper is issued for public comment and does not represent the Committee's final views on this subject. The purpose of the Paper is to raise options and stimulate debate, in the hope that members of the public, both Aboriginal and non-Aboriginal, will take the opportunity to provide comments to the Committee and assist it in it's task.

4. 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. Many of these visits were to Territory Aboriginal communities. 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 1990/91. These consultations will continue into the future as circumstances permit.

(c) In the course of its public hearings at various communities, the Committee received a large number of oral submissions on the need for recognition of customary law. Some of these submissions were made in an Aboriginal language. In many cases, they have since been translated into English. All of these submissions stressed the importance of customary law to Aboriginal people in support of their traditional lifestyles. All of them stressed the unchanging nature of customary law. Many submissions stressed the parallel nature of customary law and "white" law, each being complementary to the other.

(d) A typical oral submission was as follows:

> *"Because the Balanda (white people) don't understand Yolgnu (Aboriginal) law and we Yolgnu need to understand Balanda Law, we need to make the law work for everybody. Let's put our both laws, Yolgnu and Balanda in the Territory constitution but our law must exist and be recognised."*
>
> (Translation of evidence in Djapu language from Arnhem land given by Mr Wakuratjpi at a public hearing, Yirrkala, 8 May 1989)

(e) Excerpts of written submissions to the Committee raised on the subject of recognition of customary law are as follows:

> *"This is an exceedingly difficult question in practice, if not in theory. The major political parties of Australia take different (and seemingly changing) views and Aborigines themselves have different views (or at least in my perception they do.) I am assuming from the outset that all basic "Human Rights", ... are totally accepted as being the rights of Aborigines as well as non-Aborigines, all being Australian citizens. Should there be positive discrimination of any kind? Some people would argue "No", yet all major political parties in Australia seem to accept that there should be some, even if they differ substantially in what form it should take, how it should be implemented."*
>
> **(Submission No: 35 - Mr R G Kimber, Alice Springs)**
>
> *"Aboriginal traditional law draws on a body of experience with life in Australia which extends back "40,000" years and possibly longer.... I suggest that, given the respective standing of the two traditions, the question should be properly put by seeking to determine how Anglo-Australian law fits in with the*

tried and tested law of the land (Traditional Aboriginal law) rather than vice versa."

(Submission No: 49 - Mr B Reyburn, Tennant Creek)

"The new Constitution should contain a statement, in general terms, recognising the special position of the Aboriginal people in the history, culture and development of the Territory and, in particular, recognising prior occupation of the Northern Territory. Such a statement could possibly form a part of the preamble to the Constitution. However,the writer is not persuaded that any such statement should of itself be justiciable."

(Submission No: 19 - Mr P McNab, Darwin)

(f) A list of persons who have made oral and written submissions is set out in Appendix II to this Paper.

(g) Committee has considered all of these submissions. It has also had the advantage of a growing body of literature on the subject. Individual members of the Committee have drawn upon their own knowledge and experience on this subject and have shared that with fellow members. The Committee offers this Paper, with its options and tentative views, not in the sense of some scholarly work with definite proposals, but as a means of stimulating interest and debate. The Committee's work can only be enhanced by constructive feedback from the public on this and related subjects.

C. ABORIGINAL BACKGROUND

1. Aboriginal History

(a) The study of Aboriginal history was until recently a somewhat neglected area, but work in this field has intensified in the last few decades. The origins of the Aboriginal people of Australia continue to attract considerable research and debate, but it is now generally accepted that their settlement of the Continent predates European settlement by some 50,000 to 100,000 years. Knowledge of the detail of this history continues to be limited, although archaeological discoveries, dreaming stories and rock art sites have provided valuable insights.

(b) Given such a lengthy period of occupation, and the physical isolation of the Australian Continent from the Asian mainland for most of that time, it is hardly surprising that the Aboriginal people developed unique cultures and societies. In regions where those cultures and societies survive today, mainly in the north and outback of Australia, their uniqueness and the degree of their distinctness from European culture and society is striking.

(c) As part of those traditional cultures and societies, the Aboriginal people developed sophisticated and intricate legal, social and religious rules and customs, generally regarded as being obligatory on the people affected, and in which there was an integral relationship between law, morality, religion and society generally. A strong spiritual

element was evident throughout these systems and which governed the relationships between Aboriginals and the land.

(d) There was and still is considerable diversity between these rules and customs in different parts of Australia, accompanied by a great diversity of languages. Although they were well-developed local and regional relations among groups, we have no knowledge of wider political or administrative structures as found in nation-states today. However, there were and are similarities in traditions, customs and practices.

(e) Aboriginal cultures and societies were profoundly affected by European settlement and development. The degree of impact varied considerably among regions and groups. Much new research is illustrating this complicated cross-cultural history. The consequences of European settlement have now been widely documented and need not be examined in detail in this paper. There is no hiding the fact that a legacy of mistrust remains in many places.

(f) European-derived culture and society, together with other influences, generally predominates in Australia, even in many areas of the north. Aboriginal lifestyles also continue to flourish, especially in rural and remote areas, and including in a number of areas of the Northern Territory where there are Aboriginal communities. There is also an urban Aboriginal experience that is emerging. Non-western culture and lifestyles are often invisible or are undetected by outsiders. But even in those areas where Aboriginal lifestyles continue, Western law and society has had a considerable impact.

(g) The number of Aboriginal people who still largely adhere to traditional lifestyles is relatively small in comparison to the total Australian population, and they are scattered over a vast area of land. Many of them reside in land in the Northern Territory which is now Aboriginal land vested in Land Trusts in fee simple on behalf of the traditional owners, although the land remains within the boundaries of the Self-governing Northern Territory and is subject to most Northern Territory laws made by the Territory Legislative Assembly. Other areas occupied by Aboriginals are under claim by them or are held on Crown leasehold tenure, or are part of national parks or comprise smaller community living areas. Some traditional Aboriginals reside on pastoral leases owned by others or live in or near towns. Many urban Aboriginals continue to value, and increasingly seek to strengthen, their ties with their unique cultures and heritage.

(h) The Committee concludes that there are in the Northern Territory a sizeable number of Aboriginal people to whom their Aboriginal history and heritage are proud facts of life and provide a frame of reference for their daily activities. Any successful resolution of future constitutional arrangements for the Territory must take this into account. The Territory is a multi-cultural community, and Aboriginal societies and cultures contribute a most valuable element of diversity to that community. Such pluralism is not inconsistent with the existence and unity of the Australian nation as a whole or with that of the Self-governing Northern Territory. Emerging conventions and practices suggest that Aboriginal cultures, as the indigenous cultures of Australia, have a particular status that demands some consideration. This view of the Committee accords with basic principles of human rights (see Item C.4 below).

2. Nature and Role of Customary Law

(a) Aboriginal customary law is an integral part of traditional Aboriginal society. It follows that in so far as that traditional society continues to function as a living system in the Northern Territory, then so must Aboriginal customary law. In such a situation, despite the fact that European-derived law does not generally recognise Aboriginal rules and customs as part of the law of the land (see Item C.2 (g) below), those rules and customs in a real sense can be said to be part of the "law" in relation to those Aboriginal people who still respect them.

(b) There is a question whether Aboriginal customary law is correctly classified as a form of law at all. In the Gove Land Rights case (Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141), Justice Blackburn considered the nature of Aboriginal traditional society at Gove in the Northern Territory in some detail, and concluded that the evidence showed a recognisable system of law, even though he considered that in accordance with the common law it did not provide for any recognisable form of proprietary interest in the land. This latter qualification may no longer be supported in view of the decision in Mabo v Queensland, High Court, 3 June 1992, in which a majority of the Court recognised indigenous customary title to land of the Torres Strait people under certain conditions. It is still of interest, however, that in reaching this conclusion as to Aboriginal law generally, Justice Blackburn adopted a concept of law by reference to "a system of rules and conduct which is felt as obligatory upon them by the members of a definable group of people" (Gove Land Rights Case @ 266).

(c) Subsequent to this decision, Justice Woodward was entrusted by way of Royal Commission with the task of inquiring into the appropriate means of recognising and establishing the traditional rights and interest of Aborigines to and in relation to the land in the Territory. He pointed to the difference between Aboriginal concepts relating to land ownership and European legal concepts and the difficulty of expressing Aboriginal ideas and arrangements in English terms, Notwithstanding this, in his Report he in effect accepted without debate the existence of Aboriginal traditional rights to land and hence a form of Aboriginal customary law.

(d) It is said that customary law is perceived by Aboriginal people as a wider system of social control than non-Aboriginal Australians would normallyconceive law to be. Aboriginal customary law includes elements which could normally be described as "private law"(eg: interpersonal relations and dispute resolution), "public law" (community government), and religious beliefs and practices. These aspects of social control are inextricably mixed in a traditional Aboriginal community (Preliminary Report of the SA Aboriginal Customary Law Committee 1979 @ pp15-16).

(e) Many aspects of Aboriginal customary law are inaccessible to others, for a variety of reasons.These include the fact that the law varies from community to community, that it is usually not recorded in writing, that some of it is secret or confidential, that it can usually only be learnt orally in the relevant Aboriginal language, and that it is based on ideas and concepts radically different from "Western" ideas and concepts. However, research over the last few decades has recorded and analysed great deal of information about Aboriginal society in the Northern Territory. Much is now known about such

rules and customs as apply to kinship and marriage, to the role of different people in that society (including that of women), to hunting, fishing and gathering rights and practices, to rights and duties in respect of land, sacred sites and objects, to spiritual beliefs and practices, and to concepts of authority and responsibility and methods of conflict resolution and punishment. Some of this information has come from research undertaken in preparation for land claims. It is clear that Aboriginal customary law is complex and extends well beyond matters of land rights, although aspects are often connected to land issues.

(f) A number of Northern Territory court decisions have recognised the existence of Aboriginal law for particular purposes, in part in reliance on earlier Territory legislation. For example, the now repealed Criminal Law Amendment Ordinance 1939 required a court, upon a conviction of murder, to hear evidence "as to any relevant native law or custom" (see R v Anderson [1954] NTJ 240 per Justice Kriewaldt @ 248 and see the Law Reform Commission Report No.31, Recognition of Aboriginal Customary Laws, Vol 1 @ para 52). In other cases, the courts have found themselves able to have some regard to customary law in particular situations without recourse to legislation. Thus, for example, the motivation under tribal law for committing a criminal offence, or the likely penalty under customary law, have been taken into account by courts in relation to the penalty to be imposed by the court, although not as a defence to a criminal charge (for example, that the victim had broken tribal law and that the offender acted on the orders of tribal elders; see R v Mulparinga [1953] NTJ 205, 219). In some cases, Territory courts have taken a defendant's Aboriginality into account in determining provocation. Cases where Aboriginal customary law have been taken into account by the courts in sentencing offenders are collected in the Report of the Law Reform Commission on the Recognition of Aboriginal Customary Law, Vol.1, Chapter 21. Recent N.T. Supreme Court decisions of relevance include R v. Minor (1992 - Court of Criminal Appeal) as to whether "pay back" can be taken into account in sentencing and Mungatopi v. R (1991 - Court of Criminal Appeal) as to the relevance of custom and acceptable conduct in Aboriginal society in deciding whether there was provocation.

(g) On occasions, Northern Territory stipendiary magistrates sitting as the Court of Summary Jurisdiction have sat with Aboriginal Justices of the Peace in the Territory and have been assisted with explanations of Aboriginal customary law and social practices by way of background to the case.

(h) Northern Territory courts have taken Aboriginal customary law into account in a variety of other contexts. For example, in the protection of secret Aboriginal ceremonies from disclosure by publication (Foster v Mountford and Rigby [1976] 14 ALR 71), in the immunity of confidentiality information about Aboriginal sacred sites from use in evidence (Aboriginal Sacred Sites Protection Authority v Maurice (1986) 65 ALR 247), in taking into account Aboriginal traditional status and the ability to participate in ceremonies in determining damages for injuries (Roberts v Devereux, NT Supreme Court, 22 April 1982) and in one unreported case in having regard to tribal marriages for purposes of adoption.

(i) The current legislation in the Northern Territory also allows reference to Aboriginal customary law in the Northern Territory in specific matters. For example, the

Aboriginal Land Rights (Northern Territory) Act 1976 of the Commonwealth allows claims to be made by Aboriginals as to Crown land in the Northern Territory in accordance with traditional concepts of ownership The Northern Territory Aboriginal Sacred Sites Act provides protection for Aboriginal sacred sites in the Territory and the Heritage Conservation Act provides protection for archaeological places or objects, including objects sacred according to Aboriginal tradition (see also the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 of the Commonwealth). Traditional use of land and water by Aboriginals is protected by section 122 of the Territory Parks and Wildlife Conservation Act, sections 24(2) and 37(b) of the Crown Lands Act and section 53 of the Fisheries Act. Aboriginal tribal marriages are recognised in a number of Territory Acts, including the Administration and Probate Act (sections 6(1) and (4), 67A and 96), Adoption of Children Act (section 6(3)), Criminal Code (section 1, definition of "husband" and "wife"), Family Provision Act (section 7(1A)), Motor Accidents (Compensation) Act (section 4, definition of "spouse" paragraph (e)), Status of Children Act (section 3, definition of "marriage" paragraph (b)) and the Work Health Act (section 49(1), definitions of "family" and "spouse"). Special provision is made for Aboriginal child welfare, including the need to have regard to Aboriginal customary law in determining the welfare of the child (Community Welfare Act, Part IX). Special provision is made for the distribution of the estate of an Aboriginal dying intestate, having regard to the traditions of the community (Administration and Probate Act Division 4A).

(j) Apart from the matter of indigenous customary title to land, now dealt with in the recent High Court decision in Mabo v Commonwealth, there has so far been no general recognition of Aboriginal customary law in the Northern Territory as a source of law enforceable by the courts, or otherwise cognisable by those in authority. Aboriginal customary law does not, for example, have a status similar to the common law inherited from England (compare the Sources of Law Act 1985 of the Northern Territory, section 2). Unless a particular aspect of customary law can be taken into account in one of the ways described in the preceding paragraphs, then as far as the law in force in the Northern Territory is concerned, it merely represents a form of private belief, custom or practice.

(k) Notwithstanding this non-recognition, the Committee is satisfied that there are a significant number of Aboriginal people resident in the Northern Territory who strongly regard their customary laws as being applicable to them in a binding way and who have a desire to preserve that application.

3. Proposals for Reconciliation and Self-determination

(a) The Aboriginal people of the Northern Territory comprise in excess of one quarter of the population of the Territory. While all of these people may not live according to traditional lifestyle, the number that do is still significant in percentage terms. It may be thought desirable that there be some form of recognition of their role within the wider Northern Territory society with a view to establishing and maintaining harmonious relations between Aboriginal and non-Aboriginal people in the Territory as equals.

(b) Historically, as has been discussed above, relations between Aboriginal and non-Aboriginals have not always been good. The Northern Territory was treated by its first European settlers as if it was uninhabited apart from the few nomadic indigenous peoples. These peoples were frequently regarded as being inferior and their laws and customs were generally ignored. Some of the new immigrants thought them to be a race of people who would gradually die out.

(c) In more recent times, various policies have been devised to seek some form of accommodation with the Aboriginal people, including by way of assimilationist policies (from about 1937) and integrationist policies (from about 1962). These policies tended against any discussion of the possible recognition of customary law.

(d) A significant change in thinking occurred around the time of the passage of the 1967 national referendum, giving the Commonwealth Parliament concurrent power with the States to enact special laws for the people of any race (Constitution, section 51(xxvi)). This gave rise to new legislation and a series of programs, federal and State/Territory, designed to provide assistance to Aboriginal people, although the referendum made no difference to the Commonwealth's plenary powers in the Northern Territory. It did not give Aboriginal people and their laws any form of constitutional recognition.

(e) The difficulty in designing such programs is to find a balance between genuine assistance to ameliorate the disadvantages still experienced by many Aboriginal people and intrusion or dependency-creation. The concerns in this regard have lead to increasing demands by the Aboriginal people themselves for greater consultation and participation in the design and management of programs.

(f) At a federal level new approaches are being sought which stress consultation and greater participation by Aborigines. While most Australians may agree with this in principle, further discussions and practical outcomes has only just begun. It is not appropriate in this paper to enter into detailed discussion of these matters.

(g) At a community level in the Territory, the experience of the Committee is that there is frequently a desire for local Aboriginal self-management within the framework of the wider community, wherever possible based on links with the traditional tribal lands, and with preservation of customary law and traditional society.

(h) This approach has been complemented by efforts seeking to increase that involvement of Aboriginal people in the wider community. There have, for example, been extensive efforts to encourage Aboriginal communities to incorporate as community government councils under the Local Government Act of the Territory. However, some communities have preferred to use the medium of the Aboriginal Councils and Associations Act of the Commonwealth or to remain as an incorporated association.

(i) Apart from local government, and the special provision made for the role of Territory land councils under federal legislation and complementary Territory legislation, Aboriginal residents of the self-governing Northern Territory have generally been expected to use the same channels as other Territorians in order to participate in Territory decision-making processes within the wider community.

(j) No special provision has been made by the Commonwealth for the representation in Parliament of Aboriginals at either federal or Territory level. Under the Northern Territory (Self-Government) Act 1978, the single member electorates for the Territory Legislative Assembly are to be distributed in accordance with a 20% quota rule (section 13(5)), without regard to race.

(k) The two main Aboriginal Land Councils in the Northern Territory, established under the Aboriginal Land Rights (Northern Territory) Act 1976 of the Commonwealth, have taken a leading role in pushing for greater Aboriginal control in various matters, including as to land. Land Council support was given to a Conference in Alice Springs in June 1989 on the Future of Government for Aborigines in Central and Northern Australia. That Conference advocated autonomous Aboriginal local and regional self-government with direct links with the Commonwealth, and not as part of the Northern Territory.

(l) The concepts of Aboriginal self-management and self-sufficiency are explicitly stated to underlie the Aboriginal and Torres Strait Islander Commission Act 1989 (see in particular section 3), or "ATSIC" for short.

(m) Proposals for self-government or self-determination have generally been concerned more with enclave forms of separate development of Aboriginals as a distinct group. They are not so much concerned just with the preservation of traditional society within and as part of the wider State or Territory community. These broader proposals raise issues going beyond this Committee's terms of reference. In any event, the Committee, although not of a final view on the matter, does not consider that any recognition of customary law is an appropriate method for achieving Aboriginal self-government or self-determination. The issues concerning possible self-government or self-determination are much broader. The full range of problems experienced by Aboriginal people generally in the Northern Territory in their contact with the wider constitutional and legal system will not be solved just by recognition of customary law.

(n) Alongside the development of concepts of self-government, self-determination or self-management, the concept of a "Makaratta" or treaty between Aboriginal and non-Aboriginal Australians has developed in recent years. This originated in the late 1970's with calls by Dr HC Coombs, Judith Wright, Stuart Harris and others. The concept was to use such a mechanism to recognise the historic rights of Aboriginal people to the Continent, and to work towards reconciliation between the two groups. It could include provision for the maintenance of tribal laws.

(o) This call was supported in 1983 by the Senate Standing Committee on Constitutional and Legal Affairs when it called for a constitutional amendment to provide for a treaty. This approach was subsequently endorsed by the Advisory Committee in its Report on Individual and Democratic Rights 1987, but not accepted by the Constitutional Commission in its Final Report of 1988 until such time as an agreement with Aboriginal people had been negotiated. A referendum for this purpose has not so far resulted.

(p) In 1988, Prime Minister Hawke announced in the Barunga Statement that there would be a treaty negotiated between the Aboriginal people and the Commonwealth Government on behalf of all the people of Australia.

(q) The current federal Minister for Aboriginal Affairs has stated that there will be an instrument of reconciliation, which should be achieved by the Centenary of Federation, 1 January 2001. The Commonwealth Parliament has enacted the Council for Aboriginal Reconciliation Act 1991 to promote the process of reconciliation, including a consideration of whether it would be advanced by a formal document or documents of reconciliation. The Act ceases to operate on 1 January 2001.

(r) The 1991 Constitutional Centenary Conference, in its concluding statement, resolved that there should be a process of reconciliation between the Aboriginal and Torres Strait Islander peoples of Australia and the wider Australian community, aiming to achieve some agreed outcomes by the Centenary. It said that this process should among other things, seek to identify what rights these peoples have and should have as the indigenous peoples of Australia, and how best to secure those rights, including through constitutional change. As part of that reconciliation process, the Commonwealth Constitution should recognise these peoples as the indigenous peoples of Australia.

(s) The Committee does not wish to comment on the proposals for reconciliation at a national level, as this is outside its terms of reference. It is, however, concerned with the issue of reconciliation between the Aboriginal and non-Aboriginal residents of the Northern Territory and in particular how that might be assisted by the adoption of a new constitution for the Territory. It would seem to be in the interests of all Territorians to work towards a harmonious and tolerant society. There may be considerable merit in the comments in the 1991 Report of the Royal Commission on Aboriginal Deaths in Custody (Vol 5) that reconciliation should be an ongoing process which must have bi-partisan support, and which should not be limited to the concept of a single instrument of agreement (however called). It is clearly not just a matter for the Commonwealth.

(t) One of the arguments in favour of some form of constitutional or legal recognition of Aboriginal customary law within the Territory is that it may well advance the process of reconciliation. The question of whether any such recognition could or should take place, and the options for same, including by way of provisions in a new Northern Territory constitution, are dealt with in Item H below.

4. International developments

(a) In recent years there have been significant developments at an international level seeking to specifically recognise the rights of indigenous peoples throughout the World. The Aboriginal people of Australia have played a prominent part in these events.

(b) Initial moves to recognise such rights internationally with specific reference to indigenous people were advanced through the International Labour Organisation. This culminated in the ILO Convention No.107, concerning the protection and integration

of indigenous and other tribal and semi-tribal populations in independent countries. The emphasis in this Convention was on the protection of such peoples in the course of integrating them into the wider community. Article 7 provided that regard had to be had to their customary laws. These peoples were to be entitled to retain their customs and institutions where not incompatible with national legal systems or the objectives of integration programs. Other articles dealt with the application of custom to criminal offences and traditional rights of land ownership.

(c) In the Report of the Meeting of Experts on the revision of ILO Convention No.107 dated September 1986, which advocated the revision of that Convention, it was said as follows:

"96. The discussion on this Article bore essentially on the relation between national law and the customary laws and procedures of indigenous and tribal peoples. A distinction was drawn between the positive laws of nations, as expressed in their constitutions and other forms of legislation, and the largely uncodified laws of the indigenous and tribal peoples. There was a wide measure of agreement that significant weight has to be given to these customary laws and procedures, but that in cases of conflicts the national laws should prevail. Procedures should be established to resolve conflicts between customary and national laws, and consideration should be given to the customary laws and procedures as far as possible. Examples were given of some countries in which such procedures had already been established and where a great deal of attention had been paid to how to resolve the conflicts which inevitably arose. The exact procedures which should be established could easily be left to the various countries.

97. The point was also made that individuals should have the right to appeal to the national legal system if they did not wish to be governed only by customary laws and procedures. The expert representing the World Council of Indigenous Peoples pointed out that customary law was not static, and that it might therefore be preferable to refer to laws decided according to traditional methods by the indigenous or tribal peoples themselves.

98. Some of the participants, in particular the observers from indigenous organisations, stated that the imposition of national laws on their peoples often caused great hardship and was sometimes in sharp conflict with their own desires and institutions. These participants felt that only their own rules should govern the various kinds of relationships among themselves."

(d) This Convention has since been replaced by ILO Convention No.169 of 1989 concerning Indigenous and Tribal Peoples in independent countries. Article 8 of this Convention is in somewhat similar terms to Article 7 of ILO Convention No.107. In applying national laws and regulations to the peoples concerned , due regard is to be had to their customs or customary laws. The right to retain the customs and institutions of indigenous peoples is to apply except where not incompatible with fundamental rights defined by the national legal system and with other internationally recognised human rights. Procedures are to be established, whenever necessary, to

resolve conflicts which may arise in the application of this principle. Other Articles deal with criminal matters and traditional rights of land ownership and use.

(e) In 1988 the UN Working Group on Indigenous Rights produced a draft Universal Declaration on Indigenous Rights. This included the right of indigenous peoples to have their specific characteristics duly respected in the legal systems and political institutions of a country, including full recognition of indigenous law and custom. This draft has since been further revised, but has not yet been adopted by the UN General Assembly.

(f) Work is proceeding in various international forums seeking further recognition of indigenous rights. No doubt, this work will be furthered as part of the 1993 International Year of the World's Indigenous Peoples.

D. SITUATION IN THE NORTHERN TERRITORY

1. Northern Territory sources of law and federal 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) 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.

(c) In fact, the Commonwealth Parliament, by its own legislation, has conferred a substantial grant of self-governing powers on the new Northern Territory body politic established by the Northern Territory (Self-Government) Act 1978 through the Territory's own institutions of government - legislative, executive and judicial. The Committee understands that this grant of legislative powers to the Territory Legislative Assembly is wide enough to include the making of laws on matters of recognition of Aboriginal customary law in the Territory. This is subject to there being no inconsistency with or repugnancy to existing Commonwealth legislation on specific matters. For example, it may not be possible for the Territory Legislative Assembly to legislate to convert tribal marriages into legal marriages for all purposes, having regard to the Commonwealth Marriage Act.

(d) The recognised sources of law at present in the Northern Territory basically comprise the common law, inherited from England (plus a few old English statutes), a few items of old South Australian legislation enacted prior to 1911 that are still in force in the Territory, Commonwealth legislation enacted since 1901 and still applicable in the

Northern Territory and Northern Territory legislation enacted since 1911 and still in force.

(e) The common law of England, as introduced upon the European settlement of Australia, still continues as a source of law throughout Australia, including in the Northern Territory, but as modified by Commonwealth, State and territory legislation and as affected by later Australian judicial decisions.

(f) As the common law presently stands in Australia, apart from indigenous customary title to land, it does not yet recognise or adopt Aboriginal customary law, either as it existed at the time of European settlement or since, as part of Australian law. Whether the High Court of Australia will continue to take this approach into the future is uncertain.

(g) Further, it has so far been held that the whole of Australia had the status of a settled colony upon European settlement, as distinct from one that was conquered. Arguably this has the consequence that the pre-existing Aboriginal customary laws (other than as to land ownership) did not survive European settlement of their own force as a part of Australian law. The High Court in Mabo has, however, rejected the view that Australia was "terra nullius" at European settlement, that is, vacant land without occupants. In doing so, the Court has recognised the historical facts.

(h) Should the Northern Territory become a new state in the federation, then unless otherwise provided in any terms and conditions that may be imposed by the Commonwealth Parliament upon the grant of Statehood, these basic sources of law will not necessarily change. Subject to any such terms and conditions and to any applicable Commonwealth legislation it would be open for the new State constitution to define the sources of law for the new State. Alternatively, the new State Parliament could legislate on this topic following the grant of Statehood, providing it did so consistently with any Commonwealth legislation and the new State constitution.

(i) The Committee is satisfied that, subject to the qualifications mentioned in the last paragraph, there are no constitutional impediments to the recognition of Aboriginal customary law in the Northern Territory. That is so, whether that recognition results from a Territory law enacted prior to the grant of Statehood, or from the provisions of a new State constitution or if it is contained in legislation enacted by the new State Parliament after Statehood.

(j) The Committee is not aware of any general impediments to any such recognition as a result of existing Commonwealth legislation. The Committee is satisfied that such recognition would not offend against the Racial Discrimination Act 1975 of the Commonwealth. Under that Act, any "acts" of discrimination (but not legislative "Acts") based on race are unlawful, and in the case of persons of a particular race who enjoy some right by reason of race under any legislation, a similar right is conferred by that Act on others. These provisions are subject to "special measures" taken under the Convention on the Elimination of all forms of Racial Discrimination of 1965 for the sole purpose of securing the adequate advancement of particular racial or ethnic groups. The High Court in Gerhardy's case has held that State legislative measures for the protection of particular Aboriginal people are capable of constituting such "special

measures" and hence are not in breach of this Act. The Committee thinks it likely that any recognition of Aboriginal customary law in the Territory would not infringe against this Act, either because it would constitute such a "special measure", or because the "right" to the recognition of customary law is not a general right, but is a right that is only capable of applying to indigenous people and would not be of a discriminatory nature.

(k) The Committee notes that it may be possible for the Commonwealth Parliament to legislate to override any Territory recognition of Aboriginal customary law, particularly if that occurred by way of ordinary Territory legislation rather than in a new Territory constitution. Such Commonwealth legislation could be passed either under section 122 of the Constitution while the Territory remains a Commonwealth territory, or under the "race" power in section 51(xxvi) of the Constitution should the Territory become a new State. Just because the Commonwealth may have such legislative capacity, this may not be a sufficient reason in itself for not taking action that may otherwise be thought to be necessary or desirable.

2. Northern Territory views and initiatives

(a) The particular experience of the Northern Territory in relation to Aboriginal people and their customary laws, and the initiatives proposed or taken in the Territory, are of interest in determining whether those laws should now be recognised by legislative or constitutional provisions in any way.

(b) One of the early proposals for the modification of the law to meet Aboriginal customs in the Territory included a suggestion in 1931 by the Commonwealth Minister for Home Affairs, A Blakely, in which he proposed that there be a simple tribunal to sift Aboriginal evidence free of technicalities, and staffed by persons with a thorough knowledge of native customs.

(c) In 1932, Sir Hubert Murray advised the new Commonwealth Minister for the Interior that there should be some changes in the Territory to ensure that evidence of native custom could properly come before the court in matters of sentencing and in determining criminal intent. He proposed regular court sittings in various Territory centres and the abolition of juries for offences by Aboriginals.

(d) In 1933, the Criminal Procedures Ordinance was enacted to abolish juries in the Northern Territory for all indictable offences except those punishable by death. This provision was repealed in 1961. In 1934 the Crimes Ordinance was amended to give courts a discretion not to impose the death penalty for an Aborigine convicted of murder, and in determining the sentence the Courts could take into account relevant native law and customs. The effect of this provision was subsequently carried forward by the Criminal Law Amendment Ordinance 1939 which repealed the Crimes Ordinance. It ceased with the enactment of the Criminal Code in 1983, although the death penalty had already been abolished by the Death Penalty Abolition Act 1973 of the Commonwealth.

(e) In 1939, the Evidence Ordinance was amended to remove the requirement for Aborigines to take an oath before giving evidence, and to enable an Aborigine's

evidence to be taken though an interpreter, reduced in writing, and used in later proceedings without further appearance. This provision continued up to 1967.

(f) In the late 1930's, discussions took place as to the establishment of Aboriginal (native) courts. In 1940, the Native Administration Ordinance was enacted to provide for the establishment of such courts to deal with disputes between Aborigines and between the Northern Territory Administration and Aborigines. However, the Ordinance was not commenced due to the War and hence no such courts were established.

(g) Professor Strehlow, a recognised scholar of Central Australian Aboriginal society, became well aware, through his work, of the special significance of customary law to Centralian Aboriginal peoples. Although the Committee does not necessarily adopt his views, he had no doubt that it was too late (if it ever was possible) to recognise and enforce this traditional law. He saw the secrecy and the apparently harsh legal punishments, tailored to meet the rigours of a nomadic desert life, as mitigating against such recognition. He warned against some modern, syncretic form of recognition which could have the effect of allowing persons to flaunt established authority and avoid proper punishment in the name of a well-meaning attempt to secure respect for Aboriginal people, their traditions and institutions. Customary law and its effectiveness depended upon strict religious views and ceremonies and unquestioned authority to tribal elders. Once these were undermined by European-derived influences, then in his opinion so was the value of customary law.

(h) Following the War, AP Elkin wrote in favour of the establishment of native courts, at least on an experimental basis. A similar view was later expressed by E Eggleston writing in 1976.

(i) Justice Kriewaldt of the Northern Territory Supreme Court, in an article published posthumously in 1960, expressed the view that Aborigines were entitled to the protection of the law and should be dealt with by the criminal law in the same way as others. He thought that the only case where serious discussion was required of the influence of tribal law is that of an Aborigine whose contact with "white" civilisation had been small and who acted in conformity with tribal custom. He disagreed with the views in favour of establishing special courts or tribunals to deal with Aboriginal offenders, although he was prepared to accept that for the trial of serious crimes, the Judge should sit with two assessors drawn from a panel of persons who have had substantial experience of Aborigines. He favoured the Supreme Court sitting near the scene of the crime.

(j) In three Reports commissioned by the Commonwealth on the criminal justice system in the Northern Territory in 1973-4 GJ Hawkins and RL Misner advocated the decentralisation of justice to enable elected councils on settlements and missions to deal with "street offences" by both Aborigines and non-Aborigines, with an appeal to a magistrate. However, the Reports did not deal with the matter in detail.

(k) In 1976, Justice Forster, in the case of R v Anunga handed down guidelines to be observed by police in the interrogation of Aborigines. This followed the Report of the Australian Law Reform Commission on Criminal Investigation (1975) and a number of other cases involving police interrogation. The guidelines require an interpreter to be

present if the suspect is not fluent in English, the presence of a prisoner's friend, care in administering the caution to ensure it is understood, basic refreshments and substitute clothing (if needed), limits on questioning when the person in custody is not able to deal with them and reasonable steps to be taken to obtain legal assistance. These Rules have since been applied in cases coming before Northern Territory courts.

(l) In 1978, amendments to the Local Government Act (NT) introduced the concept of "community government". This was a simplified form of local government, not limited to Aboriginal communities, but clearly designed for those communities. It enabled an elected community government to make by-laws on a range of matters, including liquor and firearms, with monetary penalties for breach. A number of Aboriginal communities have adopted this form of government.

(m) On various occasions in more recent times, stipendiary magistrates in the Northern Territory have sat in courts held in Aboriginal communities in the presence of Aboriginal elders in order to obtain advice and assistance, especially in sentencing matters. Some prominent Aboriginal elders have been appointed as Justices of the Peace and sat with magistrates.

(n) A particular experiment along these lines was tried at Galiwinku (Elcho Island), using clan elders to sit with magistrates. The pilot scheme also involved the use of an employed anthropologist to provide a background report on the offender and to obtain local information and views. One aim of the pilot scheme was to try to resolve disputes in traditional ways in consultations held before the matter came up in court. The defendant's family and social control groups were directly involved in seeking appropriate methods of traditional control and rehabilitation. However, little change was made to the court procedure as such. The scheme was also tried in other Territory communities. It is difficult to assess their success, and the scheme is not presently functioning anywhere in the Territory. A review of the scheme was recently recommended in the Report of the Royal Commission into Aboriginal Deaths in Custody.

(o) One proposal of interest, developed by Dr HC Coombs and others, was to establish a system for the control of law and order at Yirrkala. The object was to use traditional ways of settling disputes and restoring order within the wider framework of the legal system. Consensual solutions would be sought where possible, using senior Aboriginal members appointed by the Aboriginal Council as a "community court". In cases coming before magistrates or a judge, the community court would hold a preliminary hearing and would report to the magistrate or judge. The community court could order a range of penalties including compensation, fines, community work and overnight imprisonment. The proposal is discussed in the Australian Law Reform Commission's Report on Aboriginal Customary Law, Vol 2 @ 83-88. It was not implemented.

(p) Other programs have involved attempts to use Aboriginal officers to a greater extent in various aspects of the justice system, for example, as police aides or as community correction officers in relation to probation, parole and community service orders. Other programs currently in operation include community policing patrols in several centres organised by Aboriginal Councils to attend disturbances. Police do not

intervene unless requested by the Council patrol. Complainants are encouraged to seek resolution of their complaints in the community rather than go to the Police.

E. POSITION ELSEWHERE IN AUSTRALIA

1. The Commonwealth and the States

(a) None of the constitutions of the Australian States contain provisions dealing with the position of the Aboriginal inhabitants of those States, or their laws or customs. A provision amounting to a standing appropriation of Government funds for the welfare of "Aboriginal natives" was at one time contained in the WA Constitution Act 1889, but was later repealed.

(b) The original Royal Letters Patent that established the Province (now State) of South Australia of 1836 contained a proviso to the effect that nothing in that document was to affect or be construed to affect the rights of any Aboriginal Natives of the Province to the actual occupation and enjoyment in their own persons or their descendants of any lands then actually occupied and enjoyed by those Natives. This proviso was given a narrow legal interpretation by Justice Blackburn in the Gove Land Rights case (1971). In any event it never applied to the Northern Territory. The Letters Patent have since been replaced.

(c) The Commonwealth Constitution contains no provisions dealing with the position of the Aboriginal inhabitants of Australia. The Commonwealth Parliament has power to enact special laws for the people of any race, including, since the 1967 referendum, people of the Aboriginal race (section 51(xxvi)).

(d) The Commonwealth has not so far enacted any laws to recognise Aboriginal customary law in any comprehensive way. However, some Commonwealth legislation operates by reference to customary principles. For example, claims to Crown land in the Northern Territory under the Aboriginal Land Rights (Northern Territory) Act 1976 of the Commonwealth are based on "traditional Aboriginal ownership", that latter concept involving common spiritual affiliations to a site on the land, plus a traditional right to forage over the land. Under the Aboriginal Councils and Associations Act 1976 of the Commonwealth, an Aboriginal Council incorporated under that Act may make rules on a variety of matters, which may be based on Aboriginal customs (section@23).

(e) The Aboriginal and Torres Strait Islander Commission Act 1989 of the Commonwealth, despite its broad objects in section 3 which include the development of self-management, self-sufficiency and the furtherance of the economic, social and cultural development of Aboriginal peoples and Torres Strait Islanders, is largely based on western concepts. Apart from provisions to protect cultural material and information considered to be sacred or otherwise significant (section 7(1)(g) and (4)), the Act makes no reference to traditional laws, customs, beliefs or practices.

(f) The Commonwealth has not so far implemented the legislative recommendations of the Report of the Australian Law Reform Commission on Aboriginal Customary Law (see Item F2 below).

(g) Proposals are under consideration to implement aspects of the Royal Commission into Aboriginal Deaths in Custody (see Item F3 below).

(h) No State has legislated to recognise Aboriginal customary law generally. However, some States do have legislation which has some relationship to that customary law. For example, several States have their own versions of Aboriginal land rights legislation.

(i) In Queensland, the Community Services (Aborigines) Act 1984 (see also the Community Services (Torres Strait) Act 1984), provides for the establishment of Aboriginal Councils for every trust area to discharge the functions of local government in that area. Such Councils have power to make by-laws as to a wide range of matters, with penalties up to $500 plus $50 per day. Under Regulations, this extends to community service orders on adults. They are specifically charged with the good rule and government of the area "in accordance with the customs and practices of the Aborigines concerned" (section 25(1)).

(j) The same Queensland Acts establish Aboriginal Courts (or Island Courts) for each such area, constituted by two Aborigine (Islander) Justices of the Peace or other members of the Aboriginal (Island) Council. The jurisdiction of these Courts extend to breaches of the by-laws, disputes over usages and customs of the community (not otherwise being a breach of Commonwealth or State law or by-laws), and other matters prescribed by regulations. The Courts are required to have regard to the usages and customs of the community (section 43(1) and (2)). A recent amendment enables the extension of the jurisdiction to persons, whether Aborigines or not, within the area (section 44). There is a right of appeal under the Justices Act 1986 (section 45), although appeals are apparently rare. A stipendiary magistrate may be appointed to visit trust areas at least quarterly and to give non-binding advice to such a court (section 11). A council may appoint authorised officers to perform functions under the by-laws (sections 45A and 45B).

(k) A discussion of the role and effectiveness of Queensland Aboriginal courts is contained in the Australian Law Reform Commission's Report on Recognition of Aboriginal Customary Law, Vol 2 @ 31-42. There has been some criticism of the system, including the inferior nature of the system, the lack of training provided, the formality required, the lack of real Aboriginal influence or control (a criticism more applicable to earlier legislation) and the imposition of alien structures and values. There was no equivalent of such courts in traditional Aboriginal society.

(l) Proposals for change in the Queensland system to that more appropriate to concepts of self-determination are discussed in Item F4 below.

(m) Under the Aboriginal Communities Act 1979 of Western Australia, the Council of Aboriginal communities to which that Act extends have been given wide powers to make by-laws. The Act does not expressly refer to Aboriginal customary law. The by-laws can extend to all persons on community lands, and may prescribe fines up to $100, imprisonment for 3 months or compensation up to $250. Under arrangements

made in a few communities, courts constituted by Aboriginal Justices of the Peace have sat to deal with breaches of the by-laws as well as general offences.

(n) A discussion of the merits and disadvantages of the WA scheme is contained in the Report of the Australian Law Reform Commission on Recognition of Aboriginal Customary Law, Vol 2 @ 42-48.

(o) Provision is made in South Australian law for a "tribal assessor" to be appointed by the Minister with the approval of the relevant Aboriginal body. That tribal assessor has the function of resolving disputes concerning decisions of that body as to land and other matters. The tribal assessor is required to observe, and where appropriate, give effect to, the customs and traditions of the Aboriginal people - see Pitjantjatjara Land Rights Act 1981, Part IV, and Maralinga Tjarutja Land Rights Act 1984, Part IV. However, this falls well short of a general provision for enforcement of Aboriginal customary law in that State.

(p) The courts of the various Australian jurisdictions have continued to take a similar view to Aboriginal customary law as that taken by the courts of the Northern Territory. Courts have taken that customary law into account for limited purposes, for example, in determining the sentence for a criminal offence where the offender agreed to submit herself to the tribal elders for a specified period and to obey their lawful directions (R v Sydney Williams (1976), Supreme Court of South Australia). Subject to such specific cases, Aboriginal customs have not been given any legal effect in those courts, and Aboriginal people have been held to be subject to the ordinary law of the land in the same way as non-Aboriginal people (R v Wedge (1976), Supreme Court of New South Wales).

(q) It has been held that evidence of an Aboriginal custom, allowing an Aboriginal husband to use force to discipline his wife, is not admissible upon a charge of a criminal offence under statute for the resulting death or injury. The positive law prevails over any custom to the contrary effect (Watson (1986) Court of Criminal Appeal, Queensland).

(r) On the other hand, the High Court has recognised that the traditional responsibilities of specific Aboriginal people for a particular site on land gave them a sufficient standing as plaintiffs to challenge proposed industrial developments on that land (Onus & Frankland v Alcoa (1981), High Court).

(s) Section 18 of the Cocos (Keeling) Islands Act 1955 of the Commonwealth provides the only example in Australia of a form of general recognition of custom under legislation. It provides that the institutions, customs and usages of the Malay residents shall, subject to any law in force in the Territory from time to time, be permitted to continue in existence.

(t) The House of Representatives Standing Committee on Legal and Constitutional Affairs, in its 1992 Report "Islands in the Sun", in recommending that W.A .laws be applied to the Island's, added a caveat to ensure that Malay customs, culture and traditions continue to be taken into account (and see the Territories Law Reform Bill 1992).

F. PROPOSALS IN AUSTRALIA

1. Introduction

(a) From the early days of European settlement of Australia, the policy was not to recognise Aboriginal customary law. It has only been in comparatively recent times that official proposals for some form of comprehensive legal recognition have gained currency.

(b) The factors that are said to have contributed to changing attitudes in favour of recognition are said to include:. the

- perception that denying all recognition to distinctive and long-established Aboriginal ways of belief and action may be unjust;
- the apparent failure of the legal system to deal effectively or appropriately with many Aboriginal disputes;
- published statistics indicating disproportionately high levels of Aboriginal contact with the criminal justice system, which have been seen as symptoms of failure and discrimination within that system; and
- the movement away from policies of "assimilation" and "integration" towards policies based on "self-management" or "self-determination" at federal level and to varying degrees also at State and Territory level.

(See Report of the Australian Law Reform Commission on the Recognition of Aboriginal Customary Laws, Vol 1 @ p2).

(c) Reference has already been made in preceding parts of this Paper to the recognition that has already been given of specific aspects of customary law for specific purposes, either by the courts or by legislation.

2. Australian Law Reform Commission Report

(a) The first comprehensive examination of possible recognition of customary law in Australia resulted from a reference to the Australian Law Reform Commission in 1977. The basic terms of reference were:

> *"TO INQUIRE INTO AND REPORT UPON whether it would be desirable to apply either in whole or in part Aboriginal customary law to Aborigines, either generally or in particular areas or to those living in tribal conditions only and, in particular:*
>
> *(a) whether, and in what manner, existing courts dealing with criminal charges against Aborigines should be empowered to apply Aboriginal customary law and practices in the trial and punishment of Aborigines;*

(b) to what extent Aboriginal communities should have the power to apply their customary law and practices in the punishment and rehabilitation of Aborigines; and

(c) any other related matter.

IN MAKING ITS INQUIRY AND REPORT the Commission will give special regard to the need to ensure that no person should be subject to any treatment, conduct or punishment which is cruel or inhumane."

(b) Arguments put to the Commission in support of some form of recognition were:

(i) Customary laws influence the lives of traditionally oriented Aboriginal people, and non-recognition contributes to the undermining or traditional law and authority.

(ii) In some communities Aboriginal customary law may be the most appropriate vehicle for the maintenance of law and order.

(iii) Recognition would reinforce decisions by individual judges and officials to recognise customary laws in individual cases and would promote consistency and clarity in the law.

(iv) Non-recognition leads to injustice.

(v) Recognition now would act as at least partial compensation to the Aboriginal people for the effects of non-recognition since 1788.

(vi) Aboriginal people support some form of recognition of their laws, although they desire to maintain control of their law and to maintain secret aspects of it.

(vii) A certain degree of recognition is required to be consistent with Federal Government policy which recognises the right of Aborigines to retain their identity and traditional lifestyle if they wish.

(viii) Australia's international standing would benefit from appropriate forms of recognition. On the other hand, arguments put to the Commission against any form of recognition were:

On the other hand, arguments put to the Commission against any form of recognition were:

(i) A court cannot recognise those aspects of Aboriginal laws which are secret and about which it cannot be informed.

(ii) Recognition should be restricted to Aborigines living a traditional lifestyle, and should not extend to "fringe dwellers" or urban Aborigines.

(iii) Difficulties in definitions and in formulating proposals for recognition make recognition impossible.

(iv) It is too late to recognise Aboriginal customary laws because they have ceased to exist in any meaningful form. There were also very strong arguments that this was not the case. The Committee supports this view in the Northern Territory.

(v) Recognition in the form of the codification of Aboriginal customary laws or similar methods of direct enforcement by means of the general law would entail the loss of control of Aborigines over their law and traditions.

(vi) Aboriginal women may benefit from the abandonment of certain Aboriginal traditions, particularly those that discriminate against women.

(vii Recognition would lead to the acceptance of certain punishments which infringe against basic human rights.

(viii) Recognition would go against the notion that there should be one law for all Australians.

(c) The Commission duly presented its Report No.31 in two volumes in 1986 entitled "The Recognition of Aboriginal Customary Laws". The Commission recommended against any comprehensive legal recognition of these laws throughout Australia. In particular, it did not advocate the codification or direct enforcement of these customary laws as part of the general law of Australia. Nor did it see it as appropriate to allow these customary laws to operate generally to the exclusion of the general law. However, it did not consider that it was too late to recognise and give force to traditional laws. It viewed those laws as still being subject to growth and adaption to new circumstances and hence sought a flexible approach. It favoured specific forms of recognition which only dealt with particular subjects but which avoided the need for precise definitions of the customary law on those subjects. The specific subjects that it deal with by way of recommendations included marriage and family matters, distribution of property, the criminal law (including policing, interrogation, evidence and sentencing), local justice mechanisms and hunting, fishing and gathering rights. It did not favour a general scheme of Aboriginal courts in Australia. Rather, it preferred local methods of resolution of disputes adapted to meet the needs of particular communities.

(d) One of the difficulties the Commission had was in defining the forms of "recognition" that would be appropriate across Australia, involving different Aboriginal people in different areas, including both those living traditional and those living non-traditional lifestyles. It therefore sought a flexible solution to meet those varying needs, one determined on an issue by issue basis in a functional way. It felt that this approach best dealt with the genuine difficulties involved, not the least of which was the danger of loss of control over customary laws to the detriment of Aboriginal people. However, it recognised that its approach was open to criticism in that it involved no genuine recognition of customary law; rather, the general legal system would be dictating the extent to which it was prepared to accommodate Aboriginal customary laws.

(e) An example of this selective functional approach is found in the Commission's recommendations as to customary marriage. It recommended that the general law should not be available to enforce Aboriginal marriage rules, including the customary rules as to promised brides (which often extends to babies). However, it also recommended that Aboriginal customary marriages should be legally recognised for particular purposes, for example, in determining rights to adopt. This recognition should include polygamous customary marriages (see Volume 1, pp179-190, 192-196).

(f) As noted in Item D2, para (h) above, the Northern Territory has already legislated to afford legal recognition to Aboriginal tribal marriages in a variety of situations within Territory power.

(g) The Committee appreciates why the Commission would adopt this approach, but is not at this stage convinced that the justification offered for the Commission's approach for the whole of Australia necessarily applies to the special situation of Aboriginal citizens in the Northern Territory, and in particular, to those Aboriginal citizens in the Territory who still lead traditional lifestyles and who consider Aboriginal customary law to be binding on themselves. Nor is it convinced that this selective, functional approach is necessarily one that accords with the expectations or desires of most traditional Aboriginal people living in the Territory, although it would welcome comment from Aboriginal people and others on this point.

(h) In any event, the Territory has, in a number of matters of relevance to this topic, already legislated in selected areas of customary law (see discussion in Item D). There may be no reason The Committee's concern in this Paper is not to enter into a detailed discussion of spewhy this selective, legislative approach should not be an ongoing process in association with any general recognition of customary law.

(i) The Committee's concern in this Paper is not to enter into a detailed discussion of specific subjects which could receive recognition as customary law. Rather it is primarily concerned with the more general question of whether customary law should be constitutionally recognised as a source of law. It discusses in Item H below the options for such general recognition of customary law as a source of law in the Northern Territory, and in particular by way of recognition in a new Territory constitution.

3. Royal Commission into Aboriginal Deaths in Custody Report

(a) The Report of the Royal Commission in 1991, Volume 4, gave some consideration to the recognition of Aboriginal customary law. It noted that the inter-relationship between that customary law and the general legal system was complex. It also noted the Australian Law Reform Commission recommendations on the subject, and that it had been "prudently" reluctant to recommend any general propositions (for example, the establishment of Aboriginal courts). It expressed the opinion that in view of the range of experience, styles of living and immediacy of connection with traditional rule, even within the Northern Territory let alone Australia, that this was sensible and in accord with the expressed views of Aboriginal people. It noted, however, that in the

Northern Territory there were a significant proportion of Aboriginal people with prime allegiance to traditional values. It also noted a sense of unease in the broader non-Aboriginal community to having two sets of laws, one for white and one for black. It expressed the view that recognition of the significance of customary law and formal reference to it in the legal system did not of itself create conflict between the two systems. Respect for Aboriginal law and practical steps to incorporate and honour its traditional social function could be achieved without proposing separate systems (@ pp97-99).

(b) The Royal Commission was unable to thoroughly examine the issues relating to possible recognition of customary law. It did, however, recommend that the Government report back to Aboriginal people at the progress in dealing with the Australian Law Reform Commission Report on the subject of recognition of customary law (Recommendation 219 @ p102).

(c) In the published Response by Governments to the Royal Commission, Volume 2, this recommendation was supported by the Commonwealth, the Northern Territory and several of the States. The Commonwealth undertook to report accordingly before the end of 1992. The Northern Territory and several States noted that the matter was under review in the Australian Aboriginal Affairs Ministerial Council (@ pp 836-8).

4. Other Proposals

(a) The Queensland Legislation Review Committee has been inquiring into legislation relating to the management of Aboriginal and Torres Strait Islander communities in Queensland. It issued a Stage 1 Report in September 1990 , which resulted in amendments to the Community Services (Aborigines) Act and the Community Services (Torres Strait) Act. In August 1991 it issued a discussion paper entitled "Towards Self-Government". This Discussion Paper advocated legislation for a new form of local self-government for local communities, with power to develop and adopt by local referendum community constitutions tailored to the local situation and which could cover a variety of matters including the recognition of customary law. This would permit flexibility to enable indigenous people to live and operate in accordance with their own customs and traditions.

(b) The Report also considered that the existing Aboriginal and Island courts should continue unless the communities agreed otherwise. Assistance should be given to communities to assess and develop community justice schemes such as the Yirrkala scheme. If the existing courts were retained, they should have power to make compensation orders for victims and community service orders for all offenders, including juveniles.

(c) In the Final Report of the Legislation Review Committee in November 1991, the proposal for new legislation was endorsed, with recognition of the pre-existing rights of indigenous peoples to their own forms of community government within the State and power to develop those forms by local referendum. These community government structures would have power to deal with a range of matters, including recognition of customary rights, law and traditions not inconsistent with the rights, functions, powers

and responsibilities of landowners. The earlier recommendations as to Aboriginal and Island Courts and community justice systems were basically endorsed.

(d) Legislation in Queensland to implement these and other recommendations is now awaited. The Queensland Parliament has recently enacted the Legislative Standards Act 1992 which requires the Parliamentary Counsel of Queensland, in carrying out his/her duties, to have regard to certain "fundamental legislative principles", including Aboriginal tradition and Island custom.

(e) No other State of Australia has as yet engaged in a similar review on such a comprehensive basis.

G. POSITION ELSEWHERE

1. Introduction

(a) It is not possible in the space of a paper of this size to engage in a detailed consideration of the extent to which indigenous customary law is legally recognised in the various countries of the World other than Australia. There are said to be about 250-300 million indigenous peoples world-wide. They live in over 70 countries, and in all but a few of these, they constitute a minority group. The arrangements that apply in these countries vary greatly, from little accommodation of indigenous law within the general legal system, to various systems of legal pluralism which do accommodate and recognise indigenous law. The position is often complicated.

(b) In a number of countries, the advent of colonialism did not oust the indigenous law. Existing legal systems continued to operate, often by way of treaty recognition in so far as they were compatible with the laws introduced by the new colonial settlers.

(c) In some of these countries, the continued operation of indigenous customary law depends, in whole or part, upon constitutional provisions.

(d) It is not possible to generalise as to the applicable constitutional and legal arrangements in this regard. A broad overview can best be obtained by briefly considering the position in a few selected countries.

2. United States of America

(a) In very broad terms, the relationship of American Indians to the USA and its government is said to be governed by four main factors:

(i) Indian tribes are independent entities with inherent powers of self-government.

(ii) The independence of Indian tribes is subject to the exceptionally wide legislative powers of the federal Congress. This has primarily been achieved through Art 1, s8 of the USA Constitution giving Congress power to regulate commerce with the Indian tribes and the power of the President to make treaties, including Indian treaties, in Art II, s2.

(iii) This power is wholly federal - States are excluded unless Congress delegates power to them; and

(iv) The federal Government has a responsibility for the protection of the Indian tribes and their properties, including protection from encroachments by the States and by citizens.

(b) Relations with Indians were formalised first by treaties with the British Crown and subsequently with the federal Government. Indian "sovereignty" and title to land was recognised by the USA Supreme Court, and title could only be extinguished by federal action. However, by a gradual process, including the use of Indian reservations, federal administration and legislation and delegation to States, the traditional roles of the tribes have been gradually eroded.

(c) In more resent years, there has been a movement in thinking back in favour of greater Indian self-management and authority. This has reinforced the scope for applying Indian customary law on Indian lands.

(d) Many Indian tribes, since the Indian Reorganization Act 1934, have adopted their own constitution and by-laws and have incorporated, with tribal councils and tribal courts. A few Indian tribes remain without written constitutions, relying on unwritten customary law.

(e) Indian law primarily operates on Indian land and not in respect of the many urban dwelling Indians. There may, however, be exceptions - for example, in Hawaii only a small area of land is set aside in trust for the indigenous Hawaiians, but Hawaiian usage is not only admissible in Hawaiian courts, it also controls inconsistent common law (absent any statute). Custom can be used to clarify ambiguous statute.

(f) It is difficult to draw legal analogies between the situation in Australia and in USA as far as the application of customary law is concerned. The differences are fundamental and reach back long into history and to the origins of indigenous-colonial contact.

(g) The exact division of jurisdiction between Indian tribal institutions and law on the one hand and federal institutions and law and State institutions and law on the other is complex and changing.

3. Canada

(a) The position as to Aboriginal or Indian customary legal rights in Canada has been shrouded in a degree of uncertainty and has involved considerable amount of litigation. However, it is now established, both by decisions of the Canadian Supreme Court and by the provisions of the Constitution Act 1982 that certain existing Aboriginal and treaty rights are constitutionally protected.

(b) Historically, colonial policy in relation to the aboriginal peoples of Canada was developed in an ad hoc manner, leading to some inconsistency of approach. There were a range of treaties in various areas, although large parts were not covered by any treaties. The Royal Proclamation of 1763 prohibited sale of Indian land to private

interests and stipulated a specific procedure for government acquisition. This lead to a pattern of cessions of land rights and the establishment of reserve lands.

(c) The federal Parliament has exclusive jurisdiction over "Indians and lands reserved for the Indians" (Constitution Act 1867, s91(24)). The primary vehicle imposing controls under this power has been the Indian Act 1876, now 1951.

(d) Under s88 of the Indian Act, subject to the terms of any Indian treaty and any other federal legislation, all laws of general application (including provincial laws) apply to Indians except on reserve lands and except in so far as inconsistent with the Indian Act.

(e) Thus Indian treaty rights such as to hunt, fish and trap, were protected from provincial laws which conflicted with those rights. In the absence of a treaty, it was rare for customary rights to be recognised by the courts outside of territories.

(f) Section 35(1) of the Constitution Act 1982 now recognises and affirms the aboriginal and treaty rights existing prior to that date. The Supreme Court of Canada has held that this extends to protect existing traditional customary rights as at 1982, even if not supported by a special treaty, proclamation, contract or other legal document. The federal Government has been held to have a fiduciary duty to protect such rights, and the federal powers of legislation must not be used to unreasonably infringe such traditional rights. Any prior extinguishment of such rights must have been indicated by a clear and plain intention. The section has therefore been interpreted as providing constitutional protection of customary rights.

(g) There has been an ongoing negotiation in recent years of out-of-court settlements of aboriginal land claims with a view to entering into comprehensive agreements for territorial self-government, the most notable of which has been the recent decision to create Nunavut from out of the NW Territories. This latter Agreement involves co-management of land, resources and wildlife throughout the entire region, to be exercised through the new territorial institutions of government. Consideration is being given to ways of "customising" or implementing customary law within the framework of the Canadian judicial system.

(h) Under section 35(3) of the Constitution Act 1982, the "treaty rights" that are protected include rights that now exist by way of land claim agreements or which may be so acquired. Thus the constitutional protection will extend to treaty rights under any such new land claims agreements.

(i) Under section 25 of the Constitution Act 1982, rights and freedoms of the Aboriginal people of Canada cannot be abrogated or derogated from under the new Canadian Charter of Rights and Freedoms applicable to all Canadians.

(j) Thus there is now substantial constitutional protection of Aboriginal customary rights and the laws that go with them, either on the basis that they are non-treaty rights that arose prior to 1982 which have not been extinguished, or on the basis that they flow from treaties whenever made.

(k) The Assembly of Indian First Nations has now advocated a general constitutionally entrenched right of self-government, and that First Nation justice systems be established to apply Aboriginal principles and practices to those indigenous people. It has accepted the recognition of gender equality, but otherwise the Canadian Charter of Rights and Freedoms (the Canadian Bill of Rights) is not to override First Nations law.

4. New Zealand

(a) Since European settlement, the Maori people have been subject to the general legal system introduced by the settlers, with little account being taken in that system of Maori laws and customs. To that extent, the position is not that dissimilar to Australia.

(b) A major difference arose from the signature in 1840 of the Treaty of Waitangi with Maori leaders in the North Island. By that Treaty, sovereignty over their lands was ceded to the Imperial Crown. However the Crown confirmed and guaranteed to the Maori the full and exclusive and undisturbed possession of their lands, estates, forests, fisheries and other properties, reserving to the Crown the exclusive right of pre-emption.

(c) Early court decisions on this Treaty held that it did not give customary rights any legal effect as against the Crown. These decisions were subsequently doubted but were later confirmed by New Zealand statute as far as Maori land was concerned. The Privy Council has since held that the rights conferred by the Treaty cannot be enforced by the courts except in so far as they have statutory recognition.

(d) A Maori Land Court was established by statute in 1865 to regulate the way in which the Crown acquired Maori land. More recently, the Waitangi Tribunal has been set up by the Treaty of Waitangi Act 1975 with power to inquire into claims by Maoris and to make recommendations about changes to New Zealand law or its administration which would further the principles of the Treaty. Maori land is dealt with by the Maori Land Court under the Maori Affairs Act 1953.

(e) There continues to be a degree of controversy about the effect of the Treaty of Waitangi in New Zealand law and whether it has any constitutional effect. Recent court decisions have indicated that the Treaty can to some extent be taken into account in determining the applicable law particularly where referred to in statutes, and that it signifies a partnership between the races, giving rise to fiduciary duties of good faith.

(f) There may also be an as yet undefined scope for giving effect to customary rights at common law.

(g) New Zealand has a network of Maori workers with disciplinary and welfare responsibility in cities as well as rural areas, with varying effectiveness.

(h) In a White Paper presented to Parliament in 1985 entitled "A Bill of Rights for New Zealand", it was proposed to include in new legislation a provision for recognising and affirming the rights of the Maori under the Treaty on an ongoing basis. This would have made the Treaty part of domestic law and enforceable in the courts.

(i) The New Zealand Bill of Rights as enacted in 1990 (No 109), does not contain such a provision. It does, however, have a provision guaranteeing the rights of minorities to enjoy the culture, profess and practice the religion, or to use the language of those minorities (section 20).

5. Papua New Guinea

(a) Unlike Australia, it seems to have been generally accepted from an early date in both Papua and New Guinea that customary rights, and in particular rights to land, were recognisable as having legal effect upon European contact. This in part may have been due to the different constitutional framework within which this contact occurred, with a protectorate being established in Papua and with German colonial occupation followed by an Australian international mandate in New Guinea. Native rights to land were recognised by early legislation, in which the capacity to deal in these native lands was regulated. The High Court of Australia has since judicially recognised this position.

(b) The Australian administration of Papua New Guinea was generally prepared to allow customary law to operate among local people in the traditional way, although it decided against the introduction of officially recognised customary courts.

(c) Comprehensive treatment of the role of custom in the legal system occurred with the passage of the Native Customs Recognition Act 1963. If provided for the circumstances in which custom could be pleaded and recognised in the ordinary courts, but included a number of exceptions, namely, repugnance to the general principles of humanity, inconsistency with legislation, contrary to the public interest or resulting in injustice and adverse to child welfare. In criminal law, it provided that custom was also not to be taken into account except for the purpose of ascertaining the existence or otherwise of a state of mind, deciding the reasonableness or otherwise of an act, default or omission, deciding the reasonableness or otherwise of an excuse, deciding in a accordance with other laws whether to proceed to conviction of a guilty person or determining the penalty. It may be taken into account where otherwise it would lead to injustice. Given these exceptions and limited operation, it did not result in widespread recognition of custom in the legal system.

(d) Most acts of sorcery were made illegal by the Sorcery Act 1971.

(e) A major development was the enactment of the Village Courts Act 1974. This was an effort to bridge the gap between unofficial customary moots held in villages and the incorporation of custom into official dispute resolution procedures. The primary function of village courts is stated to be to ensure peace and harmony in the local area by mediating in and endeavouring to obtain just and amicable dispute settlements. They have a compulsory jurisdiction but must attempt settlement by mediation first.

They have a criminal jurisdiction in non-indictable matters and a civil jurisdiction up to (PNG) K300, plus general jurisdiction as to custody of children, bride price and compensation for death. Car accident cases are excluded as are land disputes which are dealt with in parallel land courts (see the Land Disputes Settlement Act). The village courts apply customary law. Lawyers are excluded. Village magistrates are generally well versed in local custom and are supervised by regular magistrates, to whom an appeal lies.

(f) The Papua New Guinea Constitution of 1975 provides for development to take place primarily through the use of PNG forms of social and political organisations (Principle 1(6)). It calls for a fundamental re-orientation of attitudes to a variety of matters (Principle 5(1)). It provides that the laws of PNG are to consist only of the Constitution, organic laws, legislation, emergency regulations, subordinate legislation and "the underlying law" (section 9). The latter term is defined in Schedule 2 by reference firstly to custom (except so far as inconsistent with Constitutional law or statute or repugnant to the general principles of humanity) and secondly to the common law appropriate to PNG unless inconsistent with the Constitution, statute or custom. There is a duty on superior courts to formulate and develop the underlying law.

(g) The Constitution also establishes the Law Reform Commission, which has issued various papers on customary law and the development of the underlying law. Proposals for an Underlying Law Act have not yet been implemented.

(h) The Native Customs Recognition Act has now been replaced by the Customs Recognition Act. Custom may now be taken into account and enforced by courts except where it would lead to injustice or not be in the public interest, or where it would be adverse to child welfare. In civil cases, custom is limited to matters of land, hunting and gathering rights, rights over water, fishing, trespass to animals, marriage and divorce matters intended by the parties to be governed by custom, the reasonableness of acts, defaults or omissions and the existence of a state of mind of a person, or where otherwise by not taking custom into account it would lead to injustice. Custom is also to be taken into account in guardianship and custody of infants and adoption.

(i) The Customs Recognition Act preserves the operation of the Local Government Act, whereby a Council may make recommendations to the Minister on matters of custom (including customary marriage but not customary land). If accepted by the Minister, the Council may make rules to give effect to it (Part VI Division 3).

(j) Certain other items of legislation give effect to custom in specific matters.

(k) Some difficulties have been encountered in PNG in developing and expanding the use of custom outside of these specific items of legislation, and notwithstanding the Constitution and the Customs Recognition Act.

(l) The Australian Law Reform Commission, in its report on the Recognition of Aboriginal Customary Law, has compared PNG and its indigenous majority with the situation in Australia. It expressed the view that if ordinary Australian courts were

empowered to apply Aboriginal customary law and to become primary agents for its application, there would be a real danger that traditional Aborigines, whose access to and comprehension of court proceedings may be limited, would loose control of their own law. The Commission compared the western legal approach to law as a set of rules, compared to the indigenous approach which generally relates law to the resolution of conflict. As a result, the Commission ruled out any form of incorporation by codification in its recommendations. Matters of interpretation and content of customary law should not, in its view, be taken out of the hands of Aborigines (Volume 1, para 202).

6. Malaysia, Indonesia

a. Malaysia

(a) Malaysia has its own indigenous peoples, both on the mainland (Orang Asli) and the various ethnic groups on the Island of Borneo (Sabah and Sarawak). To these must be added the Malay people who originally inhabited the coastal regions, and who gave rise to the institution of the Sultanate. Many of these indigenous people subsequently adopted the faith of Islam, which had a profound effect on customary law. The law was also affected by the later colonial settlements of the Portugese, the Dutch and lastly the English, and the systems of law they introduced.

(b) English law was only applied to Malaya in so far as the religions, manners and customs of the local inhabitants would permit. As a result, customary law was accepted by the courts from an early date.

(c) Malay customary law (adat) was developed centuries ago, but with the arrival of Islam, Muslim laws were applied alongside customary laws. Both these systems of law have survived in relation to the Malays, and notwithstanding the introduction of European laws and legal systems and, since Independence, the Malaysian system of legislation, both federal and State.

(d) To a very limited extent there is some continuing application of Chinese and Hindu customary laws in some personal matters. This follows the immigration of Chinese and Indian peoples to the Malayan Peninsula.

(e) In the case of Islamic law, this is enforced through special courts known as the Syariah courts independent of the civil courts. In Sabah and Sarawak native laws are administered by Native courts.

(f) The Constitution of Malaysia recognises the term "law" as including not only the common law in so far as it is in operation in Malaysia, but also "any custom or usage having the force of law in the federation or any part thereof" (Article 160). Provisions for equality before the law contain exceptions which include any provision regulating personal law (Article 8(5)(a)). Certain special constitutional privileges are conferred on Islam and on the Malays and the natives of Salah and Sarawak which are of relevance to preserving the operation of adat and Islamic law.

(g) Some customary law has been codified. In a number of cases it is now dealt with by statute. It is clear that the Constitution is the supreme law of the federation (Article 4) and that within the limits of that Constitution it is legally possible by legislation to override customary or Islamic law.

b. Indonesia

(a) In a similar manner to Malaysia, customary law (adat) applied and continues to apply as part of the law of the country.

(b) Indonesian customary law was affected in many places by the introduction of the Islamic Faith and its laws.

(c) The Dutch colonial government was mainly concerned with the laws applicable to non-natives, thus giving rise to a dual system of laws. Customary laws were left to largely operate on their own, administered through the indigenous local institutions. Indonesians were given the option of subjecting themselves to European law, but few chose the option. However some colonial legislation was extended to native Indonesians.

(d) The 1945 Indonesian Independence Constitution stipulated that existing institutions and regulations were to continue until new ones were established in conformity with that Constitution.

(e) Some efforts have been made since Independence to introduce a single national law on specific topics. However adat law continues to operate in an uncodified manner in most of Indonesia.

(f) The former "native" or "customary law" courts have now been replaced by a system of general courts of justice. These are in addition to Islamic courts, military courts and administrative courts. At a village level, traditional methods of dispute resolution are still common.

7. South Africa

(a) Upon first European settlement at the Cape, Roman-Dutch law was applied, later supplemented by local legislation. No recognition was given to African customary law as a system of law. However Africans were frequently left to act and live in accordance with their traditional laws and customs.

(b) Modifications to this position were introduced as further territories were annexed. Upon the annexation of the Transkei, magistrates courts were given a discretion to apply customary law between Africans. Legislation was passed for the Transvaal to apply the laws, habits and customs among Blacks as long as they did not appear to be inconsistent with the general principles of civilisation recognised in the civilised world. Provision for separate trials in a special court was made. Somewhat similar legislation was enacted for Natal.

(c) The position in the Republic of South Africa is now governed by the Black Administration Act 1927. Magistrates can try cases between "Blacks" (as defined) and may apply customary (or indigenous) law. Courts of chiefs and headmen have also been retained. However the law of the land does not recognise customary law as a concurrent system of law, and disputes between Blacks and non-Blacks are determined in accordance with the law of the land, which excludes customary law.

(d) In the homeland Republics of Transkei and other areas, courts are empowered to apply tribal law.

(e) Elsewhere in Africa, there is a great diversity of legal systems. In many African countries, customary or tribal law survived colonial settlement. The Privy Council, for example, accepted that in a least some cases the law and rights of traditional African societies were capable of surviving European conquest or cession. In some cases, native law was protected by a convention - e.g. Swaziland. However European law did have a modifying influence and did supply some of the deficiencies of traditional legal systems.

(f) Since the acquisition of independence by many African countries, customary law has continued to be applied subject to the legislation of these new nations.

H. OPTIONS FOR RECOGNITION

1. Introduction

(a) The two most convincing arguments for some form of recognition of Aboriginal customary law in the Northern Territory are:

(i) that Aboriginal customary law continues in practice to exist as a living system in the lives of many Aboriginal Territorians, influencing and controlling their daily actions and lives, and

(ii) that many of those Aboriginal Territorians have, in the course of the Committee's consultations, expressed a deep desire for some form of formal recognition of their customary law.

(b) The decision of the High Court in Mabo can perhaps be regarded as a first step in the recognition of Aboriginal customary law - namely, a recognition by the common law of the legal force of customary indigenous rights to land where those rights have continued to be asserted without significant interruption and where they have not since been extinguished by or pursuant to the general law.

(c) If other aspects of Aboriginal customary law are to be formally recognised (and the Committee expresses no firm view on this point at this time), the question arises as to the form that that recognition should take. There are a number of options, outlined in the Australian Law Reform Commission's Report, Vol I @ paragraphs 198-208. These comprise:

(i) Recognition by way of incorporation of customary law, either generally or by reference to specific subjects, into the general law, such that it becomes a part of that single body of general law. This in turn can be done in several ways, either by statutory codification of the rules of customary law, or by incorporation by way of reference to those customary laws without setting out their content in detail. There are no examples of such codification in Australia, but an example of the latter form of incorporation of specific subjects by way of reference might be the legislative provisions for protection of Aboriginal sacred sites, such as contained in the Northern Territory Aboriginal Sacred Sites Act.

(ii) Recognition by way of exclusion of Aboriginal customary law from the general law, allowing the former to be regulated directly by itself. This could possibly entail the establishment of tribal courts to administer the separate system of customary law.

(iii) Recognition by way of translating Aboriginal customary law into concepts and institutions known to the general law.

(iv) Recognition by way of adjustment or accommodation of the general law to take into account Aboriginal customary law in appropriate ways - for example, by taking into account Aboriginal custom in the sentencing of Aboriginal criminal offenders convicted under the general law, in the manner described earlier in this paper.

(d) There may be little, if any, scope for the incorporation of Aboriginal customary law, in whole or part, into the general law by way of codification. Of all the options for recognition, this is the least likely to be acceptable or workable in the Northern Territory. Factors to be taken into account in this regard include the great diversity in traditional law, the difficulties of expressing that law in statutory form, the fact that it would not be possible to codify much of the law because of its secret nature, and the fact that it would probably result in the loss of control of that law by the Aboriginal people directly affected.

(e) Considerable difficulty could also be encountered in a form of recognition that attempts to translate customary law into a western framework. In most cases, the differences between the two systems and the ideas and concepts on which they are based may be too great.

(f) On the other hand there could be considerable merit in a continuation of the process of legislative incorporation of selected aspects of Aboriginal customary law by reference, but only in appropriate cases where there is broad agreement, including support from traditional Aboriginal people,to do so. This is a matter that could be subject to some form of ongoing study. The Committee invites suggestions and comment on the best way of achieving this. It would not be necessary to have any constitutional support for this process as the legislature could take action as it thought fit under its general law-making powers.

(g) In much the same way, there may be some merit in a continuation of the process of adjusting the general law to take into account selected aspects of Aboriginal customary law in appropriate ways. This is also a process that can be undertaken by the legislature under its general law-making powers, as well as by adjustments to court procedures, and does not need constitutional support. It is a process that is already well advanced in the Northern Territory in the various areas of the law discussed earlier in this paper.

(h) However, neither of these ongoing processes discussed in the two previous paragraphs really amount to any form of comprehensive recognition of Aboriginal customary law, and may not of themselves satisfy the requests for recognition by traditional Aboriginal people with whom the Committee has already come into contact. Without necessarily reflecting the views of the Committee, there are arguments in favour of going further and providing for some more general form of constitutional recognition. This would meet these requests made to the Committee for recognition, it would in turn give due recognition to the important place of Aboriginal people and their laws in contemporary Territory society, it would acknowledge the historical reality of prior Aboriginal occupation of the Northern Territory within the framework of the unique traditional systems of culture and law, and it may well contribute to some meaningful form of reconciliation and a sense of partnership between indigenous and non-indigenous Territorians.

(i) The difficulties of any more comprehensive form of recognition of customary law have, however, been recognised by the Australian Law Reform Commission, which recommended against it Australia-wide. These difficulties stem partly from the diverse nature of Aboriginal communities, varying from largely traditional societies on the one hand, to groups living in a largely westernised manner on the other, including in urban or near urban situations. Inevitably, any general recognition of customary law will lead to issues of demarcation and to problems of the inter-relationships between that law and non-indigenous law. While the Territory has a greater percentage of Aboriginal people leading traditional lifestyles, the situation is still not one of a discrete, homogeneous group of indigenous people living in accordance with a single code of customary law.

(j) There may be alternatives to any comprehensive form of recognition of customary law as an enforceable source of law, but which still acknowledge the importance of customary law in the lives of Aboriginal Territorians. One of these is suggested below, in the form of a constitutional preamble.

2. Preamble

An alternative to any comprehensive recognition of customary law would be to include a form of preamble in any new Territory constitution. This preamble could refer to the history and the prior occupation of the Territory by the Aboriginal people as distinct societies, with their own culture and law and how many of the descendants of those people continue to live in accordance with their own culture and law. Such a preamble might not be expressed to be legally enforceable in itself, but could have effect as an aid to the interpretation of Territory law. It would also have an educative effect and may assist in the process of reconciliation.

3. General Constitutional Recognition

(a) Any form of general constitutional recognition of customary law must, if it is to be legally meaningful, elevate that law to the status of a source of law in the Northern Territory, in a similar way as the other present sources of law in the Territory (see item D.1 para (d) above).

(b) However, clearly the matter is not just simply one of acknowledging the status of customary law as a source of law. In determining the form of any such recognition, a number of consequential issues also have to be addressed, including:

(i) whether all aspects of customary law should be recognised, or whether some exceptions are necessary or desirable;

(ii) who should be bound by customary law as so recognised;

(iii) whether customary law as so recognised should apply throughout the Territory or only in specified areas; and as a corollary, whether it should only be applied in areas under the jurisdiction or control of appropriate Aboriginal institutions;

(iv) the interrelationship and priorities between customary law as so recognised and the other sources of law in the Territory;

(v) how should customary law as so recognised be enforced and by what institutions.

(c) In a paper of this nature, it is only possible to canvas these issues in a most general way, without getting into the detail of particular laws. The purpose is to draw attention in broad outline to some of the main issues involved in any comprehensive recognition of customary law as a source of law. Comment is invited on these broad issues as well as on any matters of detail that any person may wish to raise.

Should there be any exceptions

(d) The Committee refers to the first of the five factors mentioned in paragraph (b), that is, whether there should be any exceptions to the types of customary law to be recognised. In this regard, the diversity and complexity of Aboriginal customary law has already been noted in this paper. Also noted is the fact that it is based on ideas and concepts radically different from "Western" ideas and concepts. The tendency to judge whether certain aspects of customary law are appropriate for recognition in the wider legal system, viewed from the perspective of a different cultural and legal background, has to be kept in mind to avoid any prejudicial judgment. On the other hand, there are an emerging set of international standards by which to judge the validity of any law, standards which are increasingly transcending particular cultural or legal derivations. These standards are becoming evident in the developing jurisprudence of human rights.

(e) In most cases, there will be no clash between indigenous customary law and these wider international standards. This is in part because the relevant international instruments give some prominence to cultural and indigenous rights. This is

recognised, for example, in Article 27 of the International Covenant on Civil and Political Rights, guaranteeing to members of ethnic, religious or linguistic minorities the right, in community with other members, to enjoy their own culture, to profess and practice their own religion, and to use their own language.

(f) However, all such indigenous rights have to balance against other fundamental rights and to any reasonable restrictions arising therefrom. There may be isolated examples where insistence upon the full application of existing indigenous rights under customary law could lead to an infringement of individual human rights. For example, certain forms of traditional punishment, such as spearing, may be seen as offending against the individual's right not to be subject to "cruel, inhuman or degrading treatment or punishment" (ICCPR, Article 7).

(g) These are very difficult issues, involving contemporary notions and values. It is a matter discussed in the Australian Law Reform Commission's Report, Vol I @ paragraphs 179-193, where the Commission, while accepting a need for adherence to international human rights norms, stressed the need to determine the application of those norms in the context of the particular society and not in the abstract or by reference to "western" expectations.

(h) Subject to this last-mentioned consideration, the Committee sees merit in a provision that would only recognise customary law as a source of law (if in fact it is to be so recognised) in so far as that law was consistent with international human rights norms or, as expressed in Papua New Guinea, the general principles of humanity (see also ILO Convention No 169, discussed in Item C.4 above). The inter-relationship between the two would of course be a matter to be worked out by the appropriate judicial institutions.

Who should be bound

(i) The Committee now refers to the second of the 5 factors in paragraph (b) above, that is, who should be bound by customary law if it is to be recognised as a source of law in the Territory. In this regard, it has already been noted in this paper that Aboriginal customary law is still commonly regarded as having an obligatory effect on a number of Aboriginal people in the Territory who have a traditional lifestyle and that in a real sense it can already be said to be part of the "law" in relation to those people.

(j) The question that follows from this is whether, if Aboriginal customary law is to be recognised as a source of law, its legal operation as so recognised should be limited to those Aboriginal people already so affected. The alternative of giving that law some wider application to the Territory community as a whole would be likely to involve serious objections, not only from non-Aboriginal people, but possibly also from people of Aboriginal descent who live a "westernised" life style and who no longer consider themselves, or have never considered themselves, as being subject to customary law. If some limitation of legal application is to be adopted by reference to specific categories of persons, there may be difficulties defining the lines of demarcation. In addition, objections to what would be a form of discriminatory legal pluralism may be voiced.

(k) There may in any event be some aspects of customary law that should perhaps apply to persons who do not lead traditional lifestyles, particularly where they reside or are present in Aboriginal communities. For example, customary rules as to secrecy or privacy in ceremonial matters.

(l) The Committee sees no easy answers to these issues, but would welcome comment.

Geographical limitations

(m) The Committee now refers to the third of the issues referred to in paragraph (b) above, namely, whether any recognition of customary law in the Territory should be limited geographically in some way, including whether it should only be applied in areas under the jurisdiction or control of appropriate Aboriginal institutions. In this regard, the Committee notes that a number of Aboriginal localities in the Territory are now governed under the system of community government. Other areas have their own local Aboriginal councils or committees under a variety of arrangements. None of these institutions presently have the legal power to apply Aboriginal customary law within their own areas.

(n) It would be possible to empower appropriate Aboriginal institutions to adopt and enforce customary law principles within their areas of jurisdiction. No doubt this would need to be subject to existing constitutional and statutory limits, a matter considered further below. It may also need to be integrated with existing judicial institutions having jurisdiction over the same area, to ensure effective means of enforcement, and also in association with any new Aboriginal institutions that might be created for the purpose of the application of customary law.

(o) One advantage of a geographical application of customary law is that it would allow that law to be applied in areas of exclusive or predominant Aboriginal populations in the Territory where traditional life styles were still observed. It also allows for Aboriginal control of, or at least close involvement in, the process of adoption and enforcement of that law. A geographical demarcation also has the advantage of simplicity and clarity, thereby avoiding the problems of demarcation spoken of in relation to any application of customary law by reference to specific categories of persons. It has the disadvantage that outside the specified geographical areas, customary law would still have no effect as a source of law except in so far as the general law otherwise provided. The latter effect could to some extent be countered by an ongoing program of study to consider how to give wider effect to customary law within the general law, discussed above in H.1 paras (f) and (g).

(p) The Committee notes in this context recommendations of the Queensland Legislation Review Committee which would, if implemented, allow Aboriginal self-governing local communities to adopt through their own constitutions aspects of customary law, with effect within the area of jurisdiction of those communities (see paragraph item F.4 above).

(q) The Committee would welcome comment on the methods whereby Aboriginal customary law, if it is to be recognised, could be given effect by reference to geographical criteria. Comment is also invited on which Aboriginal institutions could

appropriately be given power to apply customary law within their area of jurisdiction and by what mechanisms those institutions might give effect to customary law in that area.

Relationship between customary law and other sources of law

(r) The Committee now turns to the fourth of the factors mentioned in paragraph (b) above, namely the interrelationship and priorities between customary law if recognised as a source of law in the Territory and the other sources of law in the Territory. In this regard, it is quite clear that customary law must be applied consistently with the Commonwealth Constitution and with any relevant laws of the Commonwealth Parliament. This necessarily follows from the superior status of that Constitution and those Commonwealth laws, whether in relation to a State or a territory. In a similar way, if Aboriginal customary law is to be constitutionally recognised as a source of law in the Northern Territory, then that recognition would be subject to, and have effect in accordance with, the terms of that recognition as included in the new Territory constitution. The more difficult issue is to determine the status of that customary law in relation to Territory legislation and also the common law as applicable in the Territory.

(s) To a large extent, consideration of the issue raised at the end of the preceding paragraph is associated with the two questions posed in paragraphs (b) and (c) above; namely, whether any recognition of customary law should be limited by reference to specific categories of persons or by reference to specific geographical areas. If recognition is limited in either of these two ways, then it may usually be more practicable to tailor the general law to avoid any conflict with customary law as and when recognised. However, even with these limitations, there would be scope for inconsistencies to arise. A typical example would be where customary law accorded certain traditional hunting and fishing rights, and where in the interests of conservation the Territory introduced certain statutory limits or controls on hunting and fishing of native animals which could, if they had superior legal effect, impede the exercise of those traditional rights.

(t) As far as the common law in its application to the Territory is concerned, the Committee sees less cause for concern in this regard. The rules of customary law could be given equivalent status to the common law in its application in the Territory, in much the same way as applies in Papua New Guinea. There is much less likelihood of inconsistency arising between common law and customary law. The more likely result would be that the common law would expand to accommodate customary law, such as has recently occurred as a result of the High Court decision in Mabo, recognising customary indigenous rights to land of a proprietary nature.

(u) The decision in Mabo also recognised the superior force of statute law, both Commonwealth and State, including the power of the Crown pursuant to statute to alienate land and also to extinguish customary rights to land by a sufficiently clear legislative intention. There would seem to be compelling reasons in the wider public interest why superior status should be given to statute law over all customary law in this regard, to enable the legislature to deal with the exigencies of any given situation

and in order to change the general law where necessary to meet the needs of the time. This, for example, is the situation in Papua New Guinea.

(v) This could lead to concerns that Territory legislation could be used to override customary law and customary rights. However the danger of this occurring is limited by the operation of the Racial Discrimination Act of the Commonwealth. In addition any Territory legislative power could be subject to constitutional guarantees. For example, a requirement that the removal of any customary rights should only result from a clear legislative intention to that effect, and that if this involves any acquisition of "property" that this should only occur on "just terms", that is, subject to payment of fair compensation (cf: Commonwealth Constitution section 51(31) and Northern Territory (Self Government) Act 1978, section 50). Whether the superior force of statute should be subject to these or any other overriding constitutional guarantees, and if so, what form those guarantees should take, are matters upon which the Committee would welcome comment.

Enforcement

(w) Finally, the Committee turns to the fifth factor mentioned in paragraph (b) above, namely, if customary law is to be recognised as a source of law, how should it be enforced and by what institutions or mechanisms. In this regard, the Committee has noted above how there have been increasing demands for Aboriginal consultation and participation in the business of government and its effects on Aboriginal people. This paper has not previously dealt with the question of how this could be achieved in relation to the enforcement of customary law. It did note certain practices that have already been employed in the Territory, such as having Aboriginal justices of the peace to sit with magistrates when dealing with Aboriginal defendants, as well as proposals made for community justice schemes using traditional consultative methods in association with magisterial sittings.

(x) Difficulties may arise if customary law, as a comprehensive and recognised source of law, was to be applied and enforced generally by the existing general courts. The reasons for this have already been outlined above, and include the unique and distinct nature of customary law, the fact that it is unwritten and that much of it is secret, and that direct enforcement by the general courts would entail a real risk of the loss of control of that law by the Aboriginal people. It may not be practical option to vest jurisdiction as to all matters of customary law, at least in cases at first instance, in the general courts, with power to determine, apply and enforce that customary law. The Committee invites comment, however, on this point.

(y) Here may, however, be some situations where it might be appropriate to vest jurisdiction in the general courts in cases where some aspect of customary law arises. Examples have already been given above where the general law (statute or common law) specifically provides for particular aspects of customary law to be taken into account in some way, thus necessitating some reference by the general courts to that customary law. In other cases, appropriate arrangements could be made with particular Aboriginal communities to use the existing general courts for the purpose of applying customary law, rather than some other specialised justice mechanism tailored specifically for those Aboriginal communities. Where there is any conflict between

customary law and the general law, it might also be appropriate to vest jurisdiction in the general courts, perhaps with power to arrive at such decision as is just in the circumstances.

(z) An alternative to giving the general courts comprehensive jurisdiction with respect to customary law would be to establish a comprehensive system of special Aboriginal courts or similar institutions to deal with matters of Aboriginal law, such as has been used in Papua New Guinea and in parts of Queensland (see discussion in items G.5 and E.1 para (j) above). The Australian Law Reform Commission, in its Report Vol 2, looked in some depth at various models that have been tried along these lines, as well as other community justice options that have been tried or suggested (see in particular @ Chapter 31).

The range of options considered included:

(i) local Aboriginal autonomy over a range of law and order matters, to be exercised through local Aboriginal institutions of government;

(ii) Aboriginal courts or similar bodies officially constituted;

(iii) specifically designed structures aimed at overcoming the difficulties often experienced with Aboriginal courts (eg: the Yirrkala scheme);

(iv) bodies with power of mediation and conciliation (as distinct from adjudication);

(v) administrative measures for recognising Aboriginal customary law; and

(vi) changes to the existing courts, for example, by way of some form of "Aboriginalisation" of those courts.

(za) The Law Reform Commission, after considering arguments for and against a system of Aboriginal courts, recommended against a general scheme of such courts in Australia (paragraph 817). It stated that there was no indication that such a scheme could be welcomed by, or be workable in, the diverse range of Aboriginal communities It felt that it was better that such questions be considered in the broad context of proposals for local self-government. Particular courts could be established in response to genuine local demands or initiative, subject to certain basic standards. Alternatively, existing general courts could be retained if the local community so wished.

(zb) The Law Reform Commission noted that, with few exceptions, Aboriginal communities had not sought separate or independent justice mechanisms to be officially established. What they had often sought was improved working relationships with the police and the courts (paragraph 835). No one solution or straight forward answer appeared as to the extent to which Aboriginal communities should be given power to apply customary law in order to deal with Aboriginal offenders. In the view of the Commission, its only possible response was to present various options and to initiate, or further the process of discussion and consultation with a view to the eventual introduction of agreed justice mechanism proposals, there being no single preferred approach. The decision must rest with each Aboriginal community after

being fully informed of the various options (paragraph 838). The Commission considered the possibility of setting up an official agency to liaise with Aboriginal communities, groups and organisations to assist in the formulation of justice proposals tailored to meet the needs of the particular Aboriginals concerned. A variation of this suggested by Dr Coombs was for a non-governmental research service to be established for similar purposes. To a considerable degree, the Commission felt that the choice of the appropriate method depended on the wider issues of self-government and local customs (paragraphs 839-843).

(zc) There may well be considerable merit in a flexible approach to the introduction of justice mechanisms which comprise or include any reference to the application and enforcement of customary law. This could be done on an individual community by community basis, in consultation with the Aboriginals concerned and with existing Aboriginal institutions. One option might be to facilitate this by giving community governments the power to not only adopt customary law rules, but also to establish justice mechanisms to apply those rules as adopted, being in conjunction with or as supplementary to the wider legal system. Other options for community consultation and implementation could be considered, and the Committee invites comment and suggestions thereon In the absence of the adoption by the community concerned of any specific forms of implementation and enforcement mechanisms, then customary law would continue to be enforced in traditional ways outside of the wider general legal system.

(zd) Under these proposals, even if there was to be some form of constitutional recognition of customary law as a source of law, provisions for general enforcement of that law would be left to be determined in accordance with specific schemes prepared in consultation with the Aboriginals concerned and as subsequently put into legal effect by some appropriate mechanism.

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APPENDIX I

Part S - Aboriginal Rights: Extract from the Discussion Paper on a Proposed New State Constitution for the NorthernTerritory dated October 1987

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PART: S - Aboriginal Rights: Extract from the Discussion Paper on a Proposed New State Constitution for the Northern Territory - dated October 1987.

1. Comprehensive Commonwealth legislation in the form of the Aboriginal Land Rights (Northern Territory) Act 1976 presently applies in the Northern Territory. In the Option Paper entitled "Land Matters Upon Statehood" dated November 1986, it was advocated that this Act be patriated to and become part of the law of the new State upon the grant of Statehood by some agreed method. that Paper suggests that the process of patriation should include appropriate guarantees of Aboriginal ownership. In the absence of Commonwealth land rights legislation applying Australia-wide, the Select Committee in broad terms endorses this approach.

2. One option, favoured by the Select Committee, is to entrench these guarantees of Aboriginal ownership in the new State constitution, such that they can only be amended by following specified entrenchment procedures. The extent of these guarantees and the degree of entrenchment are matters upon which public comment is invited.

3. There is a question whether the new State constitution should go further in its reference to Aboriginal citizens of the new State. One possibility is to include in the constitution some fundamental principles of a non-enforceable nature in the form of a preamble which would give particular recognition to the place of those citizens in comtemporary society (and see Part T, paragraph 8 below).

4. Such a preamble could take many forms. It might, for example, recognize that the new State is now a multi-racial and multi-cultural society in which Aboriginal citizens are fully entitled to participate with other citizens on an equal, non-discriminatory basis under the law. Where special provisions are provided under new State law for any particular class or group of citizens, they should only have effect for so long and in so far as they are necessary to redress any continuing lack of equality of opportunity or other disadvantages.

5. In an address by Ms L Liddle to the 1986 Law Society Conference on Statehood, she indicated that the new State constitution should go further and recognize not only the current place of Aboriginal citizens in the new State, but also their historical rights, including their traditional ownership of the land the usurpation of those rights by European settlement.

6. There is undoubtedly some merit in recognizing the pre-existing circumstances of Aboriginal citizens of the new State, including as to their language, social cultural and religious customs and practices. Having regard to the desirability of maintaining harmonious relationships within the new State, it is preferable that any such recognition should be in a form acceptable to the broader new State community and compatible with its multi-racial, multi-cultural nature and the principles of equality and non-discrimination. The exact form this recognition should take is a matter for discussion.

7. The Select Committee makes no specific recommendation on these proposals but invites public comment.

APPENDIX II

List of submissions to the Committee

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List of written submissions to the Committee.

Submission No.	Name	Organisation
2(a)	Kevin Fletcher	
3	Wendy Whiley	NT Women's Advisory Council, Groote Eylandt
9		NT Local Government Association
11		Tangentyere Council Inc
13		Northern Territory Trades & Labour Council
14		Office of Equal Opportunity,
19	P McNab	
23	Ms Sheila Keunen	
26	Prof J M Thomson	Northern Territory University
32		Alice Springs Peace Group
34(b)	T S Worthington-Eyre	
35	R G Kimber	
36	Phillip R Hockey	
39	Dr Peter K Thorn	
42		Nat'l Spiritual Assembly of the Baha'is of Australia
48	Earl B M James	
49	Bruce Reyburn	
50		Julalikari Council Inc

List of oral submissions to the Committee.

Name	Place	Date
Mr Holland	Palmerston	28/3/89
Mr Winungij	Maningrid	02/5/89
Mrs J Hargraves	Batchelor	31/3/89
Mr V Forrester	Amoonguna	14/4/89
Mr Rioli	Pularumpi	11/5/89
Mr Mansfield	Oenpelli	09/5/89
Mr Tipungwuti	Nguiu	11/5/89
Mr Johnston	Lajamanu	13/3/89
Mr J Herbert	Lajamanu	13/3/89
Mr Nicholls	Lajamanu	13/3/89
Mr M Price	Lajamanu	13/3/89
Mr Finlay	Junkurrakur (Tennant Ck)	17/4/89
Mr J Havnen	Junkurrakur (Tennant Ck)	17/4/89
Mr Manyidjarri	Gapuwiyak	05/5/89
Mr J Havnen	Tennant Creek	16/7/88

List of oral submissions to the Committee (Cont'd)

Name	Place	Date
Mrs Kanromger	Tennant Creek	06/7/88
Mr MacMichael	Nhulunbuy	08/5/89
Mr MacMichael	Nhulunbuy	09/5/89
Mr Rungari	Dagaragu	13/3/89
Mr Martin	Jabiru	09/5/89
Mr Rainer	Angurugu	02/5/89
Mr H Bigfoot	Docker River	04/4/89
Mr V Forrester	Alice Springs	05/7/88
Mr I Yule	Alice Springs	05/7/88
Ms Gilmour	Alyangula	08/5/89
Mrs Waddy	Alyangula	08/5/89
Mr Donaldson	Alyangula	08/5/89
Mr Goldflam	Alice Springs	13/4/89
Mr D Collins MLA	Alice Springs	13/4/89
Mr P McNab	Darwin	10/8/88
Mr K Fletcher	Darwin	10/8/88
NT Women's Advisory Council	Darwin	10/8/88
Ms S Schmolke		
Ms M Bull		
Ms I Williams		
Office of Equal Opportunity	Darwin	10/8/88
Ms L Powierza		
Mr H Coehn		
Mr Perceval	Darwin	11/8/88
Mr A Hosking	Darwin	11/8/88
Mr K Ellis (TLC)	Darwin	11/8/88
Mr N Lynagh (NTLGA)	Darwin	11/8/88
Mr E James	Darwin	27/9/89
Mr D Shannon	Palmerston	28/3/89

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

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MARCH 1993

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Sessional Committee on Constitutional Development

DISCUSSION PAPER No. 5

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March 1993

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 Australian 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 <u>disadvantages</u> 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."

Chapter 6

Discussion Paper No. 6

Aboriginal Rights and Issues-Options for Entrenchment

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Sessional Committee on Constitutional Development

Discussion Paper No. 6

Aboriginal Rights and Issues — Options for Entrenchment

JULY 1993

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LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Sessional Committee on Constitutional Development

DISCUSSION PAPER No. 6

Aboriginal Rights and Issues - Options for Entrenchment

July 1993

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

CONTENTS

A. EXECUTIVE SUMMARY

(a) This paper considers options for possible inclusion of provisions within a Territory or new State constitution pertaining to the recognition of Aboriginal rights and other matters that would facilitate the creation and maintenance in the Territory of a single harmonious, tolerant and united community.

(b) The Committee stresses that it does not wish at this stage, to advocate any particular view or position as to the constitutional entrenchment of provisions relating to Aboriginal rights. The purpose of this paper is to stimulate debate and invite comments and suggestions by way of submissions to the Committee.

(c) Particular issues on which comment and suggestions are sought and which are discussed in more detail throughout the paper include:

(i) Should the Aboriginal Land Rights (Northern Territory) Act 1976 be patriated and become a Territory or new State law, and if so what form should it take?

(ii) What elements if any of the Land Rights Act need to be constitutionally entrenched in order to provide guarantees of Aboriginal land granted?

(iii) Should a Territory or new State constitution refer to any customary rights of the Aboriginal people, and if so how should they be dealt within the new constitution?

(iv) Should provision be made in a Territory or new State constitution to protect Aboriginal sacred sites and objects?

(v) Should a Territory or new State constitution entrench rights of Aboriginal communities in the Territory concerning self-determination and in what manner and form should any such Aboriginal self-determination take?

(vi) Should Aboriginal languages, customs, culture and religion be constitutionally recognised in some way?

(vii) Should there be special constitutional procedures adopted to recognise matters of concern to Aboriginal people that might be the subject of constitutional entrenchment, and if so what procedures should be used?

B. INTRODUCTION

1. 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 terms 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:
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> (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 and Australian populations."

2. Membership

The membership of the Committee presently comprises equal numbers of Government and Opposition members and includes one Aboriginal member of the Legislative Assembly from a traditional background.

3. Discussion and Information Papers

(a) The Committee has prepared and issued a number of papers arising from its terms of reference and relevant to the subject of this Discussion Paper, 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".

* Information Paper No. 1 on "Options for a Grant of Statehood".

* Information Paper No. 2 on "Entrenchment of a New State Constitution".

(b) The Committee has in these Papers indicated its preliminary views in dealing with a number of Aboriginal matters, not only as to the possible recognition of Aboriginal Customary Law, but also to other Aboriginal matters, and without considering those other matters in any detail.

Thus in its first Discussion Paper, mentioned above, it expressed a preference for a single member electorate system for the new State Parliament, with Aboriginal people participating in the same way as other non-Aboriginal people in the Territory on the basis of one person one vote and with no distinction on the basis of race (@ p31). The Committee in the same Paper in broad terms raised the possibility that, in the absence of Commonwealth land rights legislation applying Australia wide, the Aboriginal Land Rights (Northern Territory) Act 1976 of the Commonwealth could be patriated to and become part of the law of the new State by some agreed method. One option, favoured by the Committee, was to entrench guarantees of Aboriginal ownership in the new State constitution, such that they could only be amended by following specified entrenchment procedures. The Paper raised the possibility of the new constitution going further in its reference to Aboriginal citizens of the new State, to give particular recognition to their place in contemporary society. It suggested there was some merit in recognising the pre-existing circumstances of Aboriginal citizens, including as to their language, social, cultural and religious customs and practices, but made no specific recommendations on this issue. A copy of that Paper @ pp 93-94 is set out in Appendix 1.

(c) In the Committee's illustrated booklet "Proposals for a new State Constitution for the Northern Territory - Have Your Say", the Committee also dealt very briefly with Aboriginal rights.

(d) In the Committee's Information Paper No. 2 - "Entrenchment of a New State Constitution", the matter of how a new State constitution could be entrenched to prevent easy amendment was discussed. The Committee pointed out that the mechanism of entrenchment might be more important to some sections of the Territory public than others. For example, the Committee was aware that Aboriginal people maintaining traditional lifestyles were particularly concerned about their land, law, language and religion. The Committee stated that entrenchment in a new constitution could provide a legal method of safeguarding these interests and removing them from the control of politicians (@ pp 4-5).

(e) The Committee in its Discussion Paper No. 4 - "Recognition of Aboriginal Customary Law", examined in some detail the options for recognition of Aboriginal customary law as a source of law as part of the new State constitutional arrangements. A copy of the "Executive Summary" of that Paper is set out in Appendix 2. This present Discussion Paper will not examine the issue of recognition of customary law any further except in so far as it is necessary to do so incidentally.

(f) Most of the work of the Committee has, so far, been undertaken in conjunction with proposals for a grant of Statehood. However, as pointed out in Discussion Paper No. 5 - "The Merits or Otherwise of Bringing an NT Constitution into Force before Statehood" the proposals for a new constitution for the Northern Territory do not necessarily have to be implemented contemporaneously with such a grant. The options for and against some earlier implementation of a new constitution are considered in that Paper. This includes the question of what guarantees are to be provided if, for example, the Aboriginal Land Rights (Northern Territory) Act was to be patriated (see Item D.2 below).

(g) Since the issue of Discussion Paper No. 4 - "Recognition of Aboriginal Customary Law", the Committee has come to the conclusion that it should proceed to consider in more detail the options for dealing with a range of other issues relevant to Aboriginal citizens in the context of possible future Territory constitutional development. These issues include not only that of Aboriginal land rights, but also other issues such as self determination. These issues must be properly considered before any further comprehensive constitutional change in the Territory can occur. This Discussion paper seeks to address a number of these other issues and is issued for public comment.

(h) The Committee does not suggest that this present Paper covers every issue of concern to Aboriginal citizens of the Territory, nor does this Paper purport to comprehensively cover every point that should perhaps be addressed in preparing a new constitution for the Territory. It is issued to stimulate public debate and to invite comment on the matters raised in the Paper or on any other matters that any member of the public may wish to raise with the Committee.

4. 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 within a Territory or 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. Many of these visits were to Territory Aboriginal communities. The Committee has also invited public submissions on its terms of reference and received a large number of both written and oral submissions. These consultations will continue into the future as circumstances permit.

(c) The Committee has received a range of submissions on matters of concern to Aboriginal people during its community consultations, extending beyond matters of Aboriginal customary law. Such other matters as Aboriginal traditional rights to land and sacred sites have not infrequently been raised.

(d) There has been a commonly expressed desire by Aboriginal people to legally protect Aboriginal land and sacred sites. To a considerable extent the present law in force in the Territory achieves this, although not in a constitutionally entrenched way. In some matters of concern to Aboriginal people other than land rights and sacred sites, it is not always possible to discern a common view among Aboriginal people within the Territory.

It is hoped that by issuing this Discussion Paper, it will focus comments and clarify views on a range of matters, thus enabling options to be considered for further constitutional development.

(e) The Committee proceeds on the assumption that it is absolutely essential for Aboriginal people to be involved in the process of further constitutional development in the Territory. The Committee considers that without such involvement, the prospects of achieving major constitutional reform are negligible. Accordingly, the Committee calls upon all Territorians (Aboriginal and non-Aboriginal) to contribute to this present exercise by considering this Paper and by providing the Committee with constructive views and comments. The Committee remains willing, upon request and within the constraints of its budget, to undertake further community visits and consultation in order to explain this Paper, to answer any questions, and to receive submissions and comments.

5. Object of this Paper

(a) The main object of this Paper is to discuss options for possible inclusion of provisions in a Territory or new State constitution that would fairly reflect Aboriginal interests in partnership with other Territorians and which would facilitate the creation and maintenance of a harmonious, tolerant and united community. This is a subject of vital concern to the future of all Territorians.

(b) A constitutional settlement for the Territory that achieves a balance between the different groups in the Territory will be in the interests of all Territorians and should greatly assist to avoid the racial tension evident in other parts of the world.

(c) The Committee considers that special constitutional measures for indigenous peoples can be justified within the broad objective of this Paper, but only so far as they are fair and equitable, having regard to the legitimate interests and aspirations of all Territorians and taking into account all relevant resources and constraints.

C. HISTORICAL BACKGROUND AND ISSUES OF RECONCILIATION

(a) Upon European settlement of Australia, little account was taken of the position and rights of the Aboriginal residents in developing the constitutional framework of the new colonies. This approach was carried over into the framing of the Commonwealth Constitution, which came into effect upon federation in 1901. As a result, Aboriginals were only given recognition in that Constitution in a negative way, for example, by excluding them from being counted in reckoning the numbers of people of the Commonwealth or of a State (former section 127), or by exclusion from Commonwealth legislative power by reference to race (section 51 (xxvi) prior to the 1967 amendment).

(b) In more recent decades, Aboriginal citizens of Australia have been given a variety of legal rights and entitlements, generally by way of legislative change. The successful 1967 amendments to the Commonwealth Constitution removed the negative features of that document in relation to Aboriginal people and conferred legislative power on the Commonwealth Parliament to make special laws for people of the Aboriginal race. As a result, the Commonwealth Parliament has enacted a range of legislation as to Aboriginal people in the States; but that legislation is neither comprehensive nor (in some cases) of uniform application throughout Australia. To date there has been no constitutional recognition of the place of Aboriginal people, either in the Commonwealth or State constitutions (but see the final report of the Joint Select Committee of the Western Australian Parliament on the Constitution (1991) Vol. 2 @ p.3, which proposes a limited reference to Aboriginal people in the preamble).

(c) In the Northern Territory, full legislative capacity already existed in the Commonwealth Parliament even before the 1967 referendum. This is because of the status of the Northern Territory as a Commonwealth territory under section 122 of the Constitution, a status that has not changed with the grant of Self-government in 1978.

(d) The enactment of the Northern Territory (Self-Government) Act 1978 resulted in the conferral of a wide range of executive powers on the new Self-governing Northern Territory through its own Government and Ministers, extending to many matters of concern to Aboriginal people in the Territory. However, most matters relating to Aboriginal land in the Territory have remained a Commonwealth responsibility under the Aboriginal Land Rights (Northern Territory) Act 1976. As that Act is a Commonwealth Act, it is beyond the competence of the Northern Territory Legislative Assembly to alter or affect its operation, although it remains amenable to change by the Commonwealth Parliament under its ordinary processes. Other Commonwealth legislation that is of relevance in this context includes the Racial Discrimination Act 1975, the National Parks and Wildlife Conservation Act 1975 and the Aboriginal and Torres Strait Islander Heritage Protection Act 1984.

(e) The recent High Court decision in Mabo has recognised that at common law there can be enforceable indigenous rights to land according to the traditional laws and customs of those indigenous people. The same decision recognised that any such common law title was liable to extinguishment by Government, but subject to the operation of Commonwealth legislation such as the Racial Discrimination Act. In the Northern Territory this qualification extends to the just terms requirement in section 50 of the Northern Territory (Self-Government) Act (see Item D 2.3 below).

(f) There have been various calls for constitutional recognition of the place of Aboriginal people in Australia, but none have yet been implemented. Some of these are mentioned in Discussion Paper No. 4 - "Recognition of Aboriginal Customary Law", under the heading "Proposals for Reconciliation and Self-determination" (pp 11-15), see Appendix 3. It is not necessary for the purposes of this present paper to discuss these proposals in greater detail, as they all relate to the possibility of constitutional change at the national level. They include proposals for an agreement or treaty between Aboriginal and non-Aboriginal Australia as part of the reconciliation process, which may or may not be implemented by constitutional change at the national level.

(g) The Committee repeats its views expressed in Discussion Paper No. 4 - "Recognition of Aboriginal Customary Law" that it is in the interests of all Territorians to work towards a harmonious, tolerant and united society. There may be considerable merit in the comments of the 1991 Report of the Royal Commission into Aboriginal Deaths in Custody (Vol 5) that reconciliation should be an ongoing process which must have bi-partisan support, and which should not be limited to the concept of a single instrument of agreement (however called). It is clearly not just a matter for the Commonwealth.

(h) As stated in Item B.5 above, the main objective of this Paper is to discuss options for possible inclusion of provisions in a Territory or new State constitution relevant to matters of concern to the Aboriginal people. Such provisions could, if carefully drawn, facilitate the process of reconciliation and advance the cause of a harmonious, tolerant and united Territory community as part of a partnership between Aboriginal and non-Aboriginal Territorians. This could be done, either as part of the constitutional arrangements specifically adopted for a new State, or as part of any new constitutional arrangements for the Territory to be effected prior to any grant of Statehood.

(i) In this regard, the Committee notes the June 1989 Submission by the Northern Territory Government to the Commonwealth on "Full Self-Government- the further Transfer of Powers to the Northern Territory" and in particular those aspects of that Submission relevant to Aboriginals. The Committee, which is bi-partisan, does not wish to be seen as endorsing that Submission, but it does suggest that if all or any of the proposals in that Submission are to be implemented prior to any grant of Statehood, there is considerable merit in doing so in conjunction with adoption of a Territory or new State constitution. The Committee has already considered - in its Discussion Paper No. 5 - "The merits of bringing an NT Constitution into force before any grant of Statehood" - guarantees designed to protect the interests of Aboriginal

people in the Territory in respect of any further matters transferred to the responsibility of the Northern Territory could be secured by appropriate entrenchment arrangements in such a new constitution.

(j) The Committee is firmly of the view that the Territory should remain as one geographical and political entity, irrespective of what constitutional changes may occur in the future. So much is contemplated by the Committee's terms of reference and does not permit a consideration of other options. It is the responsibility of the Committee to frame options and proposals for a Territory or new State constitution that will provide a solid framework for a united Territory community.

(k) This can only be achieved on a long term basis, the Committee believes, if the constitutional arrangements are fair and reasonable for all Territorians, Aboriginal and non-Aboriginal alike. Given the view previously expressed that no further major constitutional change can occur in the Territory without Aboriginal involvement, it seems inevitable that at least some broad matters of principle relevant to Aboriginal and non-Aboriginal relations and the indigenous rights of Aboriginal people may have to be contained in any Territory or new State constitution. Matters of details may be relegated to ordinary legislation.

(l) The Committee accepts that whatever the constitutional or legal arrangements, the achievement of reconciliation and harmonious race relations is ultimately dependant upon appropriate individual values and attitudes. There is a limit to what can be achieved by written law.

(m) In so far as constitutional provision is eventually made on the matters addressed in the Paper, there will be issues of the degree of constitutional entrenchment desirable. This is addressed in Item H below.

D. ABORIGINAL LAND

1. Outline

(a) The Committee is of the view that ownership of land is of great importance to the Aboriginal inhabitants of the Northern Territory who still retain their traditional links to the land. So much is clear from the Committee's community consultations. The central place of land to Aboriginal traditions and beliefs has been more than adequately documented. Aboriginal identity is defined largely by reference to particular land. The links are first and foremost spiritual in nature. They are still strong in many parts of the Territory.

(b) The importance of land to indigenous peoples has been demonstrated at an international level. Reference should be made, for example, to ILO Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries (1989), and in particular to Part II of that Convention, which deals with indigenous rights to land.

(c) Aboriginal people already legally own significantly large areas of land in the Territory. Apart from any customary title to land of the indigenous people of the Territory (dealt

with below), most (but not all) Aboriginal land in the Territory is held under Commonwealth legislation.

(d) The Aboriginal Land Rights (Northern Territory) Act 1976 of the Commonwealth contains comprehensive provisions as to the granting of Aboriginal freehold title to Land Trusts for the benefit of Aboriginal people. Under that Act, a large portion of the Territory is already held as Aboriginal land, and a number of other areas are under claim and may be granted as Aboriginal land.

(e) The Act is administered on behalf of Aboriginals by Land Councils, and there is currently four such Land Councils, two of them being for the northern half and the central half respectively, and two Island Land Councils.

(f) There are statutory restrictions on any alienation of Aboriginal land under the Act. In addition, there is a once only Aboriginal veto on mining on that Aboriginal land, although ownership of minerals in the land is reserved to the Crown.

(g) Land claims under the Act are enquired into by Commissioners appointed by the Governor-General, with the final decision being made by a Commonwealth Minister on the recommendation of a Commissioner. Claims may be made to unalienated Crown land or alienated Crown land held by Aboriginals, provided it is land outside of a town. The basis of a land claim is that there is a local descent group of Aboriginals who have common spiritual affiliations to a site on the land with primary spiritual responsibility for that site and are entitled by tradition to forage over the land (see definition of *"traditional Aboriginal owners"* in section 3 (1) of the Aboriginal Land Rights (Northern Territory) Act 1976).

(h) Entry onto sacred sites (wherever located in the Territory - see Item E below), or onto Aboriginal land is controlled by the Act, with preservation of traditional Aboriginal rights of access to and use of Aboriginal land. The Northern Territory cannot compulsorily resume Aboriginal land, nor can it prevent or impede a land claim except on the legal grounds that a claim does not legally comply with the Act.

(i) The Northern Territory receives the royalties for its own minerals (which excludes uranium and similar substances) mined on Aboriginal land, but there is an equivalent payment made to Aboriginal interests by the Commonwealth. In addition, Land Councils negotiate agreements with miners which include monetary payments.

(j) Complementary Territory legislation provides for claims to Aboriginal living areas on pastoral leases and also for closure of seas to non-Aboriginals where adjoining Aboriginal land and within two kilometres. Other Territory legislation deals with community living areas excised from pastoral leases, protection of sacred sites, entry onto Aboriginal land and closed seas by a system of permits and provisions for wildlife on Aboriginal land or fishing on adjoining waters.

(k) The statutory provisions as to Aboriginal land are intertwined with the operation of the National Parks and Wildlife Conservation Act 1975 of the Commonwealth in relation

to Kakadu and Uluru National Parks, both of which are established under that Act and which are located, in whole or part, on Aboriginal land under lease for Park purposes.

(l) The statutory provisions as to Aboriginal land are also intertwined with the operation of the Ranger Uranium Mine under the Atomic Energy Act 1953 of the Commonwealth, which is located on Aboriginal land.

(m) There are also other Commonwealth Acts of relevance, such as the Environment Protection (Alligator Rivers Region) Act 1978, which would need to be considered in any proposal for patriation of the Aboriginal Land Rights (Northern Territory) Act.

(n) Other land in the Territory is held by Aboriginal people or organisations pursuant to a variety of arrangements under Territory legislation and may sometimes be called Territory Aboriginal title or land or enhanced Territory title.

2. Land Rights

(a) The Committee is of the view that no lasting constitutional settlement can occur in the Territory without some appropriate recognition of the importance of land to Aboriginal people in the Territory as the indigenous inhabitants. Whether this should occur in the form of constitutional provisions, and if so, the nature of those provisions, are matters for consideration.

(b) Any successful constitutional settlement in the Territory must balance the particular interests of the Aboriginal people in land with the wider interests of the whole community in land and land use and the proprietary interests of that wider community. The Territory is fortunate in that a great effort has already been made seeking to establish and operate such arrangements through ordinary legislation, being firstly the Aboriginal Land Rights (Northern Territory) Act and secondly a variety of Territory legislation. Whether these efforts have been entirely successful is a matter for judgment.

(c) The question that arises on any grant of Statehood is whether it is necessary, as part of those new constitutional arrangements, to have specific legislation, whether constitutionally entrenched or otherwise, dealing just with Aboriginal land. On one view, all land in the Territory should be held under the one system of land titles, and not under two parallel systems divided on racial grounds.

(d) However it has to be recognised that at present there is a dual system in the Northern Territory, and it seems inevitable that the question will have to be addressed, as part of any further constitutional advancement, as to what aspects (if any) of this dual system are to be carried over into a new constitutional setting.

(e) This raises very difficult and complex considerations which include the developing maturity of Aboriginal communities in the Territory and their right to make their own decisions with respect to their own land, their right to participate more fully in the wider community if they so choose, and yet the desirability of continuing certain protections and guarantees that are designed to maintain Aboriginal culture, customs

and laws and to recognise their unique status as the indigenous inhabitants of this country.

(f) One option, which is raised for discussion but not advocated by the Committee, is to dispense with the Aboriginal Land Rights (Northern Territory) Act and to absorb all Aboriginal land into ordinary Territory freehold title as part of one system. Presumably certain general guarantees would still apply; for example, no compulsory acquisition of property other than on payment of just compensation. This would still leave unsettled the position of any common law interests under the Mabo doctrine, discussed below.

(g) Another option is to patriate the Aboriginal Land Rights (Northern Territory) Act in some form to the Territory (new State).

(h) As mentioned above, the Committee has already raised the possibility in broad terms of the patriation of the Aboriginal Land Rights (Northern Territory) Act to the Territory in the absence of Commonwealth wide land rights legislation, providing it is subject to appropriate guarantees of Aboriginal ownership. The Committee is unaware of any firm proposals by the Commonwealth Government for new Commonwealth legislation applying Australia-wide other than recent suggestions, formulated in terms of broad principles, for legislation to deal with the consequences of the Mabo decision.

(i) There is no doubt that the Commonwealth has the legislative capacity if it so chooses to patriate the Act to the Territory by some appropriate method, such that it became the responsibility of the Territory and its Parliament.

(j) The Committee is aware, however, that there are views which oppose any such patriation and which advocate the continuance of present Commonwealth legislation. The view sometimes taken is that Aboriginal title under ordinary Commonwealth legislation is more secure than under Territory legislation.

(k) The Committee for its part accepts that patriation of the Act should not occur without adequate constitutional guarantees which are sufficient to protect vital Aboriginal interests, as mentioned above. In fact, the protection that could be accorded by such guarantees in a Northern Territory constitution could be more substantial than that under an ordinary Commonwealth Act (see Information Paper No.2 - "Entrenchment of a New State Constitution"). The present regime of Commonwealth legislation is liable to amendment by an ordinary Act of the Commonwealth Parliament.

(l) Subject to such guarantees, the Committee believes that it is desirable that the Territory as a new State should have the same powers as other State Parliaments (see the Committee's first Discussion Paper on a "Proposed New State Constitution for the Northern Territory" @ p. 9). The Committee does not see any justification for unequal treatment of the Territory in this respect. The Territory is entitled, and should, take its place in the Australian federation on an equal basis with the existing States.

(m) In the States, the present legislation dealing with Aboriginal rights to land is State legislation.

(n) The Committee therefore considers that, in the absence of Commonwealth-wide legislation, the law governing the ownership and control of land in the Territory as a new State should be new State legislation, but with appropriate constitutional guarantees. This applies, whether it is contained in a patriated Land Rights Act or in some other legislative arrangement.

(o) If patriation of the Aboriginal Land Rights (Northern Territory) Act is to take place, the basic options are -

(i) To patriate the Act in the form in which it presently exists, with only necessary administrative and transitional changes. The Act would then become a Northern Territory Act on the same terms as before (Note: this was in effect the proposal advocated by the Northern Territory Government in its June 1989 Submission to the Commonwealth); or

(ii) To patriate the Act with whatever substantial amendments that may be sought and agreed to by Territorians and accepted by the Commonwealth as part of the total constitutional package.

2.1 Patriation of the Aboriginal Land Rights (Northern Territory) Act in its Present Form

(a) Under the first of these two options, it would still be necessary to make certain minimal amendments to the Aboriginal Land Rights (Northern Territory) Act to reflect the change in responsibility from the Commonwealth to the Northern Territory (including references to the Governor-General and to Commonwealth Ministers). In addition, transitional provisions would be necessary to preserve existing appointments and actions, such as the tenure of existing Commissioners and the continuation of unfinalised land claims.

(b) The changes from Governor-General and the relevant Commonwealth Minister to Administrator (or new State Governor) and the relevant Territory (new State) Minister may give rise to questions. For example, decisions would need to be made in relation to the existing function of deciding whether or not to implement the recommendation of a land grant by an Aboriginal Land Commissioner (sections 11 and 12), whether or not to establish a new Land Council (section 21), whether or not to consent to an alienation of Aboriginal land (section 19) or to consent to the grant of a mining interest (sections 40 and 45). It may be considered that in some such cases, the Act should be amended in a more substantive way than by a mere substitution. This in effect would be to move to the second option, discussed below.

(c) If this first option was to be adopted, it would also be necessary to consider what form of constitutional guarantees (if any) should also be adopted and for which provisions of the patriated Act. Such guarantees should include that existing Aboriginal freehold titles under the Act continue in force in

accordance with the Act. This might involve restrictions on the powers of compulsory acquisition of Aboriginal land by Government - sometimes described as "enhanced freehold". As mentioned above, transitional arrangements could also provide for the continuance of existing land claims (but not any claims made after the termination date already contained in the Act).

(d) There will no doubt be considerable debate as to how much further any such constitutional guarantees upon any patriation should go. At one extreme, it could be argued that the whole Act should be entrenched as part of the new constitution, or at least all those parts of the Act that are transferred to Northern Territory responsibility. This would ensure that none of the Act could be later altered by the Territory or a new State Parliament without observing the special procedures prescribed in the new constitution for its amendment.

(e) However, this would create considerable inflexibility to meet later changed circumstances and would be contrary to the Committee's basic thinking that only the most fundamental type of provisions should be included in a constitution. Other matters should be relegated to ordinary legislation.

(f) Another option may be to include the Act, or at least the less fundamental provisions of the Act, in an "Organic Law" rather than in the constitution proper, with a less onerous form of entrenchment, although perhaps being more onerous and therefore offering greater guarantees than for ordinary legislation. A system of Organic Laws is used in Papua New Guinea under its Constitution. An example is the Organic Law on Provincial Government implemented under Part VI A (*Provincial Government and Local Level Government*) of that Constitution to provide for the establishment and management of a system of provincial government. These laws although not part of the Papua New Guinea Constitution have a special constitutional status and require the observance of a special parliamentary procedure for amendment.

(g) A further option would be to relegate all these less fundamental provisions to ordinary legislation, leaving only the fundamental provisions in the constitution.

(h) Any solution, other than the entrenchment of the whole Aboriginal Land Rights (Northern Territory) Act in the new constitution, would require an identification of those provisions of fundamental constitutional importance, leaving a residue of those provisions of less importance. Matters that might arguably be in the former category could include (albeit not as an exhaustive list):

(i) restrictions on the capacity of Government to prevent valid land claims proceeding to finality;

(ii) provisions to secure the office of the Aboriginal Land Commissioner;

(iii) limitations on the powers of compulsory acquisition by Government of Aboriginal land (but see Items D3 (c) above and D4 (c) (ii) below);

(iv) protections in respect of Land Councils;

(v) provisions to give Aboriginal owners reasonable control of mining on their land while still recognising Crown ownership;

(vi) guarantees of traditional Aboriginal access to and use of Aboriginal land and closed seas and against the abolition of existing entry restrictions.

(vii) A guarantee of royalty equivalent payments to Aboriginal interests (this may involve appropriate arrangements with the Commonwealth).

(i) The Committee makes no firm recommendations at this stage on whether there should be such guarantees and the extent and nature of any guarantees but would welcome comment and suggestions. The question of the degree of entrenchment is further dealt with in Item H below.

2.2 Patriation of <u>Aboriginal Land Rights (Northern Territory) Act</u> with amendments

(a) If the second of these two basic options was to be adopted, it would be necessary to identify those provisions of the present Act that could or should be amended. This would be a more controversial exercise and would no doubt give rise to problems of achieving a broad consensus among Territorians. However the Committee considers that it should raise all options for consideration in this Paper.

(b) The Committee does not at this stage wish to propose any specific amendments to the Act (other than those necessary amendments consequent upon patriation and already referred to above under the first option), but invites suggestions and comment from the public.

(c) Matters that could be considered for further amendment include:

(i) Whether all or any of the powers or functions of the Governor-General (Administrator or State Governor on patriation) and/or the relevant Minister need be retained - for

example, the requirement to approve certain forms of alienation of Aboriginal land by a Land Trust (s.19). Arguably this requirement may be seen, in some cases at least, as paternalistic. On the other hand, some controls may still be considered necessary to prevent undesirable transactions, for example, the mortgaging of Aboriginal land;

(ii) Whether there should be some limited powers of acquisition of Aboriginal land by the Government at reasonable compensation for essential public works - pipelines, public roads, schools, etc, but limited in some way to prevent abuse; for example, to that land which is actually required for those works and only for the period of those works, and perhaps after a public investigation of any alternatives. At present, no such power exists in the Aboriginal Land Rights (Northern Territory) Act (s.67) but such an arrangement has been included in respect of "enhanced Territory freehold";

(iii) Whether there should be any change to the mining provisions of Part IV, and designed to facilitate the expansion of mining and exploration on Aboriginal land but on terms acceptable to the Aboriginal owners.

(iv) Whether there should be any other changes designed to increase the powers and independence of the traditional owners of Aboriginal land or the Land Trusts, after appropriate consultation with the Aboriginal people directly concerned.

(d) Whatever amendments might be accepted, there will also be the question of what aspects of the Act in its amended form should be constitutionally guaranteed and in what manner.

(e) The Committee again stresses that it is not proposing any specific amendments to the Act. It is merely raising the matter for discussion and comment. It seeks the views of both Aboriginal and non-Aboriginal people as to whether they are happy with the Act as it is or whether they would like any changes, and the extent to which the Act in its amended form should be constitutionally guaranteed.

2.3 Customary Title

(a) As noted above, the High Court in the Mabo case (June, 1992) has held that the common law now recognises as enforceable any customary rights to land according to the traditional laws and customs of the indigenous people if they are still subsisting. That decision applied to the special circumstances of Torres Strait Islanders. Arguably the principles expressed in that case can be applied to the indigenous Aboriginal inhabitants in the Northern Territory in so far as they still have subsisting customary rights to land in the Territory.

(b) The High Court recognised that such customary rights to land were liable to extinguishment by the Crown by a sufficiently clear intention to do so - for example, by the grant of a freehold title to land. A majority of the High Court stated that such extinguishment did not carry with it a right to compensation, at least in those cases where there was no fiduciary duty owed by the Crown to the former customary owners. At the same time, the High Court made it clear that this was subject to any contrary Commonwealth legislation, such as the Racial Discrimination Act 1975.

(c) There is a question, yet to be judicially determined, as to whether enforceable customary rights extend beyond title to land and matters necessarily incidental thereto. For example, do they extend to customary rights to hunt and fish.

(d) In a previous High Court decision in Mabo (No. 1 - 1988), the Court held to be ineffective a recent Queensland statute designed to vest in the Crown in right of Queensland absolute title to the land in the Torres Strait Islands upon their acquisition by Queensland in the 19th Century, free of any customary rights to land, with no compensation payable, on the basis of inconsistency with section 10 of the Racial Discrimination Act.

(e) These decisions in Mabo have given rise to a query whether State or Territory legislation in force since the commencement of the Racial Discrimination Act, and under which Crown grants have been made that purport to have, or may have, the effect of extinguishing any subsisting customary title to the same land without any right to compensation, are also ineffective for the purpose of those grants.

(f) In the Northern Territory a query has also arisen as to whether Northern Territory legislation enacted since Self-government on 1 July 1978, and under which Crown grants have been made that purport to have the effect of extinguishing any subsisting customary title to the same land without compensation on just terms, is also invalid and ineffective for the purposes of such grants under section 50 of the Northern Territory (Self-Government) Act 1978. Subsection (1) of section 50 provides that the Legislative Assembly cannot legislate for the acquisition of any property other than on just terms (compare section 51 (xxxi) of the Constitution).

(g) A variety of claims have been made to land in the Northern Territory and elsewhere on the basis of customary title relying on the Mabo doctrine. At the time of issue of this Discussion Paper, none of these claims have been determined by a court.

(h) The Legislative Assembly of the Northern Territory recently enacted the Confirmation of Titles to Land (Request) Act. The Act requests the Commonwealth Parliament to enact legislation in the scheduled form, to validate existing land titles in the Territory as well as Commonwealth and Territory legislation (including future legislation) under which those titles were or are granted, with superior effect to any customary title to that land which might not otherwise be extinguished. In so far as the Commonwealth legislation would result in any acquisition of property in the form of customary title, a right to claim compensation on just terms from the Commonwealth is proposed. No legislative action has been taken by the Commonwealth on the request.

(i) The Legislative Assembly has also recently amended the McArthur River Project Agreement Ratification Act, designed to confirm and regrant the mining titles already issued under that Act, but subject to the payment of compensation on just terms for any resultant acquisition of property. This amendment was introduced at the request of the Commonwealth to enable the McArthur River Mine project to proceed notwithstanding any questions arising from the Mabo decision. The Commonwealth and the Northern Territory have been attempting to negotiate a package of proposals with representatives of the traditional owners of the region at the same time.

(j) In addition, negotiations have been proceeding at an inter-governmental level in an attempt to resolve the issues arising out of the Mabo decision on a national basis. At the time of issue of this Discussion Paper, no finality in those discussions has been reached.

(k) It may be that eventually there will have to be some permanent legislative or constitutional resolution on an Australia-wide basis of the legal issues arising from Mabo, perhaps in conjunction with a settlement of a wider range of issues pertinent to some form of reconciliation between the Aboriginal people of Australia and the Australian population as a whole. It also seems that any such resolution would require direct Commonwealth involvement. The Committee believes that it may be beyond the capacity of the Northern Territory and the States to effectively implement any such resolution without such Commonwealth involvement.

(l) This being so, there is a limit to which the matter of any customary title to land or other customary rights in the Territory can be dealt with in any Territory or new State constitution. The Committee merely notes at this stage that if references are to be made in that new constitution to any customary rights of the Aboriginal people of the Territory, it may be that the content of those references in their final form should await any resolution of the issues on this Australia-wide basis and should reflect the terms of any such resolution.

(m) The Committee is of the view that any Territory attempt to deal with this matter should, as a matter of principle, attempt to achieve a fair balance between Aboriginal and non-Aboriginal interests in any recognition of customary rights. It should also take into account the varying interests of different Aboriginals and Aboriginal groups, some of whom may be content to exercise their customary rights while others may wish to assert statutory or constitutional rights.

(n) The Committee is happy to receive submissions on whether the new constitution should refer to any customary rights of the Aboriginal people of the Territory, and if so, the nature and extent of those rights, how they should be dealt with in the new constitution, and the relationship between those rights as so referred to and the rights of other members of the Territory or new State community and with the Territory or new State legislature and government.

(o) To some extent, these issues have already been raised in Discussion Paper No. 4 - "Recognition of Aboriginal Customary Law"

E. ABORIGINAL SACRED SITES AND OBJECTS

1. Background

(a) Section 69 of the Aboriginal Land Rights (Northern Territory) Act 1976 prohibits a person from entering or remaining on a sacred site in the Northern Territory except in the performance of functions under that Act or otherwise in accordance with Territory law. Aboriginal persons may enter and remain on such a site in accordance with their tradition. The term "sacred site" is defined in section 3 as meaning a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that under Territory law is declared to be sacred to Aboriginals or is of significance according to Aboriginal tradition.

(b) This provision applies to all land in the Territory, whether or not it is Aboriginal land.

(c) Section 73 (1) (a) of the Act empowers the Legislative Assembly of the Territory to make laws providing for the protection of, and the prevention of desecration of, sacred sites in the Territory, including on Aboriginal land, including laws regulating or authorising entry on those sites, but so that any such laws provide for the right of Aboriginal access in accordance with tradition and shall take into account the wishes of Aboriginals relating to the extent to which those sites should be protected.

(d) Under this power the Legislative Assembly has enacted the Northern Territory Aboriginal Sacred Sites Act of 1989. That Act establishes the Aboriginal Areas Protection Authority, comprising a majority of Aboriginal custodians, which can on application register a site. Registration is prima facie evidence that the land is a sacred site. A person may apply to the Authority for an Authority Certificate to carry out

work on any land. There is a right of review to the Territory Minister from the Authority's decision.

(e) The above provisions do not protect sacred objects that are not part of the land. These can be protected as heritage objects or archaeological objects under the Northern Territory Heritage Conservation Act 1991 (and see the Regulations under that Act). In addition, the common law offers some protection in respect of confidential matters. It remains to be seen whether this protection will be extended by the courts under the Mabo doctrine.

(f) The Commonwealth may also apply a form of statutory protection to Aboriginal areas and objects throughout Australia, including the Northern Territory, under the Aboriginal and Torres Strait Islander Heritage Protection Act 1984. In addition, rights to sacred objects of literary or artistic merit, including the right to publication and reproduction, can be protected under Commonwealth copyright laws.

2. Constitutional Protection of Sacred Sites and Objects

(a) The Committee recognises that the protection of sacred sites is a matter of great concern to those Aboriginal people in the Territory who still retain traditional lifestyles and beliefs. This is a matter that was frequently pointed out to the Committee during its visits to various Territory communities. The close affinity that Aboriginal people in the Territory have with land is invariably associated with the significance they attach to particular sites on that land as part of their belief structure.

(b) The protection of sacred sites and objects is intimately connected to Aboriginal religious beliefs. The matter of Aboriginal religion is dealt with in Item G. 3 below.

(c) If the Aboriginal Land Rights (Northern Territory) Act is patriated and becomes a part of the law of the Northern Territory (or new State), this will include the provisions of sections 69 and 73 (1) (a) of that Act as well as the definition of a "sacred site", outlined above. The question then becomes the extent to which those provisions should be constitutionally entrenched, for example, should the Territory or new State constitution reflect the different customary requirements for entry to sacred sites and sites of significance.

(d) The Committee invites comments on the extent to which sacred sites in the Territory should be protected by appropriate constitutional means, and the extent to which this can be left to ordinary Territory (new State) legislation.

(e) Aboriginal sacred objects are not presently dealt with in the Aboriginal Land Rights (Northern Territory) Act, but as noted above, they can come within existing Territory legislation. There is a question whether they should be protected, or be capable of being protected, by some constitutional means beyond ordinary legislation, and if so, the nature of that protection.

(f) In deciding these matters, the protection already afforded by the Commonwealth through the Aboriginal and Torres Strait Islander Heritage Protection Act and other legislation should be taken into account.

F. SELF-DETERMINATION

1. Background

(a) The term "self-determination" is now in frequent use in the context of Aboriginal development in Australia. Sometimes the terms "self-management", "self-government" and "sovereignty" are used. They are not, however, terms of precise meaning. In their practical application they raise issues of great complexity. In the context of this Paper, "self-determination" is not used in the full international sense of sovereign independence as a separate nation-state, but in a more limited sense of real measure of autonomy within the existing national framework.

(b) Historically, the Aboriginal people of Australia acquired a much reduced level of control over their lives once confronted with the full impact of European settlement. There is little doubt that, generally speaking, this loss of control has had an adverse effect on Aboriginal communities and their culture. All Aboriginal people, to a greater or lesser degree, have had to make adjustments to accommodate the effects (good or bad) of modern civilisation. The time within which these adjustments have had to be made has generally been much shorter in the Northern Territory than elsewhere.

(c) There are now increasing calls for a greater degree of control by Aboriginal people over their own lives. To a considerable extent, this has been reflected in the demands for land rights. However in other respects, increased autonomy has been sought over a range of concerns. The discussion in Australia has centred mainly on the descriptive terminology relating to the socio-political and economic development of Aboriginal people rather than the detailed application of the process on the ground.

(d) The Report of the Royal Commission into Aboriginal Deaths in Custody has identified "self-determination" - the gaining by Aboriginal people of control over the decision-making processes affecting themselves, and gaining the power to make ultimate decisions wherever possible - a key underlying issue in dealing with the specific problem being addressed by that Commission.

(e) All Australian Governments have made a commitment in principle to Aboriginal self-determination (see paragraph 4 of the Report of the Commonwealth/ State/Territory/Local Government Working Party on "Achieving Co-ordination of Aboriginal and Torres Strait Islander Programs and Services" (August 1991), and the subsequent National Commitment of Australian Governments.

(f) Some Aboriginal people or groups have interpreted "self-determination" as meaning a form of separate and autonomous development outside of the existing federal system in Australia, although perhaps within the overall framework of the Australian nation. Self determination in this sense has been associated with claims to Aboriginal sovereignty and separate political development based on racial lines. A recent

international example is the establishment of the self-governing territorial government of Nunavut involving the Inuit people in Canada's north. This form of self-determination provides the capacity for the region to effectively govern and manage its own affairs within a larger political (sovereign nation) framework.

(g) As pointed out in the Committee's Discussion Paper No. 4 - "Recognition of Aboriginal Customary Law" such broader proposals raise issues going beyond this Committee's terms of reference. The Committee is committed by those terms of reference to reporting to the Legislative Assembly on a constitution for the Territory as a new State. It does not have any capacity to consider options that would result in the constitutional and geographical partition of the Territory into two or more parts on racial lines. The other theoretical possibility, that is, that the whole of the Territory should come solely under Aboriginal political control, to the exclusion of all other Australian citizens residing in the Territory, is not one which the Committee suggests it could possibly recommend.

(h) The task before the Committee is to frame recommendations for a new constitution, applicable to the whole of the Territory, and in which the legitimate interests and aspirations of all Territorians, both Aboriginal and non-Aboriginal, are reflected in a balanced and fair way. The object should be to create a framework for a partnership upon which a harmonious, tolerant and united society for all Territorians can be constructed. This requires that those participating in this exercise should work in constructive ways towards the definition of constitutional rules and principles that will assist in the reconciliation of the diversity of race, colour, attitudes and beliefs that now exists in the Territory, while at the same time providing for self-determination or within the framework of the existing or proposed constitutional structures.

(i) At an international level, it is now increasingly accepted that the right to self-determination does not necessarily mean a right to independence and to the completely separate development of indigenous people or minorities (see discussion in Item F3 below). That is, the group concerned can be given a real measure of control over its own affairs on a more localised basis, and at the same time be given a right to participate in the wider community on an equal basis with others. Such a measure of control and a right to participate should be capable of being reflected in broad terms at least in the constitutional arrangements governing the total society. As such it can be constitutionally guaranteed.

(j) The concept of self-determination in this sense involves two considerations. Firstly there is the question of the degree of autonomy to be accorded to particular indigenous communities in order to be able to run their own affairs within those particular communities, while at the same time remaining part of a wider political community. Secondly, there is the question of the degree to which special measures (if any) are to be taken in favour of those indigenous peoples to assist them to more fully participate in the affairs of that wider political community in order to reduce the disadvantages commonly experienced by indigenous peoples and others.

(k) Once it is accepted that some form of self-determination is a desirable goal in respect of Aboriginal peoples and Aboriginal communities or predominantly Aboriginal communities in the Territory, the question becomes one of how to integrate that goal into the wider framework of a politically unified and self-governing Territory community with its own new constitution. The Committee does not consider that there is any necessary inconsistency in this regard. Forms of internal controls and guarantees should be able to be devised and be made to operate within such a wider framework. However, ultimately much will depend upon the attitudes and goodwill of the persons involved and on a reasonable degree of co-operation between Aboriginal representatives and communities and governments.

(l) It follows that the Committee is anxious to consider options within which a form of self-determination can be secured to Aboriginal people in the Territory, or in particular parts of the Territory where it is sought, as part of any new constitutional arrangements. The Committee is completely open at this stage to suggestions as to the nature and extent of self-determination and how it is to be achieved and would welcome all comments and views. The Committee is particularly interested in the definition of rules and principles, suitable for inclusion in a new constitution for the Territory, that would assist in securing the desired form of self-determination on an ongoing basis. The comments following under this heading are intended to assist in informed debate and comment from this perspective.

(m) Some of the possible options may raise matters that are a federal responsibility, beyond the control of a Territory or new State constitution. These are not canvassed in detail in this paper.

2. Existing Position

(a) There are arrangements presently in place in the Northern Territory which are intended to give Aboriginal communities, or predominantly Aboriginal communities, some degree of control over their own affairs in a local context and to encourage their participation in the wider community. The extent to which these arrangements have been successful in this regard is a matter of some contention.

(b) Central to many of these arrangements are the existing legislative provisions for Aboriginal land rights, discussed in Item D above. These enable the traditional owners or occupiers of Aboriginal land to exercise specific controls over their land once it is granted and to a certain extent while it is under claim. It is not proposed to discuss the specifics of Aboriginal land further in this Item other than in so far as it impacts on community organisation and control. Suffice to note that only a proportion, although a significant proportion, of land in the Territory is Aboriginal land or is under claim as such.

(c) The extent to which Aboriginal owners of land can utilise any customary title to land under the Mabo doctrine has yet to be fully explored, and it is too early to say to what extent this will impact upon claims for greater Aboriginal control and management of their affairs. It may be significant.

(d) Controls that can be exercised over specific areas of land by recourse to proprietary rights to that land do not in themselves provide a comprehensive framework in the Territory upon which to construct a form of self-determination. Only part of the Territory is or will become legally recognised as Aboriginal land, and the issues of self-determination extend well beyond rights to land in any event.

(e) It seems clear that something more is required in terms of a constitutional framework beyond guarantees of Aboriginal land if self-determination is to be assured. In part at least this is dependant upon the availability of appropriate structures for the exercise of Aboriginal autonomy at a more localised level. This requires a consideration of the existing structures available in the Territory and the degree of control which is presently exercised and administered by Aboriginal communities in respect of their own local affairs.

(f) At a wider Territory level, various arrangements exist for encouraging Aboriginal participation in the community as a whole and for ameliorating their existing disadvantages. This includes a variety of programs and services designed for Aboriginal people and aimed at addressing any inequality. Many of the latter are federally sponsored but others are Territory Government initiatives.

(g) It is theoretically open to particular Aboriginal communities in the Territory to seek greater local control through the formation of a local government municipality under the Local Government Act. So far, this has not occurred. It is doubtful that this existing form of local government in the Territory is an appropriate structure to implement Aboriginal self-determination.

(h) The Local Government Act was amended in 1978 to introduce the concept of community government (see Part VIII of that Act). This form of government is not directed specifically at Aboriginal communities, although it has most commonly been utilised by those communities. It requires a minimum of 10 residents of an area outside an ordinary local government municipality to apply to the relevant Territory Minister for the establishment of a community government. A draft scheme is then prepared and advertised, and the Minister is obliged to consult with the residents of the area. The Minister may then approve the draft, with or without amendments.

(i) The community government scheme operates as a simplified form of local government under an elected council. The functions of a community government are expressed in the scheme and can cover a wide range of matters (see section 270). A community government can also make by-laws on a wide range of matters and can by those by-laws provide for the imposition of fines for breach (see section 292). By-laws are subject to tabling and disallowance action in the Legislative Assembly (Interpretation Act, section 63).

(j) A list of those communities in the Territory that have adopted this form of government, and the functions covered by each community government scheme, are set out in Appendix 4 to this Paper.

(k) There has been some debate and difference of views about the extent to which community government has been successful in achieving a degree of autonomy in Aboriginal communities under that scheme.

(l) In the Committee's first Discussion Paper on a "Proposed new State Constitution for the Northern Territory" (October 1987), the Committee noted the special situation of the Northern Territory, with vast areas not within any local government area. Some areas were covered by community government schemes but most areas were not subject to either. The Committee raised the question of the constitutional entrenchment of local government, but did not consider it in detail.

(m) A number of Aboriginal communities have chosen to use other mechanisms for the legal organisation of their community. In some cases they have used the mechanism of an incorporated association or trading association under Territory law (see the Associations Incorporation Act). In other cases, they have sought incorporation as an Aboriginal Council or Association under Commonwealth law (Aboriginal Councils and Associations Act 1976). A list of the various communities in the Territory established under Commonwealth legislation, and the manner in which those communities are established, is set out in Appendix 5 to this paper. A comparable list of those Aboriginal bodies incorporated under Northern Territory law is not available, but it is understood the number is significant.

(n) Some of these communities are located on Aboriginal land or community living areas, while others are not. In the case of some Aboriginal organisations (other than community government), their area of operation can overlap with that of an ordinary local government municipality (for example, the Tangentyere Council Inc. of Alice Springs).

(o) The Land Councils established under the Aboriginal Land Rights (Northern Territory) Act have functions which relate only to Aboriginal land or land under claim and the entry upon and use of Aboriginal land. These functions may be extended with the approval of the relevant Commonwealth Minister by a law of the Northern Territory (for example, in relation to entry upon closed seas adjoining Aboriginal land - see the Aboriginal Land Act), but it is clearly not intended that Land Councils should exercise the functions of local or regional government in the broader sense. They are not an appropriate vehicle for the implementation of policies of self-determination.

(p) In addition, under the Aboriginal and Torres Strait Islander Commission Act 1989 of the Commonwealth, not only is the Aboriginal and Torres Strait Islander Commission ("ATSIC") established, but also elected Regional Councils. The boundaries of the regions represented by these Councils do not generally coincide with State and territory borders. It is clear that these Councils are not intended to excise the functions of local or regional government in the broader sense, but have a much more limited role allied to the work of ATSIC. The policies of ATSIC require it to work with all governments while recognising the special responsibility of the Federal Government for Aboriginal people. It has a coordinating and advisory role at a Commonwealth level to ensure Commonwealth activities are integrated with

State/Territory and local government programs and service delivery. ATSIC has the objective in local government to :

" . *increase the participation of Aboriginal and Torres Strait Islanders in local government;*

. *increase opportunities for Aboriginal and Torres Strait Islander councils and organisations to access local government funding; and*

. *improve equitable services provided by local government to Aborigines and Torres Strait Islanders and their communities."*

(q) There is no overarching Aboriginal organisation in the Territory designed to bring together and co-ordinate the work of Aboriginal communities and to provide support services to them. Support is given however, by various Commonwealth and Territory Departments and their officers, as well as by various outside agencies, including churches. Aboriginal communities often tend to be overwhelmed by advisers on short term visits.

(r) Aboriginal communities in the Northern Territory, however established, are publicly funded from a variety of sources for a variety of purposes or programs, including through both Commonwealth and Territory Departments and ATSIC. This includes local government grants. This multiplicity of funding arrangements was criticised in the Report of the Royal Commission into Aboriginal Deaths in Custody. Funding arrangements are complex, but to some extent at least, the complexity results from the need for accountability in the expenditure of public money. There is a National Commitment to improve the outcomes in the delivery of programs and services to Aboriginal people.

(s) The question of funding raises issues not only as to the extent to which Aboriginal communities are involved in, or consulted on, the decision making processes in the expenditure of funds on those communities. It also raises issues of inter-governmental financial and policy relations, both in a Territory and on a national basis. Aboriginal funding has been the subject of on-going studies at various levels.

(t) Related issues also arise as to the extent to which the respective Commonwealth, State and Territory governments are or should be involved in the determination of priorities in expenditure and programs, and in the actual provision of services to communities. The National Commitment recognises both the special responsibility of the Commonwealth to Aboriginal people, including by way of provision of funds, as well as the role of State and Territory governments in delivering services to those people.

(u) There is no doubt that substantial progress has been made in recent years in the material development of many Aboriginal communities, although not necessarily on a uniform basis. Substandard conditions clearly still exist. Public funds have been used for a wide variety of purposes in the provision of resources and programs, but much remains to be done. Many communities continue to be heavily dependant on public

funds, and in particular where they do not have the benefit of income from resource developments.

(v) No doubt that Aboriginal communities are maturing in their capacity to handle their own community affairs under the impact of other influences and the less mendicant their position, the greater is likely to be their capacity to deal with relevant issues and concerns.

(w) Mention should be made of other Territory legislation that allows for the exercise of specific powers within communities. A good example is under Part VIII of the Liquor Act. A person may apply to the Liquor Commission to have an area declared to be a restricted area so that no liquor may be brought into it. The Commission must hold a public hearing in or near the area and ascertain the residents' opinions, before it can make a binding declaration. A number of Aboriginal communities have utilised this procedure.

(x) Several community justice arrangements have been proposed or tried for Aboriginal communities which involve more direct involvement of Aboriginals in the system or consultation with the Aboriginal people concerned. Reference should be made to the Committee's Discussion Paper No. 4 - "Recognition of Aboriginal Customary Law."

(y) There is the capacity under the Education Act with approval of the Secretary of the Northern Territory Department of Education to operate non-government schools designed primarily for Aboriginal children. The question of separate Aboriginal education in the Territory has been the subject of some contention over the issue of "mainstreaming".

(z) An accurate assessment of the extent to which Aboriginal communities generally in the Territory, or any particular Aboriginal community, already exercise a level of autonomy on matters affecting those communities or that particular community, would be a very difficult task. It is a matter that depends upon legal provisions (including provisions as to security of title to land), financial and administrative arrangements and practices (including the implementation of special programs designed for Aboriginal people), as well as the personal attitudes of those involved - both Aboriginal and non-Aboriginal.

(za) At the Territory wide level, there are many programs specifically designed to assist Aboriginal people and which may have an element of Aboriginal participation or control. As noted above, some of these are established under federal programs or have federal funding support. This includes some health services, legal aid services, aged care, alcohol programs, national parks etc. Others are sponsored or supported by the Territory Government. This includes educational services, housing, business support, Territory parks and the like. A document prepared and supplied by the Territory Government outlining its programmes and initiatives as to Aboriginals is at Appendix 6. This document is an extract from a more comprehensive paper and represents the views of the Territory Government. It is included by way of background information only and is not endorsed by the Committee.

(zb) At a political level, there are no special provisions for Aboriginal representation in the Territory. In the Legislative Assembly of the Northern Territory, Aboriginal voters and candidates participate in the same way as non-Aboriginals. There are no institutionalised arrangements requiring consultation with Aboriginal interests in the development of Territory policies and proposed legislation other than as imposed by the Aboriginal Land Rights (Northern Territory) Act and in complementary Territory legislation to that Act.

(zc) The Territory Government has recently established within its own structure a separate Government Department to deal with Aboriginal matters (The Office of Aboriginal Development) with its own Minister. There are no mandatory arrangements requiring any special accommodation to be made for Aboriginal participation within the Territory Public Service and Departments, although many Aboriginal or part Aboriginal people are employed in the service of the Territory Government and its authorities. In a few cases, particular categories of employees have been engaged, such as Aboriginal police aides. The Territory Government does not yet have an access and equity policy.

(zd) It should be noted that it is unlawful under the Racial Discrimination Act of the Commonwealth to deny Aboriginal people a right to equally participate in the affairs of the wider community and to receive the benefits of that wider community. Special measures for the sole purpose of the advancement of Aboriginal people are not unlawful. However there is no obligation to take such special measures.

3. International Considerations

(a) As noted above, there is an international right to self-determination. Such a right is reflected in the United Nations Charter (Article 1.2) and attaches to distinct "peoples". Australia is a party to that Charter. The right is repeated in Article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Australia is a party to both. By virtue of that right, the relevant peoples have the right to freely determine their political status and freely pursue their economic, social and cultural development. State parties have an international obligation to promote the realisation of the right to self-determination.

(b) The application of this right to former colonised territories has lead to the creation of many new nations in recent decades. The application of this right to minorities and indigenous people located within the borders of existing nation - states has proved to be much more difficult. As noted above, it is now increasingly accepted that the right to self-determination does not necessarily mean a right to independence and to completely separate development of minorities or indigenous people, but can, in some cases, include a more limited right of self-determination within the existing national framework. Whether the Aboriginal people of the Territory or Australia constitute distinct "peoples" for the purpose of the international right is a matter yet to be determined.

(c) ILO Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries, recently adopted by that Organisation in place of an earlier 1957 ILO Convention, does not mention the right to self-determination and puts to one side the wider international law implications of the term "peoples". It does, however, purport to confer specific rights on indigenous peoples within nation-states, and places international obligations on those nation-states to take certain action, including the promotion of full realisation of the social, economic and cultural rights of those peoples. In doing so, the nation-states must among other things consult with those peoples and establish means for the full development of their institutions and initiatives, and in the necessary cases, provide the necessary resources for this purpose. The people have the right to decide their own priorities for the process of development and to exercise control, to the extent possible, over their own economic, social and cultural development. They are also to have the right to equally participate in the wider community.

(d) A Working Group within the United Nations is proceeding with the drafting of a Declaration of the rights of indigenous peoples, but this has not yet been adopted by the United Nations.

(e) The International Year for the World's Indigenous People was declared by the United Nations for 1993, with the support of the Australian Government.

(f) Despite these and other international developments, implementation of any form of self-determination for indigenous people still remains primarily a matter for the nation-state concerned in consultation with those indigenous people within its borders and in accordance with its domestic law. International law has not yet developed to the point where other nation-states have a right of intervention or to take other such action against a particular nation-state where the latter has failed to take what might be considered to be adequate steps for the advancement of its indigenous people. Nevertheless, international obligations do exist, either in relation to indigenous people specifically or as part of general human rights.

4. Options for the Northern Territory

(a) The issue is to be considered, in the context of the development of a new constitution for the Territory, is the available options for securing a real measure of autonomy for Aboriginal communities, assuming this to be the desired goal. This includes the option of some constitutionally secure form of local government (presumably a form of community government), discussed separately below.

(b) As noted above, the options must be developed within the framework of one Territory (or new State) and must seek to balance the legitimate interests of both Aboriginal and non-Aboriginal citizens. The options should be seen as being part of a social and cultural partnership, designed to facilitate a harmonious, tolerant and united Territory community. As part of that partnership, the options should take into account the unique place of the indigenous inhabitants and their special right and interests arising from that fact. This should include the right to preserve their culture and identity. At the same time, it should be accepted that the non-Aboriginal residents also have an

entitlement to live and work in the Territory and to also regard it as their home. Because non-Aboriginal citizens comprise the majority of the Territory population, the partnership should include a consideration of the need for express protections of the position and rights of the indigenous minority. The question is to what extent (if at all) and in what manner should those protections be entrenched in constitutional guarantees.

(c) One option would be to constitutionally entrench a general right of Aboriginal communities in the Territory to self-determination expressed in very broad terms, leaving it to the courts to deal with any dispute that may arise. As pointed out above, there is a right to self-determination at International law, although the content of that right short of complete independence (in the case of indigenous people or minorities located within particular nation-states) is uncertain. In terms of an enforceable constitutional right, there may be thought to be clear dangers in entrenching such a broad right, particularly if it included a power in the courts to direct and control Territory or new State Government expenditure and priorities. Such an entrenched right was recently rejected in a Canadian referendum as part of a wider package of amendments to their Constitution.

(d) Another option may be to have a constitutional preamble, not in itself directly enforceable in the courts, which recites that it is the intention to provide for the maximum practicable level of autonomy for Aboriginal, or predominantly Aboriginal, communities in the Territory in respect of their own affairs, as part of self-determination. Such a preamble may not be legally enforceable, but it would provide a point of reference in the formulation of legislation, policies and programs.

(e) If a broadly expressed constitutional right to self-determination is not considered to be acceptable, and if a constitutional preamble to the same effect is considered to be too ineffective, the alternative is to consider a range of specific constitutional provisions which together would ensure an effective form of self-determination for Aboriginal communities. In this respect, a number of issues considered in other parts of this Paper are of relevance. Reference should be made in this regard to Item D (Aboriginal Land), Item E (Aboriginal Sacred Sites and Objects) and Item G (Aboriginal Language, Social and Cultural Matters and Religion). Community government options are dealt with below.

(f) There are a range of other matters likely to be of concern to Aboriginal communities and over which those communities may like a guaranteed measure of control, or at least to be involved in the decision-making as it affects those communities. These matters include -

* health and welfare
* education
* housing
* essential services
* natural resources
* planning and land use

* administration of justice and law and order
* the exercise of customary rights and practices
* environmental concerns
* local employment and training
* local arts, crafts, trades, community enterprises and other businesses
* liquor and gambling
* access and rights of residency

Each of these is a subject in itself and would require detailed consideration in the context of proposals for self-determination. This list is not intended to be exhaustive.

(g) One way in which matters such as those in the previous paragraph could be dealt with would be by expressly listing them (or any of them) in the matters within the responsibility of a specific form of government operating in Aboriginal communities in the Territory. However, such a form of devolution would presumably operate concurrently with, and would not exclude the capacity of, the Territory or new State to exercise control over the same matters if it so chose. It would also create a system of some inflexibility, in that responsibility for all those matters, but for no others, would automatically be vested in all those Aboriginal communities having that form of government, whether they wanted that responsibility or not. In some cases those communities may merely wish to be consulted or to have other forms of involvement or input short of total responsibility.

(h) An alternative to paragraph (g) above would be to confer a discretion on some appropriate entity to vest responsibility for specific matters on specific Aboriginal communities from within a wider list of matters (compare the Local Government Act, section 84 and Schedule 2 to that Act), thus giving some flexibility to meet the needs and wishes of particular communities.

(i) An even more flexible model would be to design a particular scheme for the government of each Aboriginal community. This is in fact the model used for community government under the Local Government Act, discussed in more detail below. This still involves a measure of Territory or new State control.

(j) All these models operate within the context of a particular type of local government institution, the legal framework for which is already established by law. It may be that some Aboriginal communities or groups may wish to not only identify the matters for which they are prepared to assume some responsibility and the extent of that responsibility, but also may wish to establish, or at least have input into the development of, their own unique institutions and arrangements, tailored to meet their cultural context.

(k) This gives rise to a consideration whether the Territory or new State should have a facility whereby it can negotiate legally binding forms of self-determination with and for particular Aboriginal communities, free of any pre-existing legal framework (although subject to the laws of general application). Provisions could be adopted which give such communities a right to instigate such negotiations, perhaps with

provisions for arbitration where agreement cannot be reached within a reasonable time. This would facilitate comprehensive agreements on a community by community basis. This could include matters such as land (including customary title to land) and its administration, institutions and powers of government, funding, facilities and services and other matters referred to in paragraph (f) above. The resultant agreement could be given an appropriate legal status, and could incorporate its own agreed mechanism for amendment. Some provision may be required to protect the rights and interests of any non-Aboriginal people either residing in such communities or having interests, including proprietary interests, in the area concerned. The relationship between any such agreement and Territory laws of general application would need to be determined.

(l) Some may argue that even this is not enough, and that meaningful self-determination within the Territory cannot be assured unless there is some over-arching Aboriginal organisation to co-ordinate and support individual Aboriginal communities. Whether such a view is correct, and whether the existence of such an organisation should be required by the law or left to Aboriginal voluntary initiative, are matters for consideration.

(m) Other matters that could be considered in a wider context, are possible Aboriginal seats in the Territory or new State Parliament, a matter previously considered by the Committee but not recommended. There may be other ways in which particular Aboriginal views and interests can be advanced or brought forward within the wider community and the Committee invites comments and suggestions.

(n) The Committee stresses that it is not advocating any of the above options at this stage, but is merely opening the matter for discussion and debate.

5. Community Government-Options

(a) The Committee, in its first Discussion Paper on a "Proposed New State Constitution for the Northern Territory" (October 1987) made the point that because of the special situation of the Northern Territory, there should be no obligation to have a form of local government (including community government) for all parts of the Territory. Any decision to extend local government was appropriately a matter for the new State in consultation with the local residents.

(b) On the other hand, arguably there should be a right to apply for a grant of local government (including community government) and to have the application fairly considered. Such a right could be constitutionally entrenched.

(c) Once local government (including community government) is established in any area, the question arises of whether that form of government should be constitutionally entrenched in some way, such that it cannot be arbitrarily abolished or its powers reduced. The Committee in its first Discussion Paper raised the question of constitutional entrenchment, but pointed out that this must take into account the special situation of the Territory and the associated difficulties of administration.

Subject to these considerations, the Committee said it favoured some constitutional provisions for the recognition of local government in the new State.

(d) An alternative to entrenchment of the position of local government (including community government) in a new constitution, or perhaps as a supplement to it, would be to provide for an Organic Law - as described in Item D.2.2.1, (f) above - on local and community government, to be made by the new State Parliament after negotiations with Aboriginal and other communities directly involved. Such a law could be made subject to special amendment requirements.

(e) There may also be grounds for reviewing the present provisions of the Local Government Act as to community government, to minimise Territory or new State governmental controls and oversight and to maximise the powers of community government within its agreed charter and functions. This has been discussed above. Whether such amendments would make community government a more acceptable option for Aboriginal self-determination is a matter for consideration.

(f) Public comments have already been received by the Committee on the matter of community government and its constitutional entrenchment. Mr Kevin Anderson of the former Northern Territory Community Government Association stated:

"I would say that the introduction of local government into remote communities in the Northern Territory has been one of the greatest initiatives taken by the government of the day in the Northern Territory, supported by the opposition. We believe that it has given people in remote communities an unprecedented opportunity to manage their own affairs and, obviously, our concern with any constitution of a future Northern Territory state is that it should protect the powers which have been devolved through legislation which incorporates remote communities as legitimate partners in the third tier of government. For that reason, our submission states that we would like to see any future constitution enshrine protection clauses of local government generally in the Territory. We do not wish to see any discrimination in terms of the way the community government is treated, as opposed to municipal government. We see them both as legitimate types of local government and do not subscribe to any distinction which sees municipal government as a superior form of 'traditional' local government. We believe that all local governing bodies in the Territory, whether in remote locations or in major municipalities,, are equal under the law. We would like to see that guaranteed in the constitution.
Our submission argues for constitutional recognition in accordance with 5 principles, these being:

- *general competence and autonomy for each local government body to act for peace, order and good government in its area;*
- *a secure financial basis;*
- *a proper recognition of the elected member's role;*
- *protection from dismissal of individual local government bodies without public inquiry; and*

. *due consultation prior to any changes to powers, functions, duties, responsibilities and financial resources."*

(g) On the other hand, Tangentyere Council Inc. expressed the view that it was not happy with the community government option, as the powers retained by the Territory Government were considered to be unacceptable. In its submission to the Committee, the Council raised concerns about the physical overlap of Aboriginal forms of local government with ordinary forms of municipal local government. It concluded:

"Therefore it is submitted that if the Committee wishes to proceed with formulating a constitutional recognition of local government it should include specific reference to the situation of Aboriginal Town Campers by:

- *ensuring that an Aboriginal local governing body can exist within another local governing body's boundary;*
- *to overcome any doubt about the limitations of the Racial Discrimination Act, specifically allow the Aboriginal local governing bodies to limit membership to Aborigines;*
- *specifically allow aspects of the constitutions of Aboriginal local governing bodies which are drafted according to Aboriginal tradition to override requirements on other local governing bodies for democratic elections where there is a conflict."*

(h) It would not be possible, by a Territory or new State constitution or by a Territory or new State law, to exclude the operation of the Aboriginal Councils and Associations Act 1976 of the Commonwealth in the Territory. Even if community government was to be given a more secure constitutional position in the Territory, some Aboriginal communities may still prefer to establish or continue their legal organisation under that Act.

(i) A more secure constitutional position for community government will not of itself necessarily guarantee a much greater degree of local autonomy for Aboriginal communities. However it does provide one framework upon which such greater autonomy can be constructed by other means.

(j) The Committee would welcome comments on the nature and extent of any constitutional guarantees of local government (including community government) and how these may be best designed to facilitate a real measure of autonomy for Aboriginal communities.

(k) Where community government is established over an area of Aboriginal land, issues arise as to how the powers and functions of that community government can be reconciled with the powers and functions of the traditional Aboriginal owners and custodians of that land. The Committee would also welcome comment on this issue.

(l) The Committee also welcome comment on whether there are any alternatives to community government for Aboriginal communities (other than under the Aboriginal Councils and Associations Act). Options include a possible expanded role for the traditional Aboriginal owners and custodians of Aboriginal land, as well as possible new forms of government on a local or regional basis. The latter was recently advocated in the Final Report of the Legislation Review Committee of Queensland relating to the "Management of Aboriginal and Torres Strait Islander Communities" (November 1991).

G. ABORIGINAL LANGUAGE, SOCIAL, CULTURAL AND RELIGIOUS MATTERS

1. Aboriginal Language

(a) At the time of European settlement of the area now known as the Northern Territory, a considerable number of Aboriginal languages were in common use. Many of these languages have survived today. A significant percentage of the Aboriginal people in the Territory still speak Aboriginal languages, in some cases as their first or second language. Most of these also speak the English language to varying degrees of proficiency. There is no one Aboriginal language which is common to all Aboriginal speakers.

(b) As noted in Item B3 above, the Committee has previously raised the question whether there should be some constitutional recognition of the pre-existing circumstances of Aboriginal citizens, including as to their languages.

(c) There is no general legal provision for English to be the official language of Australia or of the Territory, but it is commonly used as such. All governmental and official use is solely, or primarily, in English. A wide variety of other languages are also spoken in addition to English and Aboriginal languages. The Territory in particular is subject to a distinct multi-cultural influence in this regard as a result of immigration from many countries over many decades.

(d) There is at present no constitutional or statutory recognition of Aboriginal languages anywhere in Australia.

(e) The International Covenant on Civil and Political Rights, Article 27, to which Australia is a party and which is scheduled to the Human Rights and Equal Opportunity Commission Act 1986 of the Commonwealth, provides that in nation-states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to use their own language (see also ILO Convention No 169, Article 28).

(f) There is therefore a question as to what, if any, provision should be made in a Territory or new State constitution as to Aboriginal languages in use in the Territory.

(g) One option may be to recognise, by way of a preamble, the historical position of the Aboriginal people, including the fact that they spoke, and in many cases still speak, their own indigenous languages.

(h) Another option may be to recognise in the new constitution (proper) a right of the Aboriginal people to use their own indigenous languages within their own communities. If this option was to be adopted, it may also be necessary to consider whether to make English the official language to avoid any dispute as to which language could be used for official purposes, and as a result whether there should be a right to an interpreter in other languages (where it is practicable to provide an interpreter) in certain situations, for example, in a court on a criminal charge.

(i) There is also the question of whether there should be a right to be educated in a particular language.

2. Aboriginal Social and Cultural Matters

(a) To some extent, Aboriginal social and cultural matters have already been dealt with either elsewhere in this Discussion Paper or in the previous Discussion Paper No. 4 - "Recognition of Aboriginal Customary Law".

(b) As noted in Item B3 above, the Committee has previously raised the question whether there should be some constitutional recognition of the pre-existing circumstances of Aboriginal citizens, including as to their social and cultural customs and practices.

(c) There is no doubt that Aboriginal social and cultural customs and practices are quite distinctive when compared to those of the later immigrants to the Territory. There is an international right to the protection of minority cultures (see below) a right that no doubt extends to indigenous cultures. There has been some loss of indigenous culture and some limited degree of admixture of customs and practices between Aboriginal and non-Aboriginal peoples since European settlement under a variety of cross-cultural influences. However, many traditional Aboriginal customs and practices still continue in the Territory, and notwithstanding the impact of non-Aboriginal settlement. The Committee is aware of a keen desire by such Aboriginals still observing traditional lifestyles to maintain their customs and practices as far as is possible in the contemporary situation.

(d) Some international instruments are relevant in this regard. For example, the Universal Declaration on Human Rights (1948), Article 27, provides that everyone has the right freely to participate in the cultural life of the community. More specifically, Article 27 of the International Covenant on Civil and Political Rights provides that in those nation-states where ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with the other members of their group, to enjoy their own culture (see also ILO Convention No 169, Articles 2, 5, 7, 8).

(e) The general law in force in the Territory, both common law and statute, already protects Aboriginal customs and practices to some limited extent. For example, the

common law offers some protection to confidential Aboriginal information, copyright and design laws are available to protect certain Aboriginal literary and artistic works and designs, while other legislation protects sacred sites and objects (see Item E above). Some of these matters are a Commonwealth responsibility, beyond the control of the Territory or new State. The granting of Aboriginal land, the support of the Aboriginal outstation homelands movement and other factors have done much to encourage and preserve Aboriginal culture and society. However the dominating influence of European-derived culture and society and the market economy exert a heavy pressure on Aboriginal culture and society.

(f) The concern in Aboriginal communities living in accordance with traditional lifestyles about the erosion of Aboriginal society, customs and values is an issue that extends far beyond legal and constitutional matters and raises much wider cross-cultural, economic and social issues. There is little doubt that Aboriginal society is in a state of transition and that it is not possible to isolate that society from wider contemporary developments, but the Committee recognises that the Aboriginal communities should have a real say in how that transition occurs. The evidence is that changes that are thrust upon those communities can have very serious effects through damage to their culture and self-identity. To some extent, this transition reflects wider international developments that are impinging on Australia as a whole.

(g) Questions that arise for consideration include whether a Territory or new State constitution should make any reference to Aboriginal social and cultural customs and practices beyond that discussed elsewhere in this Discussion Paper or Discussion Paper No 4 - "Recognition of Aboriginal Customary Law". If so, should it be by way of a reference in a preamble to the new constitution or as some form of enforceable right in that new constitution. If an enforceable right, it would be necessary to determine the nature of that right and whether it should be subject to any limitations. The Committee is concerned that it might be difficult to precisely define such an enforceable right in a way that could be applied by a court, but it invites comment and suggestions.

3. Aboriginal Religion

(a) There can be no doubt that religious beliefs and practices were a vital and integral part of the traditional social system of Aboriginal people prior to European settlement. For many Aboriginal people in the Territory that still have traditional lifestyles and others, this continues to be the case. Aboriginal religion in its various forms is entitled to respect and recognition in the same way as any other religion in Australia.

(b) Aboriginal religion is directly associated with land and sacred sites on land and the beliefs associated with that land and those sites. It is also directly connected to matters of culture. The reader is referred to the earlier parts of this Discussion Paper in this regard. In fact, Aboriginal religion permeates all aspects of Aboriginal traditional life. Any guarantee of Aboriginal religion in a new constitution must take this into account.

(c) At an international level, there is a recognised right to freedom of religion or belief, including the right to change religion or belief, and to manifest a person's religion or belief in teaching, practice, workshop and observance (Universal Declaration of Human Rights, Article 18, International Covenant on Civil and Political Rights, Article 18 which recognises that the freedom is subject only to limitations prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedom of others, and the United Nations Declaration on the Elimination of all forms of Intolerance and of Discrimination Based on Religion or Belief, (1981). In relation to ethnic, religious or linguistic minorities, it is stated that they are not to be denied the right, in community with the other members of their group, to profess and practice their own religion (International Covenant on Civil and Political Rights, Article 27).

(d) In Australia, there is no guarantee of religious freedom, either at common law or under any constitutional or legislative provisions other than section 46 of the Tasmanian Constitution and the limited provision in section 116 of the Commonwealth Constitution, applicable only to the Commonwealth.

(e) The Committee has received submissions that there should be a guarantee of religious freedom in a Territory or new State constitution, perhaps along the lines of Article 18 of the International Covenant on Civil and Political Rights. The constitutions of many countries have a guarantee of religious freedom.

(f) In the alternative, it might be argued that there should be such a guarantee in relation to Aboriginal religion only. This would presumably be in addition to any constitutional provisions that might deal with Aboriginal land, sacred sites and other specific matters of concern to Aboriginal people.

(g) The Committee has no firm views at this stage on whether there should be a constitutional guarantee of freedom of religion in the Territory. It is, however, tentatively of the view that if there is to be such a guarantee, it should apply to all religions equally. It invites comments and suggestions on the matter generally.

(h) As noted above, the Committee has, in a previous Discussion Paper, raised the question whether there was some merit in recognising the pre-existing circumstances of Aboriginal citizens in the Territory, including as to their religious customs and practices (see Item B 3 (b) above). Any such recognition could, for example, be contained in the preamble to the new constitution. Alternatively, any constitutional reference to religious customs and practices could be in the form of an enforceable constitutional right. If the latter, then it would be necessary to determine the nature of that right and whether it should be subject to any limitations.

H. OPTIONS FOR ENTRENCHMENT

(a) Apart from its comments above as to patriation of the Aboriginal Land Rights (Northern Territory) Act, the Committee does not at this stage advocate the constitutional entrenchment of any particular guarantees of Aboriginal rights in the Territory. This is a matter for further discussion and debate. The Committee merely

notes that constitutional entrenchment of such rights is an available option in the development of any new constitution. It is of particular value in a multi-cultural society where otherwise minorities and the indigenous peoples may have real cause for concern that their rights may not be respected by future governments under a system of majority rule.

(b) There is no constitutional entrenchment of Aboriginal rights in the Northern Territory as present under Territory law. However Aboriginal interests have to some extent been catered for by some items of Commonwealth legislation operating in the Territory with superior force to Territory law. The Aboriginal Land Rights (Northern Territory) Act is the best example of this.

(c) The difficulty is that any further constitutional development of the Territory is likely to be inconsistent with the continued operation of such existing Commonwealth legislation in State-type matters. It is of the essence of constitutional development that there be a devolution of authority and responsibility. It is not possible for this to occur and at the same time retain the existing controls by or under Commonwealth legislation.

(d) As pointed out in the Committee's Discussion Paper No. 2 - "Entrenchment of a New State Constitution", the method of constitutional entrenchment can provide a legal method of safeguarding the rights and interests of the Aboriginal people and removing them from the control of politicians (see Item B.3 (c) above). In doing so, it has the potential to facilitate the path to further constitutional development in the Territory by reassuring both the Aboriginal community and the larger national and international community and the obtaining of the necessary acceptance by the Commonwealth Government and Parliament.

(e) The difficulty is to determine what matters might or should be entrenched and the degree of their entrenchment. The options as to which matters of concern to Aboriginal people might be the subject of entrenchment action have been dealt with in the preceding parts of this Paper. This leaves the question of the degree or method of entrenchment.

(f) It is not possible to give a single precise answer to this latter question. It very much depends upon the subject matter, the degree of importance placed by those persons concerned with that subject matter, and the social, demographic and political circumstances generally. The best the Committee can do at this stage is to indicate the types of entrenchment that could be considered.

(g) The two main options are:

(i) special procedures or majorities in the Territory or new State legislature; and/or

(ii) a referendum of Territory or new State voters.

It is possible to combine both these options.

(h) The Committee does not support any residual Commonwealth veto or other controls as a means of entrenchment, at least after a grant of Statehood. This would be inconsistent with devolution and the assumption of full State type powers.

(i) Some State constitutions require special majorities for the amendment of specific parts of their constitutions - for example, Victoria requires an absolute majority of all members of the Parliament and Tasmania requires a two-thirds majority of Parliament for certain amendments to those State constitutions, with no referendum of State voters.

(j) Other State constitutions contain some provisions which can only be changed by a successful referendum of State voters - for example, NSW, Queensland, South Australia and Western Australia. A variation of this might be to require a special majority of voters at such a referendum.

(k) At the federal level, under the Constitution (section 128), a national referendum requires a majority of electors in a majority of States, plus a majority Australia-wide.

(l) At an Aboriginal Conference on the future of Government in the Territory held at Alice Springs in 1989, the "Conference Statement" advocated a restricted franchise on the question of Statehood, requiring voters to have had one grandparent born in the Northern Territory and/or have had a minimum of 10 years residency in the Territory. The Committee does not, however, support such a restrictive franchise for purposes of entrenchment as it considers it anti-democratic, but it invites comment on the possible options as to the franchise.

(m) It may be possible to devise some other method of entrenchment which ensured that no amendments to constitutional provisions that directly affect Aboriginal rights shall be permitted without the endorsement of a majority of Aboriginal people in the Territory as voters, or in some other way representative of Aboriginal interests.

(n) There may be other options for methods of entrenchment apart from those described above which could be considered. For example, proposed amendments could be required to be considered and passed by a special constitutional convention in much the same way as the adoption of the new constitution in the first place. The Committee would welcome comments and suggestions on the matter generally.

APPENDICES

APPENDIX 1

Part S - Aboriginal Rights:
Extract from the Discussion Paper on a
"Proposed New State Constitution for the Northern Territory"
dated October 1987.

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Part: S - Aboriginal Rights: Extract from the Discussion Paper on a Proposed New State Constitution for the Northern Territory - dated October 1987.

1. Comprehensive Commonwealth legislation in the form of the Aboriginal Land Rights (Northern Territory) Act 1976 presently applies in the Northern Territory. In the Option Paper entitled "Land Matters Upon Statehood" dated November 1986, it was advocated that this Act be patriated to and become part of the law of the new State upon the grant of Statehood by some agreed method. That Paper suggests that the process of patriation should include appropriate guarantees of Aboriginal ownership. In the absence of Commonwealth land rights legislation applying Australia-wide, the Select Committee in broad terms endorses this approach.

2. One option, favoured by the Select Committee, is to entrench these guarantees of Aboriginal ownership in the new State constitution, such that they can only be amended by following specified entrenchment procedures. The extent of these guarantees and the degree of entrenchment are matters upon which public comment is invited.

3. There is a question whether the new State constitution should go further in its reference to Aboriginal citizens of the new State. One possibility is to include in the constitution some fundamental principles of a non-enforceable nature in the form of a preamble which would give particular recognition to the place of those citizens in contemporary society (and see Part T, paragraph 8 below).

4. Such a preamble could take many forms. It might, for example, recognise that the new State is now a multi-racial and multi-cultural society in which Aboriginal citizens are fully entitled to partic ipate with other citizens on an equal, non-discriminatory basis under the law. Where special provisions are provided under new State law for any particular class or group citizens, they should only have effect for so long and in so far as they are necessary to redress any continuing lack of equality of opportunity or other disadvantages.

5. In an address by Ms Liddle to the 1986 Law Society Conference on Statehood, she indicated that the new State constitution should go further and recognise not only the current place of Aboriginal citizens in the new State, but also their historical rights, including their traditional ownership of the land the usurpation of those rights by European settlement.

6. There is undoubtedly some merit in recognising the pre-existing circumstances of Aboriginal citizens of the new State, including as to their language, social cultural and religious customs and practices. Having regard to the desirability of maintaining harmonious relationships within the new State, it is preferable that any such recognition should be in the form acceptable to the broader new State community and compatible with its multi-racial, multi-cultural nature and the principles of equality and non-discrimination. The exact form this recognition should take is a matter for discussion.

7. The Select Committee makes no specific recommendation on these proposals but invites public comment.

APPENDIX 2

Executive Summary:
Extract from the Discussion Paper No.4
"Recognition of Aboriginal Customary Law"
dated August 1992.

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Executive Summary: Extract from the Discussion Paper No.4
"Recognition of Aboriginal Customary Law" - dated August 1992

A. EXECUTIVE SUMMARY

(a) This paper considers the question of whether Aboriginal Customary Law should constitutionally be recognised in some way in the Northern Territory and the option for doing this.

(b) The Committee stresses that it does not wish at this stage to advocate any particular view on the constitutional recognition of Aboriginal customary law. The purpose of this paper is to stimulate debate and invite comments and suggestions.

(c) Particular issues on which comment and suggestions are sought, and which are discussed in more detail in Item H below, include:

(i) Should Aboriginal customary law be legally recognised in the Northern Territory?

(ii) Should any such recognition be given constitutional force in a new Northern Territory constitution?

(iii) Should the recognition be by way of a non-enforceable preamble to that constitution?

(iv) Alternatively, should any such recognition be in the form of an enforceable source of law?

(v) If recognised as an enforceable source of law, should there be an exclusion of customary law that is inconsistent with fundamental human rights?

(vi) Should any recognition be limited to Aboriginal people who still have a traditional lifestyle?

(vii) Should any recognition be limited geographically to areas under the jurisdiction or control of appropriate Aboriginal institutions?

(viii) Should any recognition be subject to any overriding Territory statue law? If so, should it be subject to appropriate constitutional guarantees of customary rights?

(ix) If customary law is recognised, how should it be applied and enforced? - By the existing general courts, by a new system of Aboriginal courts or by some other flexible scheme designed in consultation with each Aboriginal community? Alternatively should it be left to traditional methods of enforcement?

(x) Whether or not customary law generally is recognised, should there be some ongoing study to consider further legislative incorporation of selected aspects of customary law by reference, or the adjustment of the general law to take into account selected aspects of customary law?

APPENDIX 3

Proposals for Reconciliation and Self-determination
Extract from the Discussion Paper No.4
"Recognition of Aboriginal Customary Law"
dated August 1992.

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(a) The Aboriginal people of the Northern Territory comprise in excess of one quarter of the population of the Territory. While all of these people may not live according to traditional lifestyles, the number that do is still significant in percentage terms. It may be thought desirable that there be some form of recognition of their role within the wider Northern Territory society with a view to establishing and maintaining harmonious relations between Aboriginal and non-Aboriginal people in the Territory as equals.

(b) Historically, as has been discussed above, relations between Aboriginal and non-Aboriginals have not always been good. The Northern Territory was treated by its first European settlers as if it was uninhabited apart from the few nomadic indigenous peoples. These peoples were frequently regarded as being inferior and their laws and customs were generally ignored. Some of the new immigrants thought them to be a race of people who would generally die out.

(c) In more recent times, various policies have been devised to seek some form of accommodation with the Aboriginal people, including by way of assimilationist policies (from about 1937) and integrationist polices (from about 1962). These policies tended against any discussion of the possible recognition of customary law.

(d) A significant change in thinking occurred around the time of the passage of the 1967 national referendum, giving the Commonwealth Parliament concurrent power with the States to enact special laws for the people of any race (Constitution, section 51 (xxvi). This gave rise to new legislation and a series of programs, federal and State/Territory, designed to provide assistance to Aboriginal people, although the referendum made no difference to the Commonwealth's plenary powers in the Northern Territory. It did not give Aboriginal people and their laws any form of constitutional recognition.

(e) The difficulty in designing such programs is to find a balance between genuine assistance to ameliorate the disadvantages still experienced by many Aboriginal people and intrusion or dependency-creation. The concerns in this regard have lead to increasing demands by the Aboriginal people themselves for greater consultation and participation in the design and management of programs.

(f) At a federal level new approaches are being sought which stress consultation and greater participation by Aborigines. While most Australians may agree with this in principle, further discussions and practical outcomes has only just begun. It is not appropriate in this paper to enter into detailed discussion of these matters.

(g) At a community level in the Territory, the experience of the Committee is that there is frequently a desire for local Aboriginal self-management within the framework of the wider community, wherever possible based on links with the traditional tribal lands, and with preservation of customary law and traditional society.

(h) This approach has been complemented by efforts seeking to increase that involvement of Aboriginal people in the wider community. There have, for example, been extensive efforts to encourage Aboriginal communities to incorporate as community government councils under the Local Government Act of the Territory. However, some communities have preferred to use the medium of the Aboriginal Councils and Associations Act of the Commonwealth or to remain as an incorporated association.

(i) Apart from local government, and the special provision made for the role of Territory land councils, under federal legislation and complementary Territory legislation, Aboriginal residents of the self-governing Northern Territory have generally been expected to use the same channels as other Territorians in order to participate in Territory decision-making processes within the wider community.

(j) No special provision has been made by the Commonwealth for the representation in Parliament of Aboriginals at either federal or Territory level. Under the Northern Territory (Self-Government) Act 1978, the single member electorates for the Territory Legislative Assembly are to be distributed in accordance with a 20% quota rule (section 13(5)), without regard to race.

(k) The two main Aboriginal Land Councils in the Northern Territory, established under the Aboriginal Land Rights (Northern Territory) Act 1976 of the Commonwealth, have taken a leading role in pushing for greater Aboriginal control in various matters, including as to land. Land Council support was given to a Conference in Alice Springs in June 1989 on the Future of Government for Aborigines in Central and Northern Australia. That Conference advocated autonomous Aboriginal local and regional self-government with direct links with the Commonwealth, and not as part of the Northern Territory.

(l) The concepts of Aboriginal self-management and self-sufficiency are explicitly stated to underlie the Aboriginal and Torres Strait Islander Commission Act 1989 (see in particular section 3), or "ATSIC' for short.

(m) Proposals for self-government or self-determination have generally been concerned more with enclave forms of separate development of Aboriginals in a distinct group. They are not so much concerned just with the preservation of traditional society within and as part of the wider State or Territory community. These broader proposals raise issues going beyond this Committee's terms of reference. In any event, the Committee, although not of a final view on the matter, does not consider that any recognition of customary law is an appropriate method for achieving Aboriginal self-government or self-determination. The issues concerning possible self-government or self-determination are much broader. The full range of problems experienced by Aboriginal people generally in the Northern Territory in their contact with the wider constitutional and legal system will not be solved just by recognition of customary law.

(n) Alongside, the development of concepts of self-government, self-determination or self-management, the concept of a "Makaratta" or treaty between Aboriginal and

non-Aboriginal Australians has developed in recent years. This originated in the late 1970's with calls by Dr H C Coombs, Judith Wright, Stuart Harris and others. The concept was to use such a mechanism to recognise the historic rights of Aboriginal people to the Continent, and to work towards a reconciliation between the two groups. It could include provision for the maintenance of tribal laws.

(o) This call was supported in 1983 by the Senate Standing Committee on Constitutional and Legal Affairs when it called for a constitutional amendment to provide for a treaty. This approach was subsequently endorsed by the Advisory Committee in its Report on Individual and Democratic Rights 1987, but not accepted by the Constitutional Commission in its Final Report of 1988 until such time as an agreement with Aboriginal people had been negotiated. A referendum for this purpose has not so far resulted.

(p) In 1988, Prime Minister Hawke announced in the Barunga Statement that there would be a treaty negotiated between the Aboriginal people and the Commonwealth Government on behalf of all the people of Australia.

(q) The current federal Minister for Aboriginal Affairs has stated that there will be an instrument of reconciliation, which should be achieved by the Centenary of Federation, 1 January 2001. The Commonwealth Parliament has enacted the Council for Aboriginal Reconciliation Act 1991 to promote the process of reconciliation, including a consideration of whether it would be advanced by formal document or documents of reconciliation. The Act ceases to operate on 1 January 2001.

(r) The 1991 Constitutional Centenary Conference, in its concluding statement, resolved that there should be a process of reconciliation between the Aboriginal and Torres Strait Islander peoples of Australia and the wider Australian community, aiming to achieve some agreed outcomes by the Centenary. It said that this process should among other things, seek to identify what rights these peoples have and should have as the indigenous peoples of Australia, and how best to secure those rights, including through constitutional change. As part of that reconciliation process, the Commonwealth Constitution should recognise these peoples as the indigenous peoples of Australia.

(s) The Committee does not wish to comment on the proposals for reconciliation at a national level, as this is outside its terms of reference. It is, however, concerned with the issue of reconciliation between the Aboriginal and non-Aboriginal residents of the Northern Territory and in particular how that might be assisted by the adoption of a new constitution for the Territory. It would seem to be in the interest of all Territorians to work towards a harmonious and tolerant society. There may be considerable merit in the comments in the 1991 Report of the Royal Commission on Aboriginal Deaths in Custody (Vol 5) that reconciliation should be an ongoing process which must have bi-partisan support, and which should not be limited to the concept of a single instrument of agreement (however called). It is clearly not just a matter for the Commonwealth.

(t) One of the arguments in favour of some form of constitutional or legal recognition of Aboriginal customary law within the Territory is that it may well advance the process of reconciliation. The question of whether any such recognition could or should take place, and the options for same, including by way of provisions of a new Northern Territory constitution, are dealt with in Item H below.

APPENDIX 4

Northern Territory Community Government Schemes
As At June 1993

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Functions	Lajamanu	Angurugu	Milakapati	Pirlangimpi	Mataranka
1. the establishment, development , operation and maintenance of communication facilities for the community government area and in so doing the council may enter into a contract with the Australian Telecommunications Commission to act, for reward, as the agent of the Commission;	Yes	Yes	Yes	Yes	Yes
2. the establishment and maintenance of parks, gardens and recreational areas and carrying out landscaping and other associated works;	Yes	Yes	Yes	Yes	Yes
3. the establishment and maintenance of sports facilities, libraries, a cinema, community halls, public toilet and ablution blocks and laundry facilities;	Yes	Yes	Yes	Yes	Yes
4. the provision of a service for the collection and disposal of garbage, the maintenance of particular places where garbage is to be dumped, and the control of litter generally;	Yes	Yes	Yes	Yes	Yes
5. the provision and maintenance of sanitation facilities and the removal of health hazards;	Yes	Yes	Yes	Yes	Yes
6. the provision and maintenance of sewerage, drainage and water supply facilities;	Yes	Yes	Yes	Yes	Yes
7. the supply of electricity by contracting with a government department or statutory authority responsible for providing electricity, and action, for reward, as an agent in respect of the collection of electricity charges;	Yes	Yes	Yes	Yes	Yes
8. the provision of adult education and vocational and other training;	Yes	No	No	Yes	Yes
9. the provision and maintenance of housing for residents and their families on such terms and conditions as the council thinks fit;	Yes	Yes	Yes	Yes	Yes

Functions	Lajamanu	Angurugu	Milakapati	Pirlangimpi	Mataranka
10. the provision of relief work for unemployed persons;	Yes	No	No	Yes	Yes
11. the promotion and provision of community welfare, health and care facilities for all age groups within the community government area and the provision of appropriately trained staff to provide counselling or temporary assistance;	Yes	Yes	Yes	Yes	Yes
12. the prevention and control of substance abuse;	Yes	No	No	Yes	No
13. the maintenance of a cemetery or cemeteries;	Yes	Yes	Yes	Yes	Yes
14. the control or prohibition of animals within the community government area;	Yes	Yes	Yes	Yes	Yes
15. the development and maintenance of roads, boat ramps and channel markers within the community government area (including the provision of street lighting and traffic control devices) and, for reward, the development and maintenance of roads, both ramps and channel markers outside the community government area;	Yes	Yes	Yes	Yes	Yes
16. the maintenance of an airstrip and facilities related thereto;	Yes	No	Yes	Yes	Yes
17. the hiring out, for reward, of any plant, appliance or equipment belonging to the council and the repair and maintenance, for reward, of any plant appliance or equipment not owned by the council;	Yes	No	Yes	Yes	Yes
18. the contracting of works projects within or without the community government area;	Yes	No	Yes	Yes	Yes
19. the establishment and operation of pastoral and commercial enterprises;	Yes	Yes	Yes	Yes	Yes

Functions	Lajamanu	Angurugu	Milakapati	Pirlangimpi	Mataranka
20. the establishment and operation of a post office agency and bank agency;	No	Yes	Yes	Yes	No
21. the selling of petroleum products;	Yes	No	Yes	Yes	No
22. the establishment and maintenance of a fire-fighting service, including the acquisition of property and equipment and training of personnel for the service, and the protection of the community government area from fire;	Yes	No	Yes	Yes	Yes
23. the promotion and development of tourist attractions, and provision and maintenance of tourist facilities, within the community government area;	Yes	No	No	Yes	Yes
24. the production and selling of artefacts and souvenirs;	Yes	No	No	Yes	Yes
25. the management and control of sites of historic interest;	Yes	No	No	Yes	Yes
26. the maintenance and preservation of Aboriginal law and custom;	Yes	No	No	Yes	No
27. the support and encouragement of artistic, cultural and sporting activities.	Yes	No	No	Yes	Yes
28. the provision of such public transport within the community government area as the council thinks fit.	No	No	Yes	No	No
29. the distribution of social service benefits	Yes	No	No	No	No
30. the receipt of money, grants or gifts of property paid or made to the Council	No	No	No	No	No
31. The production and distribution of Publications relating to the functions of the Council.	No	No	No	No	No

Functions	Lajamanu	Angurugu	Milakapati	Pirlangimpi	Mataranka
32. The Establishment and operation of a licensed Abattoir under the *Abattoir & Slaughtering Act* .	No	No	No	Yes	No
33. Selling of goods or equipment purchased by the Council for or in connection with any enterprise and found to be in excess of the Council's immediate needs.	No	No	No	Yes	No
34. The operation of a bakery, general purpose shop, bookshop, printing enterprise, market garden, mechanic workshop and any contract for work currently in existence.	No	Yes	No	No	No
35. Liaison with, and the giving of advice to the Wampana Progress Association in the management of the Lajamanu Shop, and the provision of non-financial assistance to that Association and to any other commercial interest within the Community Government area.	Yes	No	No	No	No

Functions	Elliott	Wallace Rockhole	Yugul Mangi	Nauiyu Nambiyui	Dagaragu
1. the establishment, development , operation and maintenance of communication facilities for the community government area and in so doing the council may enter into a contract with the Australian Telecommunications Commission to act, for reward, as the agent of the Commission;	Yes	Yes	Yes	Yes	Yes
2. the establishment and maintenance of parks, gardens and recreational areas and carrying out landscaping and other associated works;	Yes	Yes	Yes	Yes	Yes
3. the establishment and maintenance of sports facilities, libraries, a cinema, community halls, public toilet and ablution blocks and laundry facilities;	Yes	Yes	Yes	Yes	Yes
4. the provision of a service for the collection and disposal of garbage, the maintenance of particular places where garbage is to be dumped, and the control of litter generally;	Yes	Yes	Yes	Yes	Yes
5. the provision and maintenance of sanitation facilities and the removal of health hazards;	Yes	Yes	Yes	Yes	Yes
6. the provision and maintenance of sewerage, drainage and water supply facilities;	Yes	Yes	Yes	Yes	Yes
7. the supply of electricity by contracting with a government department or statutory authority responsible for providing electricity, and action, for reward, as an agent in respect of the collection of electricity charges;	Yes	Yes	Yes	Yes	Yes
8. the provision of adult education and vocational and other training;	Yes	Yes	Yes	Yes	Yes
9. the provision and maintenance of housing for residents and their families on such terms and conditions as the council thinks fit;	Yes	Yes	Yes	Yes	Yes

Functions	Elliott	Wallace Rockhole	Yugul Mangi	Nauiyu Nambiyui	Dagaragu
10. the provision of relief work for unemployed persons;	Yes	Yes	Yes	Yes	Yes
11. the promotion and provision of community welfare, health and care facilities for all age groups within the community government area and the provision of appropriately trained staff to provide counselling or temporary assistance;	Yes	Yes	Yes	Yes	Yes
12. the prevention and control of substance abuse;	No	No	No	No	No
13. the maintenance of a cemetery or cemeteries;	Yes	Yes	Yes	Yes	Yes
14. the control or prohibition of animals within the community government area;	Yes	Yes	Yes	Yes	Yes
15. the development and maintenance of roads, boat ramps and channel markers within the community government area (including the provision of street lighting and traffic control devices) and, for reward, the development and maintenance of roads, both ramps and channel markers outside the community government area;	Yes	Yes	Yes	Yes	Yes
16. the maintenance of an airstrip and facilities related thereto;	Yes	No	Yes	Yes	Yes
17. the hiring out, for reward, of any plant, appliance or equipment belonging to the council and the repair and maintenance, for reward, of any plant appliance or equipment not owned by the council;	Yes	Yes	Yes	Yes	Yes
18. the contracting of works projects within or without the community government area;	Yes	Yes	Yes	Yes	Yes
19. the establishment and operation of pastoral and commercial enterprises;	Yes	Yes	Yes	Yes	Yes

Functions	Elliott	Wallace Rockhole	Yugul Mangi	Nauiyu Nambiyui	Dagaragu
20. the establishment and operation of a post office agency and bank agency;	No	No	No	No	No
21. the selling of petroleum products;	Yes	Yes	No	Yes	Yes
22. the establishment and maintenance of a fire-fighting service, including the acquisition of property and equipment and training of personnel for the service, and the protection of the community government area from fire;	Yes	Yes	Yes	Yes	Yes
23. the promotion and development of tourist attractions, and provision and maintenance of tourist facilities, within the community government area;	Yes	Yes	Yes	Yes	Yes
24. the production and selling of artefacts and souvenirs;	Yes	Yes	Yes	Yes	Yes
25. the management and control of sites of historic interest;	Yes	Yes	Yes	Yes	Yes
26. the maintenance and preservation of Aboriginal law and custom;	No	No	No	No	Yes
27. the support and encouragement of artistic, cultural and sporting activities.	Yes	Yes	Yes	Yes	Yes
28. the provision of such public transport within the community government area as the council thinks fit.	No	No	No	No	No
29. the distribution of social service benefits	No	No	No	No	No
30. the receipt of money, grants or gifts of property paid or made to the Council	No	No	No	No	No
31. The production and distribution of Publications relating to the functions of the Council.	No	No	No	No	No

Functions	Elliott	Wallace Rockhole	Yugul Mangi	Nauiyu Nambiyui	Dagaragu
32. The Establishment and operation of a licensed Abattoir under the *Abattoir & Slaughtering Act* .	No	No	No	No	No
33. Selling of goods or equipment purchased by the Council for or in connection with any enterprise and found to be in excess of the Council's immediate needs.	No	No	No	No	No
34. The operation of a bakery, general purpose shop, bookshop, printing enterprise, market garden, mechanic workshop and any contract for work currently in existence.	No	No	Yes	No	No
35. Liaison with, and the giving of advice to the Wampana Progress Association in the management of the Lajamanu Shop, and the provision of non-financial assistance to that Association and to any other commercial interest within the Community Government area.	No	No	No	No	No

Functions	Numbulwar Numburindi	Coomalie	Belyuen	Yulara	Timber Creek
1. the establishment, development , operation and maintenance of communication facilities for the community government area and in so doing the council may enter into a contract with the Australian Telecommunications Commission to act, for reward, as the agent of the Commission;	Yes	No	No	No	No
2. the establishment and maintenance of parks, gardens and recreational areas and carrying out landscaping and other associated works;	Yes	Yes	Yes	Yes	Yes
3. the establishment and maintenance of sports facilities, libraries, a cinema, community halls, public toilet and ablution blocks and laundry facilities;	Yes	Yes	Yes	Yes	Yes
4. the provision of a service for the collection and disposal of garbage, the maintenance of particular places where garbage is to be dumped, and the control of litter generally;	Yes	Yes	Yes	Yes	Yes
5. the provision and maintenance of sanitation facilities and the removal of health hazards;	Yes	Yes	Yes	Yes	Yes
6. the provision and maintenance of sewerage, drainage and water supply facilities;	Yes	No	Yes	No	Yes
7. the supply of electricity by contracting with a government department or statutory authority responsible for providing electricity, and action, for reward, as an agent in respect of the collection of electricity charges	Yes	No	Yes	No	Yes
8. the provision of adult education and vocational and other training;	Yes	Yes	Yes	Yes	Yes
9. the provision and maintenance of housing for residents and their families on such terms and conditions as the council thinks fit;	Yes	No	Yes	see Appendix 1(D)	Yes

Functions	Numbulwar Numburindi	Coomalie	Belyuen	Yulara	Timber Creek
10. the provision of relief work for unemployed persons;	Yes	No	Yes	No	Yes
11. the promotion and provision of community welfare, health and care facilities for all age groups within the community government area and the provision of appropriately trained staff to provide counselling or temporary assistance;	Yes	Yes	Yes	Yes	Yes
12. the prevention and control of substance abuse;	Yes	No	Yes	No	No
13. the maintenance of a cemetery or cemeteries;	Yes	Yes	Yes	Yes	Yes
14. the control or prohibition of animals within the community government area;	Yes	No	Yes	Yes	Yes
15. the development and maintenance of roads, boat ramps and channel markers within the community government area (including the provision of street lighting and traffic control devices) and, for reward, the development and maintenance of roads, both ramps and channel markers outside the community government area	Yes	Yes	Yes	Yes	Yes
16. the maintenance of an airstrip and facilities related thereto;	Yes	No	Yes	No	Yes
17. the hiring out, for reward, of any plant, appliance or equipment belonging to the council and the repair and maintenance, for reward, of any plant appliance or equipment not owned by the council;	Yes	Yes	Yes	Yes	Yes
18. the contracting of works projects within or without the community government area;	Yes	Yes	Yes	Yes	Yes
19. the establishment and operation of pastoral and commercial enterprises;	Yes	Yes	Yes	see Appendix 1(D)	Yes

Functions	Numbulwar Numburindi	Coomalie	Belyuen	Yulara	Timber Creek
20. the establishment and operation of a post office agency and bank agency;	Yes	No	No	No	No
21. the selling of petroleum products;	Yes	No	No	No	No
22. the establishment and maintenance of a fire-fighting service, including the acquisition of property and equipment and training of personnel for the service, and the protection of the community government area from fire;	Yes	No	Yes	No	Yes
23. the promotion and development of tourist attractions, and provision and maintenance of tourist facilities, within the community government area;	Yes	No	Yes	see Appendix 1(D)	Yes
24. the production and selling of artefacts and souvenirs;	Yes	No	Yes	No	Yes
25. the management and control of sites of historic interest;	Yes	No	Yes	No	Yes
26. the maintenance and preservation of Aboriginal law and custom;	Yes	No	Yes	No	No
27. the support and encouragement of artistic, cultural and sporting activities.	Yes	No	Yes	Yes	Yes
28. the provision of such public transport within the community government area as the council thinks fit.	No	No	No	No	No
29. the distribution of social service benefits	No	No	Yes	No	No
30. the receipt of money, grants or gifts of property paid or made to the Council	No	No	No	Yes	Yes
31. The production and distribution of Publications relating to the functions of the Council.	No	No	No	Yes	No

Functions	Numbulwar Numburindi	Coomalie	Belyuen	Yulara	Timber Creek
32. The Establishment and operation of a licensed Abattoir under the *Abattoir & Slaughtering Act* .	No	No	No	No	No
33. Selling of goods or equipment purchased by the Council for or in connection with any enterprise and found to be in excess of the Council's immediate needs.	No	No	No	No	No
34. The operation of a bakery, general purpose shop, bookshop, printing enterprise, market garden, mechanic workshop and any contract for work currently in existence.	No	No	No	No	No
35. Liaison with, and the giving of advice to the Wampana Progress Association in the management of the Lajamanu Shop, and the provision of non-financial assistance to that Association and to any other commercial interest within the Community Government area.	No	No	No	No	No

Functions	Barunga-Wugularr	Nguiu	Borroloola	Pine Creek	Anmatjere
1. the establishment, development , operation and maintenance of communication facilities for the community government area and in so doing the council may enter into a contract with the Australian Telecommunications Commission to act, for reward, as the agent of the Commission;	Yes	Yes	Yes	Yes	No
2. the establishment and maintenance of parks, gardens and recreational areas and carrying out landscaping and other associated works;	Yes	Yes	Yes	Yes	Yes
3. the establishment and maintenance of sports facilities, libraries, a cinema, community halls, public toilet and ablution blocks and laundry facilities;	Yes	Yes	Yes	Yes	Yes
4. the provision of a service for the collection and disposal of garbage, the maintenance of particular places where garbage is to be dumped, and the control of litter generally;	Yes	Yes	Yes	Yes	Yes
5. the provision and maintenance of sanitation facilities and the removal of health hazards;	Yes	Yes	Yes	Yes	No
6. the provision and maintenance of sewerage, drainage and water supply facilities;	Yes	Yes	Yes	Yes	Yes
7. the supply of electricity by contracting with a government department or statutory authority responsible for providing electricity, and action, for reward, as an agent in respect of the collection of electricity charges	Yes	Yes	Yes	Yes	No
8. the provision of adult education and vocational and other training;	Yes	Yes	Yes	Yes	Yes
9. the provision and maintenance of housing for residents and their families on such terms and conditions as the council thinks fit;	Yes	Yes	Yes	Yes	Yes

Functions	Barunga-Wugularr	Nguiu	Borroloola	Pine Creek	Anmatjere
10. the provision of relief work for unemployed persons;	Yes	Yes	Yes	Yes	Yes
11. the promotion and provision of community welfare, health and care facilities for all age groups within the community government area and the provision of appropriately trained staff to provide counselling or temporary assistance;	Yes	Yes	Yes	Yes	Yes
12. the prevention and control of substance abuse;	No	No	No	No	Yes
13. the maintenance of a cemetery or cemeteries;	Yes	Yes	Yes	Yes	Yes
14. the control or prohibition of animals within the community government area;	Yes	Yes	Yes	Yes	Yes
15. the development and maintenance of roads, boat ramps and channel markers within the community government area (including the provision of street lighting and traffic control devices) and, for reward, the development and maintenance of roads, both ramps and channel markers outside the community government area	Yes	Yes	Yes	Yes	Yes
16. the maintenance of an airstrip and facilities related thereto;	Yes	Yes	Yes	Yes	Yes
17. the hiring out, for reward, of any plant, appliance or equipment belonging to the council and the repair and maintenance, for reward, of any plant appliance or equipment not owned by the council;	Yes	Yes	Yes	Yes	Yes
18. the contracting of works projects within or without the community government area;	Yes	Yes	Yes	Yes	Yes
19. the establishment and operation of pastoral and commercial enterprises;	Yes	Yes	Yes	Yes	Yes

Functions	Barunga-Wugularr	Nguiu	Borroloola	Pine Creek	Anmatjere
20. the establishment and operation of a post office agency and bank agency;	No	Yes	No	No	No
21. the selling of petroleum products;	Yes	Yes	No	No	No
22. the establishment and maintenance of a fire-fighting service, including the acquisition of property and equipment and training of personnel for the service, and the protection of the community government area from fire;	Yes	Yes	Yes	Yes	Yes
23. the promotion and development of tourist attractions, and provision and maintenance of tourist facilities, within the community government area;	Yes	Yes	Yes	Yes	Yes
24. the production and selling of artifacts and souvenirs;	Yes	Yes	Yes	Yes	No
25. the management and control of sites of historic interest; and	Yes	Yes	Yes	Yes	Yes
26. the maintenance and preservation of Aboriginal law and custom;	No	No	No	No	No
27. the support and encouragement of artistic, cultural and sporting activities.	Yes	Yes	Yes	Yes	Yes
28. the provision of such public transport within the community government area as the council thinks fit.	No	No	No	No	No
29. the distribution of social service benefits	No	No	No	No	No
30. the recept of money, grants or gifts of property paid or made to the Council	No	No	No	No	Yes
31. The production and distribution of Publications relating to the functions of the Council.	No	No	No	No	No

Functions	Barunga-Wugularr	Nguiu	Borroloola	Pine Creek	Anmatjere
32. The Establishment and operation of a licensed Abattoir under the *Abattoir & Slaughtering Act* .	No	No	No	No	No
33. Selling of goods or equipment purchased by the Council for or in connection with any enterprise and found to be in excess of the Council's immediate needs.	No	No	No	No	No
34. The operation of a bakery, general purpose shop, bookshop, printing enterprise, market garden, mechanic workshop and any contract for work currently in existence.	No	No	No	No	No
35. Liaison with, and the giving of advice to the Wampana Progress Association in the management of the Lajamanu Shop, and the provision of non-financial assistance to that Association and to any other commercial interest within the Community Government area.	No	No	No	No	No

"Yulara Community Government Scheme

SCHEDULE 3
Clause 11(2)
SPECIFIED MATTERS

In this Schedule, "ARRC" means the Ayers Rock Resort Company Limited, and "Resort" means that part of the Community Government Area comprising the Ayers Rock Resort.

The council will take into account -

1. that the council was created, inter alia, to provide Resort employees, their families and other residents involved in supporting the commercial activities of the Resort, with appropriate community facilities and services;

2. that the prime purpose of the Resort is tourism, guest and visitor satisfaction, and commercial success to generate adequate returns to shareholders;

3. the necessity for a high degree of continuing consultation, coordination and cooperation between the council and ARRC;

4. that ARRC, recognising that the high performance of staff and residents in satisfying guests is in part dependant on the supply of appropriate staff accommodation and the application of appropriate staff accommodation policies, in its capacity as Housing Manager acting on behalf of the Northern Territory Housing Commission, undertakes to invite regular participation by the council in housing matters;

5. that the Resort, and the township of Yulara which supports its activities, have the central and over-riding objective of presenting the Resort, Uluru National Park and other surrounding attractions as a major tourist destination;

6. that ARRC, which owns, manages and develops the Resort, is a commercial venture with the objective of maximising the profitability and long term value of the Resort on behalf of the people of the Northern Territory; and

7. that it is essential -

    a. that the facilities at Yulara are developed so that the Resort presents a single consistent and integrated face to tourists; and

    b. that all tourist activities are coordinated to ensure a unique and rewarding visitor experience is offered,

under the overall direction of ARRC"

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APPENDIX 5

List of Incorporated Aboriginal Associations Established In The Northern Territory Under Commonwealth Legislation As At 18 December 1992

BLANK PAGE

Abbott Aboriginal Corporation	2-Sep-89
Aboriginal Broadcasting Organisation Media Aboriginal Corporation)	2-Jun-85
Aboriginal Bush Broadcasting Association Aboriginal Corporation	19-0ct-89
Aboriginal Corporation for Sacred Sites	17-May-89
Aboriginal Rabbit Control Programme Aboriginal Corporation	22-0ct-90
Abskill Construction Aboriginal Corporation	3-Sep-91
Aghirringho Aboriginal Corporation	28-Oct-88
Ahakey Aboriginal Corporation	12-Jun-89
Ahalperarenye Cattle Aboriginal Corporation	28-Nov-91
Aherre Aboriginal Corporation	22-Jun-89
Aheyenehne Aboriginal Corporation	1-Nov-90
Aileron Aboriginal Corporation	1-Nov-90
Alatyeye Aboriginal Corporation	13-Feb-89
Aliyawe Aboriginal Corporation	27-Feb-90
Alkngarintja Aboriginal Corporation	27-Feb-90
Alkupitja Aboriginal Corporation	14-Aug-85
Allalgara/Annangara Aboriginal Corporation	18-Jun-80
Alpara Community Aboriginal Corporation	12-Aug-81
Alparrinya Apungalindum Aboriginal Corporation	2-Nov-88
Alpawerrke Aboriginal Corporation	29-Jan-91
Alpirakina Cattle Aboriginal Corporation	30-Sep-91
Alpirakina Store Aboriginal Corporation	14-Sep-90
Alpurrurulam Land Aboriginal Corporation	17-Jul-87
Aluralkwa Aboriginal Corporation	22-Jul-83
Alyuem Aboriginal Corporation	7-May-82
Amoonguna Progress Association Aboriginal Corporation	23-Aug-85
Amundurrngu Mt Liebig Community Store (Aboriginal Corporation)	19-Aug-87
Amundurrngu Outstations Council Aboriginal Corporation	20-Dec-89
Anangu Uwankaraku Aboriginal Corporation	22-Jul-91
Anangu Winkiku Stores (Aboriginal Corporation)	7-Mar-83
Angkerle Aboriginal Corporation	17-Sep-87
Angkerle-lrenge Aboriginal Corporation	15-Feb-89
Angkwetengarenye Cattle Aboriginal Corporation	27-Mar-92
Angula Aboriginal Corporation	22-Apr-81
Anhelke Aboriginal Corporation	15-Apr-87
Anilalya Council (Aboriginal Corporation)	22-Mar-84
Antere Aboriginal Corporation	3-Aug-85
Anumarru Piti Aboriginal Corporation	25-0ct-88
Anyinginyi Congress Aboriginal Corporation	24-Aug-84
Anyungyumba Aboriginal Corporation	7-Apr-88
Apmwerre Aboriginal Corporation	10-Dec-84
Arkarnta Aboriginal Corporation	26-Sep-91
Arlparra Aboriginal Corporation	6-Feb-89
Arlperreyekele Arts Aboriginal Corporation	29-Jan-90
Armstrong Aboriginal Corporation	22-Aug-90
Arnapipe Aboriginal Corporation	23-Aug-85
Arrillhjeru Aboriginal Corporation	10-Oct-90
Arrkilku Aboriginal Corporation	30-Apr-87
Arruwurra Aboriginal Corporation	6-Feb-89

Association of Northern and Central Australian Aboriginal Artists (Aboriginal Corporation)	8-Aug-90
Atakartarenue-Theleyarenye Cattle Aboriginal Corporation	10-Dec-91
Athenge-Lhere Aboriginal Corporation	24-Apr-86
Atite Cattle Aboriginal Corporation	17-Jun-91
Atitjere Community Aboriginal Corporation	12-Aug-83
Atitjere Land Aboriginal Corporation	21-Nov-88
Atyilera Community Aboriginal Corporation	6-Mar-88
Atyilera Land Aboriginal Corporation	12-Sep-87
Autilly Aboriginal Corporation	26-Mar-87
Babbara Womens Advisory Council Aboriginal Corporation	26-Oct-87
Bampiti Nitjpurru Aboriginal Corporation	15-Feb-89
Barranyi Aboriginal Corporation	29-Mar-90
Bawinanga Aboriginal Corporation	15-Oct-79
Binjari Aboriginal Corporation	4-Jun-90
Blakbela Musicians Aboriginal Corporation	25-Aug-89
Bongoi Aboriginal Corporation	30-Sep-91
Boolrna Aboriginal Corporation	24-Apr-89
Boonu Boonu Womens Aboriginal Corporation	10-Oct-90
Borroloola Cemetery Trust Aboriginal Corporation	22-Dec-89
Broken English Band Aboriginal Corporation	28-Aug-89
Bulabula Arts Aboriginal Corporation	8-Aug-90
Bulbulanyi Aboriginal Corporation	2-Sep-90
Burungkut Aboriginal Corporation	16-Apr-86
Burungkut Homeland Resource Centre Aboriginal Corporation	2-Apr-91
Central Australian Aboriginal Child Care Agency Aboriginal Corporation	1-Nov-85
Central Australian Aboriginal Media Association (Aboriginal Corporation)	12-May-80
Central Australian Aboriginal Pastoralists Association (Aboriginal Corporation)	12-Jun-84
Central Desert Outstations Council (Aboriginal Corporation)	7-May-82
Centralian Aboriginal Organisation Enterprise (Aboriginal Corporation)	26-Apr-83
Crossroads Aboriginal Corporation	4-Oct-90
Dak Milnigin Aboriginal Corporation	11-Mar-89
Darwin Aboriginal and Islander Medical Service Aboriginal Corporation	17-Jun-91
Djarrung Aboriginal Corporation	5-Jul-90
East Arnhem Aboriginal Corporation for Sport and Recreation	18-Mar-92
Elitjia Aboriginal Corporation	16-Jun-87
Elliott Store Aboriginal Corporation	19-May-88
Fitzroy Aboriginal Corporation	6-Dec-91
Fraser Aboriginal Corporation	4-Sep-90
Garawa 1 Camp Aboriginal Corporation	27-Nov-89
Garawa No. 2 Housing Aboriginal Corporation	20-Feb-89
Goonamah Aboriginal Corporation	24-Apr-89
Granites Mine Affected Area Aboriginal Corporation	31-Jan-91
Gulgulgwanja aboRiginal Corporation	29-May-9O
Gulin Gulin & Weemol Community Council Aboriginal Corporation	29-May-92
Gulunurru Aboriginal Corporation	12-May-83
Gurungu Council Aboriginal Corporation	27-Feb-89
Guyanggan Aboriginal Corporation	30-Sep-91
Gyrrigas Aboriginal Corporation	2-Apr-91
Hermannsburg Trading Aboriginal Corporation	6-Jul-85

Illurawara Community Association Aboriginal Corporation	8-Aug-86
Ilparpa Aboriginal Corporation	25-Oct-79
llpeye llpeye Aboriginal Corporation	12-Jul-79
llpila Alkngarintja Aboriginal Corporation	13-Feb-89
llwemp-Akente Aboriginal Corporation	10-Apr-80
Imangara Aboriginal Corporation	12-Oct-79
Ingkerreke Outstations Resource Services Aboriginal Corporation	3-Aug-85
Injartnama Aboriginal Corporation	21-Nov-88
Injulkama Aboriginal Corporation	14-Nov-83
Inkamala Aboriginal Corporation	13-Feb-89
Ipolera Aboriginal Corporation	3-Aug-85
Irintata Homelands Council (Aboriginal Corporation)	15-Jul-86
Irrawanyere Aboriginal Corporation	2-Sep-90
Irrerlirre Aboriginal Corporation	19-May-88
Irriltyere Aboriginal Corporation	2-Jul-90
Iteyepintye Aboriginal Corporation	29-Jan-90
Itperlyenge Aboriginal Corporation	2-Sep-90
Janganpa Aboriginal Corporation	22-Dec-83
Jangirurlu Aboriginal Corporation	2-Dec-90
Jarnba-Gadarlandji Aboriginal Corporation	12-Oct-79
Jarra Jarra Aboriginal Corporation	21-Jul-82
Jawoyn Association Aboriginal Corporation	31-May-85
Jemelkere Aboriginal Corporation	22-Dec-89
Jibabana Aboriginal Corporation	20-Jun-91
Jingaloo Aboriginal Corporation	10-Aug-84
Jirrngow Aboriginal Corporation	9-Oct-86
Joint Aboriginal Management Information Service (Aboriginal Corporation)	25-Feb-83
Jukurrpa Aboriginal Corporation	3-Aug-89
Julalikari Council Aboriginal Corporation	29-Jun-89
Julalikari Workshops Aboriginal Corporation	29-Jun-89
Jungarrayiwarnu Aboriginal Corporation	31-Jan-91
Jurnkurakurr Aboriginal Corporation Stores Services	7-Apr-88
Jurnkurakurr Aboriginal Resource Centre Aboriginal Corporation	18-Oct-84
Kakalyalya Aboriginal Corporation	24-Nov-92
Kaltjiti Cattle (Aboriginal Corporation)	5-Jul-90
Kaltjiti Community (Aboriginal Corporation)	30-Jun-86
Kaltukatjara Association (Aboriginal Corporation)	16-Jan-90
Kaltukatjara Community Council (Aboriginal Corporation)	19-May-83
Kaltukatjara Nguratjaku Council (Aboriginal Corporation)	19-Nov-82
Karlantijpa Aboriginal Corporation	27-Jun-89
Karnte Aboriginal Corporation	7-Nov-83
Karrinyarra Aboriginal Corporation	8-Apr-87
Katherine Regional Aboriginal Cultural Centre Aboriginal Corporation	18-Mar-92
Keringke Arts Aboriginal Corporation	23-Oct-89
Kiwinyi-Wampana Aboriginal Corporation	6-Feb-87
Kiwirrkurra Council Aboriginal Corporation	10-Aug-84
Kulumbiringin Aboriginal Corporation	25-Mar-88
Kumbarada Outstation (Homeland) Centre Aboriginal Corporation	29-Mar-90
Kumunu Aboriginal Corporation	27-Mar-92
Kwombom Aboriginal Corporation	12-Mar-87

Labrabuntja Aboriginal Corporation	2-Sep-90
Lajamanu Women Yawalyu Aboriginal Corporation	2-Jan-91
Langarama Numumurdidi Enterprises Aboriginal Corporation	20-Feb-89
Larrpayanji Aboriginal Corporation	28-Jul-89
Lawi Gurindji Community Services Aboriginal Corporation	22-Jun-89
Leedi Aboriginal Corporation	4-Sep-90
Lhenpe Artne Aboriginal Corporation	8-Aug-86
Liku Aboriginal Corporation	26-May-88
Lilla Aboriginal Corporation	8-Feb-85
Lingarra - Ngaringman Aboriginal Corporation	21-Nov-88
Lirritjal/Marrawulwul Aboriginal Corporation	26-Sep-89
Ltalaltuma Aboriginal Corporation	22-Aug-88
Mala Aboriginal Corporation	3-Apr-81
Malinja Aboriginal Corporation	30-May-90
Malthouse Aboriginal Corporation	22-Aug-90
Mamadi Aboriginal Corporation	26-Oct-89
Mangarrayi Aboriginal Corporation	3-Feb-92
Mangkururrpa Aboriginal Corporation	13-Feb-90
Manuburduma Housing Association Aboriginal Corporation	5-Jan-87
Mara Aboriginal Corporation	28-Jul-87
Mara Camp Aboriginal Corporation	27-Oct-89
Maranunggu Homeland Aboriginal Corporation	24-Feb-89
Marapurn Aboriginal Corporation	27-Mar-92
Margalkmi Aboriginal Corporation	28-Nov-91
Mayamumbin Aboriginal Corporation	1-Dec-90
Mbantarinya Aborirginal Corporation	26-Aug-83
Mbungara Housing Aboriginal Corporation	26-Sep-91
McNamara Aboriginal Corporation	27-Feb-89
Merrepen Arts Aboriginal Corporation	16-Nov-90
Minbani Aboriginal Corporation	28-Feb-89
Mingatherrte Aboriginal Corporation	24-Apr-86
Mirrena Aboriginal Corporation	3-Aug-81
Mistake Creek Aboriginal Corporation	6-Jan-88
Mount Liebig Aboriginal Corporation	26-Aug-88
Mount Winter Aboriginal Corporation	23-Nov-90
Mparntwe Sacred Site Aboriginal Corporation	29-May-9O
Mpwelarre Aboriginal Corporation	15-Nov-89
Mpweringe - Arnapipe Outstation Council Aboriginal Corporation	10-Sep-84
Mpwetyerre Aboriginal Corporation	25-Oct-79
Muckaty Aboriginal Corporation	6-Dec-91
Mukurrmanja Aboriginal Corporation	(no date given)
Mulluyu Aboriginal Corporation	25-Mar-88
Mundawalla Aboriginal Corporation	1-Nov-90
Mundululu Aboriginal Corporation	22-Jul-91
Mungar Mungar Open College Women's Learning Centre Aboriginal Corporation	28-Mar-90
Mungkarta Community and Outstation Aboriginal Corporation	6-Feb-89
Mungkarta Community Store Aboriginal Corporation	27-Jun-89
Mungoorbada Aboriginal Corporation	10-Feb-90
Munupi Arts and Crafts Association Aboriginal Corporation	8-Aug-90

Munyupanji Aboriginal Corporation	27-Mar-92
Murputja Homelands Council (Aboriginal Corporation)	7-Oct-86
Mutchirr Aboriginal Corporation	5-Feb-89
Mutitjulu Community Health Service (Aboriginal Corporation)	23-Feb-89
Mutulgi Aboriginal Corporation	18-Apr-89
Naayakuku Aboriginal Corporation	31-Oct-91
Nabarlek Traditional Owners Aboriginal Corporation	25-Mar-88
Namarrmu Outstation Aboriginal Corporation	18-Mar-92
Ngaanyatjarra Land Council (Aboriginal Corporation)	l9-Oct-88
Ngadunggay Homeland Resource Centre Aboriginal Corporation	19-Apr-89
Ngalakan Aboriginal Corporation	17-Feb-89
Ngangirritja Aboriginal Corporation	7-Aug-87
Nganiyurlma Aboriginal Corporation	29-Jan-89
Ngappamilarnu Aboriginal Corporation	29-May-9O
Ngarutjara Homeland (Aboriginal Corporation)	10-Oct-90
Ngintaka Women's Council (Kamu Minyma Kutjarratjarra) Aboriginal Corp.	29-Jan-90
Ngukurr Adult Education Aboriginal Corporation	2-Sep-89
Ngukurr Womens Resource Aboriginal Corporation	15-Oct-90
Ngurra Waltja Services Aboriginal Corporation	27-Jul-88
Ngurratjuta/Pmara Ntjarra Aboriginal Corporation	23-Aug-85
Ngurrdalingi Aboriginal Corporation	3-Jun-90
Ngwalalanima Aboriginal Corporation	30-Sep-81
Ninu Aboriginal Corporation	27-Feb-90
Noradidgee Aboriginal Corporation	12-Oct-79
North Australia Aboriginal Corporation	14-Jan-91
Ntjalka Aboriginal Corporation	22-Aug-90
Nungali Jaminjung Aboriginal Corporation	22-Aug-88
Nunukut Land Council Aboriginal Corporation	27-Mar-92
Nuralindji Aboriginal Corporation	2-Aug-91
Oak Valley Aboriginal Corporation	27-Mar-92
Officer Creek Pastoral Aboriginal Corporation	2-Dec-92
Ooratippra Aboriginal Corporation	24-Apr-89
Orrtipa Thurra Aboriginal Corporation	l-Nov-85
Pantu Luritja Aboriginal Corporation	6-Feb-87
Papulu Apparr-Kari Aboriginal Corporation	12-Mar-87
Patina Aboriginal Corporation	27-Mar-92
Patjarr Aboriginal Corporation	28-Apr-80
Payeperrentye Aboriginal Corporation	31-May-88
Penapore Aboriginal Corporation	28-Nov-91
Pertame Aboriginal Corporation	11-Jun-90
Perte Rratenge Aboriginal Corporation	7-Feb-92
Pintubi Homelands Health Service (Aboriginal Corporation)	2-Jun-85
Pintubi Media Association (Aboriginal Corporation)	13-Feb-89
Pirlalinji Aboriginal Corporation	22-Jun-89
Pmer-Ulperre Aboriginal Corporation	3-Aug-85
Porodunga Aboriginal Corporation	14-Sep-90
Pulardi Aboriginal Corporation	7-Apr-88
Purrukwarra Aboriginal Corporation	14-Apr-86
Purturru Aboriginal Corporation	13-Feb-91
Putardi Aboriginal Corporation	28-May-92

Puwarrinji Aboriginal Corporation	28-Nov-83
Pwertenhatherre Aboriginal Corporation	2-Jul-90
Pweyeperre Aboriginal Corporation	24-Apr-89
Rak Ngungthwudi Aboriginal Corporation	13-Nov-92
Ramingining Homelands Resource Centre Aboriginal Corporation	9-Mar-90
Ratara Aboriginal Corporation	20-Dec-89
Red Sandhill Aboriginal Corporation	22-Aug-90
Renkaraka Aboriginal Corporation	12-May-88
Rirratjingu Association Aboriginal Corporation	17-Oct-84
Ritjingka Aboriginal Corporation	23-Aug-85
Rontji Aboriginal Corporation	22-Aug-90
Ross Aboriginal Corporation	26-Oct-88
Roulpmaulpma Aboriginal Corporation	24-Feb-89
Rrumburriya Malandari Council Aboriginal Corporation	21-Feb-89
Sandover Farm Aboriginal Corporation	17-Nov-88
Smith Aboriginal Corporation	22-Dec-89
Stingray Heads Fishing Aboriginal Corporation	8-Aug-90
Taliparnta Aboriginal Corporation	25-Oct-88
Tarrawarra Aboriginal Corporation	25-Feb-80
Thangkenharenge Aboriginal Corporation	18-Feb-87
The Arrernte Council of Central Australia Aboriginal Corporation	26-Jan-86
The Gap Youth Centre Aboriginal Corporation	12-Nov-86
The Wulaign Homelands Council Aboriginal Corporation	1l-Dec-90
Tiwi Designs Aboriginal Corporation	24-Mar-80
Tiwi Ngaripuluwamigi Aboriginal Corporation	25-Jun-80
Tjaliri Aboriginal Corporation	30-Sep-91
Tjara Antal Outstation (Aboriginal Corporation)	10-Oct-90
Tjukurla Community (Incorporated) Aboriginal Corporation	17-Feb-87
Tjunkupu Aboriginal Corporation	21-Nov-88
Tjupanyin Aboriginal Corporation	5-Jun-91
Tjurma Homelands Council (Aboriginal Corporation)	16-Dec-85
Tjuwanpa Outstation Resource Centre (Aboriginal Corporation)	27-Apr-84
Tnerte Aboriginal Corporation	16-Dec-88
Tnorala Aboriginal Corporation	25-Mar-87
Tnyimiputa Aboriginal Corporation	7-Sep-87
Top End Aboriginal Bush Broadcasting Association (Aboriginal Corporation)	10-Oct-89
Top End Aboriginal Coalition Aboriginal Corporation	25-Mar-88
Top End Catholic Aboriginal Corporation	4-Nov-90
Top End Music Aboriginal Corporation	21-Aug-92
Tupul Community Aboriginal Corporation	28-May-92
Turlpartna Aboriginal Corporation	22-Jun-89
Tuta Aboriginal Corporation	17-Feb-89
Tutiniji Aboriginal Corporation	11-Sep-90
Tuwakam Aboriginal Corporation	29-Jan-90
Twetye Aboriginal Corporation	25-Mar-88
Tyapalaneme Aboriginal Corporation	16-Dec-85
Tywenpe Aboriginal Corporation	14-Aug-85
Ukaka Aboriginal Corporation	3-Aug-85
Ulbulla Aboriginal Corporation	20-Oct-88
Ulpanyali Aboriginal Corporation	8-Feb-85

Uluperte Community Aboriginal Corporation	20-Dec-89
Umbakumba Outstation Aboriginal Corporation	2-Jun-80
Umutju Homeland Aboriginal Corporation	23-Nov-92
Undoolya Aboriginal Corporation	10-Aug-84
Urapuntja Council Aboriginal Corporation	30-Sep-81
Urapuntja Health Service Aboriginal Corporation	l-Feb-79
Uringke Aboriginal Corporation	28-Oct-88
Urlampe Aboriginal Corporation	14-Aug-85
Uruna Potara Aboriginal Corporation	6-Feb-88
Utopia Artists Aboriginal Corporation	30-Jul-91
Utopia Land Aboriginal Corporation	16-Aug-79
Utugulun, Aboriginal Corporation	l-Jul-81
Wadjigan Aboriginal Corporation	30-Aug-90
Wagaman Aboriginal Corporation	l9-Sep-89
Wakaya Aboriginal Corporation	5-Feb-84
Walangurru Community Council (Aboriginal Corporation)	16-Nov-81
Waljjukurru Aboriginal Corporation	24-Jun-92
Wallany Homeland Community Aboriginal Corporation	24-Jun-92
Wallatinna Aboriginal Corporation	25-Mar-91
Walungurra Action Group Aboriginal Corporation	12-Jul-89
Wanarkula Aboriginal Corporation	15-Mar-90
Wangari Jangu Kari Aboriginal Corporation	8-Mar-90
Wanmarra Aboriginal Corporation	8-Feb-85
Wardaman Aboriginal Corporation	29-Jan-90
Warlpiri Aboriginal Corporation	22-Aug-90
Warlukurlangu Artists Aboriginal Corporation	15-Apr-86
Warmungku Aboriginal Corporation	10-Dec-89
Warnayaka Tribal Assembly of Yuendumu (Aboriginal Corporation)	28-Jan-82
Warnutungu RRU Aboriginal Corporation	18-Jun-91
Warte Alparayetye Aboriginal Corporation	7-Aug-87
Wawi Homelands (Aboriginal Corporation)	6-Mar-92
Welere Community Aboriginal Corporation	17-Dec-84
Werenbun Association Aboriginal Corporation	31-May-85
Werre Therre Aboriginal Corporation	23-Aug-85
White Eagle Aboriginal Corporation	5-Aug-85
Winbarrku Aboriginal Corporation	22-Oct-90
Wintawata Homeland (Aboriginal Corporation)	10-Oct-90
Wirrmalyanya Aboriginal Corporation	3-Aug-85
Witjintitja Aboriginal Corporation	28-Feb-91
Wogayala Aboriginal Corporation	l-Jul-81
Wonmurri Aboriginal Corporation	21-Sep-92
Woolla Aboriginal Corporation	30-Sep-81
Wugular Aboriginal Corporation	3-Feb-92
Wunara Aboriginal Corporation	8-Aug-86
Wunoorill Aboriginal Corporation	18-Sep-89
Wurli Wurlinjang Aboriginal Corporation	17-Dec-91
Wurrkleni Aboriginal Corporation	2-Dec-90
Wutunurrgurra Aboriginal Corporation	12-Aug-83
Yambah-Mpweringe Aboriginal Corporation	4-Dec-84
Yamparlinyi Outstations Aboriginal Corporation	31-Oct-90

Yanangu Stores Association (Aboriginal Corporation)	7-Jan-85
Yanap Aboriginal Corporation	26-Mar-85
Yanginj Aboriginal Corporation	10-Dec-84
Yangulinyina Aboriginal Corporation	27-Jun-89
Yankunytjatjara Council (Aboriginal Corporation)	7-Aug-83
Yanyuwa Camp Aboriginal Corporation	27-Oct-89
Yilburra Aboriginal Corporation	9-May-90
Yothu Yindi Foundation Aboriginal Corporation	20-Nov-90
Yuendumu Alcohol Prevention Association Aboriginal Corporation	30-Sep-91
Yuendumu Outstations Councils Aboriginal Corporation	16-Dec-85
Yuendumu Outstations Resource Centre (Aboriginal Corporation)	21-Nov-88
Yuendumu Sports Association (Aboriginal Corporation)	4-Feb-82
Yuendumu Women's Centre Aboriginal Corporation	18-Jan-90
Yurrampi Crafts Aboriginal Corporation	21-Aug-91

APPENDIX 6

Northern Territory Aboriginal Programmes and Initiatives [A document prepared and supplied by the Northern Territory Government]

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Northern Territory Aboriginal Programmes and Initiatives
[A document prepared and supplied by the Northern Territory Government]

The Northern Territory's 38,000 Aboriginal people comprise 21.5% of the Territory population and 14.9% of the national Aboriginal population.

Since self-government in 1978 there have been significant advances for Aboriginal people in the Northern Territory in health. Education, housing, employment, tourism, local government and law.

The Territory Government has:

- outlayed over four billion dollars - equivalent to over $130,000 per Aboriginal person over the 11 year period - on Aboriginal housing, health, essential services, education, training, local government and culture - an amount 83% higher per capital than expenditure on non-Aboriginal Territorians
- promoted Aboriginal self-management through community government
- built over 1800 dwelling units on over 60 Aboriginal communities
- upgraded almost 2000 km of Aboriginal-purpose public roads and over 40 airstrips at a cost of some $35 million
- installed, replaced, upgraded and extended water and effluent disposal services in over 50 permanent Aboriginal communities at a cost exceeding $50 million
- achieved significant improvements in Aboriginal health, including a reduction of over 40% in the rate of Aboriginal infant mortality
- greatly expanded the number, range and effectiveness of Aboriginal educational services around the Territory
- encouraged involvement by Aboriginal people in the Territory's economy, resulting in improved Aboriginal participating in the workforce, and also substantial direct Aboriginal investment in commercial enterprises.

The Northern Territory Government has consistently:

- involved Aboriginal leaders and communities in public decision making
- sought Aboriginal opinions and aspirations in the development and implementation of programs and policies.

The program of self-management - the encouragement of local government for communities - dates back to 1978.

The housing program involves grants to Aboriginal organisations in isolated communities, land servicing, urban town camp infrastructure and housing, and a participation rate of about 20% in Territory housing developments in major urban centres.

The road, airstrip and water and sewerage programs have seen a quantum leap in the transport network and basic services to remote Aboriginal communities.

Health indicators are improving. as a consequence of better housing and water and special Aboriginal health programs.

In 1978, the attack on liquor problems began with "self-licensing", allowing communities to request total alcohol bans or tailored restrictions.

The Northern Territory Government initiated the Living With Alcohol program in November 1991. This $9 million per year program aims to minimise alcohol related harm in the Territory.

A comprehensive approach is being developed with three interwoven streams of activity, encompassing care, culture and controls.

Care covers the development of the wide range of alcohol treatment and support services for those experiencing various alcohol related problems. It will also support those close to people with alcohol related problems, particularly their families. Care also includes the provision of facilities for the safe accommodation of persons found intoxicated in public places (sobering-up shelters).

Culture includes those activities which will change the community's knowledge about, and use of, alcohol. The objectives of these, primarily educative, programs will be to alert individuals of the personal risks of alcohol abuse and provide attractive and effective alternative strategies to reduce or eliminate these risks.

Controls are the legislative and regulatory measures governing the supply of alcohol. These are being strengthened to better complement the other measures which are being implemented.

In education since 1978, the number of trained Aboriginal teachers has increased by over 300%, education delivery has spread through outstations and Aboriginal student retention rates from Year 10 to Year 12 have grown strongly.

The Territory leads Australia in bilingual education in Aboriginal communities - 21 bilingual programs, involved 17 different Aboriginal languages, are available today.

Training to increase Aboriginal economic independence has led to the creation of 34 separate vocational training courses and, in the major urban centres of Darwin, Alice Springs, Katherine and Tennant Creek, Aboriginal employment rates are commensurate with the Aboriginal proportion of the urban populations.

More than 3000 Territory Aboriginals are estimated to be involved in tourism - most in artefact production with numbers double those of the late 1970's and about 150 - around 3 times the number 10 years ago - employed in tourism and tourist attractions.

In addition to the two Commonwealth-controlled parks. Kakadu and Uluru, the Territory controls around 75 parks and reserves covering a total area exceeding 2,350,000 hectares and has doubled the number of Aboriginal rangers pre- 1978.

An early Parliamentary initiative in 1978 gave protection for Aboriginal sacred sites, and today the Territory remains the only State or Territory with its own sacred sites protection legislation. The Aboriginal Areas Protection Authority is Aboriginal controlled.

In law, the Territory led Australia in the incorporation of Aboriginal customary law into general law.

Tribal marriage is recognised for marriage, succession, maintenance and child custody and Aboriginal social structures are recognised in the adoption and fostering of children.

Territory Courts led the way in the recognition of Aboriginal tradition for assessing offender punishments, and Territory legislation and administrative practice largely pre-empted the 1986 Law Reform Commission Report on Aboriginal Customary Law.

Police and prison officers receive in-service training on Aboriginal culture and social life: the Territory Police Force in 1979 began an Aboriginal Police Aide program now 34 strong, and 10% of prison officers are of Aboriginal descent.

Territory Aboriginal imprisonment rates in per Aboriginal capita terms are the second lowest in Australia behind Tasmania - they are less than half those of Queensland. New South Wales and South Australia and less than one-quarter those of Western Australia and Victoria.

The Northern Territory Government has consistently demonstrated a high level of commitment to the vast majority of the Royal Commission's 339 recommendations. A commitment which stems from our very rapid implementation of recommendations of the Muirhead interim report. Only 3 recommendations were not supported by the Northern Territory.

Most of the 20 recommendations that have received only qualified support from the Northern Territory have done so because of our particular difficulties with regard to remote communities.

The Northern Territory is a leader among the States in addressing the Commissions recommendations and is very aware of the "underlying issues" of unemployment, education, health, housing and other social problems.

In 1980, the Territory led Australia by introducing compulsory voting for Aboriginals in Parliamentary elections and mobile polling of isolated communities.

In 1982, the Territory was again first in introducing candidates' photographs on election ballot papers.

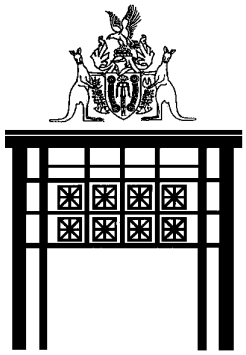
The costs to the Territory Government of meeting the needs of its Aboriginal citizens are high. There are special disability factors which have been documented to, and accepted by, the Commonwealth Grants Commission.

However, the Territory Government will continue to implement programs to support its policy objectives. Much remains to be done there is an on-going challenge for both the Commonwealth and the Northern Territory.

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

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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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CONTENTS

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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 became 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:

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

<u>AND WHEREAS</u> 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

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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 Governor[7] — 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

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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 (s5[8] 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 31[9] and 32[10]).

(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?

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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.

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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 oversighting 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:

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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.

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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 knowledgable 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

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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

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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.

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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, knowledgable 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

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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 35[26] 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.

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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 rhe 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

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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,

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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 D1(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.

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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.

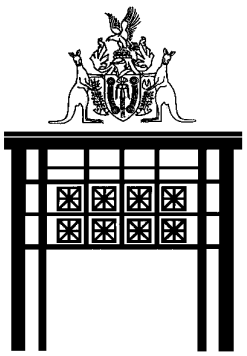
4. It may be that other consequential action by the Territory would be required as a result of the any national arrangements for an Australian Republic. It is impossible to presently foresee what these might be.

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.

Chapter 1

DISCUSSION PAPER NO. 8

A NORTHERN TERRITORY BILL OF RIGHTS?



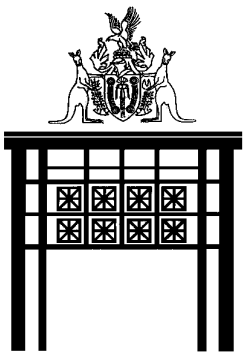
LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

SESSIONAL COMMITTEE ON
CONSTITUTIONAL DEVELOPMENT

DISCUSSION PAPER NO. 8

A NORTHERN TERRITORY BILL OF RIGHTS?

MARCH 1995



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Sessional Committee on Constitutional Development

DISCUSSION PAPER NO. 8

A Northern Territory Bill of Rights?

MARCH 1995

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

CONTENTS **Page No.**

A. EXECUTIVE SUMMARY

1. This Paper considers the options for adopting a Bill of Rights in the Northern Territory, as part of its further constitutional development, including the option of an entrenched Bill of Rights in a new Northern Territory constitution. It does not attempt a comprehensive analysis of the various types of rights that might be included in such a Bill of Rights, given the voluminous literature already on this subject. It does, however, look at some of the subjects that might be included in a Northern Territory Bill of Rights, and the possible mechanisms for dealing with those rights.

2. The Committee stresses that it does not advocate that such a Bill of Rights should be included in a new Northern Territory constitution. However the Committee wishes to raise for consideration whether there should be a Northern Territory Bill of Rights, and if so, how it should be administered and enforced, and also the extent to which it should be entrenched (if at all) in a new Northern Territory constitution.

3. The paper will not be considering the question whether a Bill of Rights should be included in the Australian Constitution. No doubt such a national Bill of Rights would have implications for any Northern Territory equivalent, but this is not a relevant consideration to the work of the Committee at this time.

4. The proposals canvassed in this Paper also bear upon the options that relate to constitutionally entrenching Aboriginal rights. However, these options are fully dealt within the Committee's Discussion Papers Number 4 and 6.[1]

5. The purpose of this Paper is to stimulate debate and invite comments and suggestions by way of submissions to the Committee on the subject of rights in the Northern Territory generally.

6. Particular issues raised in this Paper on which comment and suggestions are sought include:

   (a) The Merits or otherwise of adopting a Bill of Rights in the Northern Territory or whether this should be dealt with at the federal level only.

   (b) Should there be a Bill of Rights at all.

   (c) Whether a Bill of Rights be:

      i. entrenched in a new Northern Territory constitution;
      ii. in the preamble to a new Northern Territory constitution.
      iii. be incorporated in an organic law (a form of legislation that requires a special majority of Parliament for change).
      iv. be incorporated in ordinary legislation only.

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[1] (a) 1992. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Recognition of Aboriginal Customary Law*, Legislative Assembly of the Northern Territory, Darwin; and

(b) 1993. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Aboriginal Rights and Issues - Options for Entrenchment,* Legislative Assembly of the Northern Territory, Darwin.

(e) Possible contents of a Northern Territory Bill of Rights that address three major groups of rights:

i. political and civil rights relating to an individual's right to actively participate in society and government.
ii. economic and social rights relating to an individual's right to basic economic independence.
iii. community and cultural rights relating to the exercise of rights by an individual or in community with others.

(f) Possible contents of a Northern Territory Bill of Rights that address specific groups of rights:

i. The right to life.
ii. Torture, cruel, inhuman or degrading treatment or punishment.
iii. Slavery.
iv. Rights to liberty and security of the person.
v. The rights of people detained.
vi. Imprisonment for contractual default.
vii. Freedom of movement.
viii. The right to a fair trial.
ix. Retrospective offences and/or penalties.
x. The right to privacy.
xi. Freedom of thought, conscience and religion.
xii. Freedom of expression.
xiii. Freedom of assembly.
xiv. Freedom of association.
xv. The right to participate in public affairs.
xvi. Non discrimination and equal protection of the law.
xvii. Other rights such as:

(a) The right to own property and to fair compensation for the arbitrary deprivation of property.
(b) The right to freedom from arbitrary or unreasonable searches, entry and seizures.
(c) Equality of the sexes.
(d) The rights of the child.
(e) The right to petition government.
(f) The right to trial by jury.
(g) The right to freedom of information.
(h) Language and cultural rights of minorities.
(i) Administrative rights and natural justice.
(j) The right to education.

(g) Should any Northern Territory Bill of Rights be capable of being enforced by the Courts or by some other mechanism, or should it be left to administrative and parliamentary procedures to review any breaches, or as an aid to legislative interpretation only.

(h) If the Bill of Rights is to be included in the new Territory constitution, to what extent should it be constitutionally entrenched?

B. 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 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 and on 27 June 1994, it was again reconstituted with no further change to its terms of reference.

(b) 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.

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 and Australian populations."

2. Purpose of this Paper

(a) This Discussion Paper constitutes the eighth in a series of discussion papers issued by the Committee. It looks at the options for adopting a Bill of Rights in a new Northern Territory constitution. It does not attempt a comprehensive analysis of the various types of rights that might be included in such a Bill of Rights, given the voluminous literature already on this subject. It does, however, look at some of the subjects that might be included in a Northern Territory Bill of Rights, and the possible mechanisms for dealing with those rights.

(b) The Committee has reviewed a considerable body of literature in assessing the options for the Northern Territory. It has found particular assistance from the Victorian Legal & Constitutional Committee Report,[2] the Queensland Electoral and Administrative Review Commission Report[3] and the Attorney-General's Department (ACT) Issues Paper - 1993[4] as well as other publications.

(c) The Committee is not to be taken as necessarily advocating that such a Bill of Rights should be included in a new Northern Territory constitution. This is an issue upon which views will differ and on which Committee members have yet to make up their minds. The Committee invites public comment.

(d) The Committee wishes to raise for consideration whether there should be such a Northern Territory Bill of Rights, the contents of any such Bill of Rights, how it should be administered and enforced, and also the extent to which it should be entrenched in a new Territory constitution. The options in this regard are discussed below.

(e) The Committee will not be considering the question whether a Bill of Rights should be included in the Australian Constitution. This is a separate, national issue, upon which the Committee does not need to express any opinion. No doubt such a national Bill of Rights would have implications for any Northern Territory equivalent, but at this stage the Committee is not aware of any such firm proposals at the national level.

(f) The proposals in this Paper obviously apply to all Territorians, including Aboriginal Territorians. The question whether there should also be any constitutionally entrenched Aboriginal rights is dealt with in the Committee's Discussion Papers Number 4 and 6.[5]

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2 1987. *Report on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights*, Government Printer, Melbourne.

3 1993. *Review of the Preservation and Enhancement of Individuals Rights and Freedoms*, The Queensland Electoral and Administrative Review Commission, Brisbane.

4 1993. *A Bill of Rights for the ACT?*, Attorney General's Department, Canberra.

5 (a) 1992. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Recognition of Aboriginal Customary Law*, Legislative Assembly of the Northern Territory, Darwin; and

(b) 1993. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Aboriginal Rights and Issues - Options for Entrenchment*, Legislative Assembly of the Northern Territory, Darwin.

3. Discussion and Information Papers

The Committee has prepared and issued a number of papers and an interim report arising from its 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, *Citizens' Initiated Referendums*.
* Discussion Paper No. 4, *Recognition of Aboriginal Customary Law.*
* Discussion Paper No. 5, *The Merits or Otherwise of Bringing an NT Constitution into Force Before Statehood.*
* Discussion Paper No. 6, *Aboriginal Rights and Issues - Options for Entrenchment.*
* Discussion Paper No. 7, *An Australian Republic? Implications for the Northern Territory*.
* Information Paper No. 1, *Options for a Grant of Statehood*.
* Information Paper No. 2, *Entrenchment of a New State Constitution.*
* Interim Report No. 1, *A Northern Territory Constitutional Convention*.

4. Relevant Issues Raised in Previous Committee Papers

(a) In the Committee's *Discussion Paper on A Proposed New State Constitution for the Northern Territory,*[6] for ease of reference called the *Discussion Paper,* the question was raised whether the new State constitution should contain any provisions dealing with human rights.[7]

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[6] 1987. Northern Territory Legislative Assembly Select Committee on Constitutional Development, Legislative Assembly of the Northern Territory, Darwin.

[7] 1987. Northern Territory Legislative Assembly Select Committee on Constitutional Development. *Discussion Paper on A Proposed New Constitution for the Northern Territory,* Legislative Assembly of the Northern Territory, Darwin: 95 - 96.

ITEM T. HUMAN RIGHTS

"1. The question arises as to whether the new State constitution should contain any provisions dealing with human rights - for example, freedom of speech, freedom of religion, freedom of assembly etc. *The Universal Declaration of Human Rights,* as adopted by the United Nations in 1948, conveniently summarises the main human rights of interest and is contained in Part X below.

2. No Australian constitution contains any comprehensive provisions of this nature. The Commonwealth Constitution contains some limited provisions which could be described as coming within this category, but the courts have in most cases given them a fairly limited application. The constitution of Tasmania contains a provision dealing with religious freedom. The constitutions of other States are silent on any matters pertaining to the citizen's rights.

3. By way of contrast the Constitution of the USA and the constitutions of the States of the USA contain comprehensive bills of rights. The constitutions of many countries have similar guarantees of civil and political rights, of the nature contained in the *International Covenant on Civil and Political Rights*. Relevant extracts from the Constitution of USA and Canada are also attached in Part X below by way of example.

(b) Since the publication of the Committee's Discussion Paper in 1987, the Constitutional Commission's Final Report[8] delivered to the Commonwealth Government in 1988, recommended that a new Chapter be added to the Australian Constitution on rights and freedoms of a comprehensive kind. Subsequently, in the 1988 National Referenda, a limited number of constitutional proposals of a human rights nature were put to the Australian people in conjunction with other proposals, but the referenda failed.

(c) Neither the Commonwealth nor the States have since embarked upon a course of attempting to include a bill of rights in their respective constitutions.

(d) The *Discussion Paper* outlined arguments for and against a Bill of Rights.[9]

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4. The constitutions of some countries go further and provide for other rights of the nature contained in the *International Covenant on Economic, Social and Cultural Rights*. However, not all of these countries have an independent Judiciary, and the real value of some of these statements of rights is questionable.

5. The question whether Australia should have legally enforceable guarantees of civil and political rights has been hotly debated in recent years. Australia is a signatory to the International Covenant on Civil and Political Rights and various other international human rights instruments, and has legislated to implement in part these instruments in the *Human Rights and Equal Opportunity Commission Act* 1986, *the Racial Discrimination Act* 1975 and the *Sex Discrimination Act* 1984. However, attempts to pass a comprehensive *Human Rights Act* in the Commonwealth Parliament have not succeeded. As a consequence, generally speaking it is not possible to found a cause of action or a defence in an Australian court based solely on an internationally recognized human right.

6. The *Constitutional Commission's Advisory Committee on Individual and Democratic Rights*, in its 1987 Report, has recommended that the Commonwealth Constitution be amended to expand and entrench specified human rights. These include rights relating to trial by jury and the criminal process, freedom of religion, movement, expression and assembly, equality before the law, acquisition of property on just terms, voting and citizenship rights and other matters, not limited in operation to matters over which the Commonwealth has jurisdiction. The report proposes the insertion of a new preamble in the Constitution."

8 1988. *Final Report of the Constitutional Commission*, Vols 1 and 2, Australian Government Printing Service, Canberra.

9 1987. Northern Territory Legislative Assembly Select Committee on Constitutional Development. *Discussion Paper on A Proposed New Constitution for the Northern Territory.* Legislative Assembly of the Northern Territory, Darwin: 96-97.

ITEM T. HUMAN RIGHTS:

"7. There are arguments for and against the adoption of an enforceable statement of human rights in the new State constitution. Those arguments for such a proposal rely both on moral arguments and on the view that this is a desirable form of "check" against possible abuses by government or against undesirable legislation. Those arguments against the proposal stress the undesirability of the legislature abdicating its authority in these matters to the courts, the costs and delays potentially arising, the alleged adequacy of the common law as supplemented by legislation where found necessary or desirable in particular cases, and the fact that by prescribing some rights it may in some cases unduly limit other rights.

8. An enforceable statement of human rights entrenched in the new State constitution might or might not be expressed to be subject to express change in specific matters by later ordinary legislation.

9. An alternative may be to include in the new State constitution a preamble setting out basic human rights or goals for the new State and its citizens, that preamble not giving rise of itself to enforceable legal rights but merely acting as an aid to the interpretation of new State legislation and its administration."

(e) It will be observed that the Committee did not make any recommendations on this subject in its *Discussion Paper* at that time, but left it open for public comment.

(f) There were a considerable number of people and organisations that responded to the Committee's invitation to comment on the *Discussion Paper* concerning the question of a possible Territory Bill of Rights. Several commentators were totally opposed to the idea, preferring to leave the matter to the common law and ordinary legislation. Some others felt it was a matter which should be dealt with at a federal level only. A majority of the commentators favoured a Territory Bill of Rights, either in a preamble to the constitution or in the Territory constitution proper. Certain commentators stressed the need for the protection of particular rights. For example, the Council of Government Schools Organisation sought provisions as to the right to education. Mr R G Kimber advocated freedom of the press, freedom of information and freedom of access to land. The Women's Advisory Committee placed emphasis on provisions against sex discrimination. Other commentators stressed freedom of religion (including aspects of Aboriginal religion, such as sacred sites). A number of commentators felt that it was a matter in which the Territory should take a lead, notwithstanding the absence of any comprehensive statement of rights at a federal level or elsewhere in Australia.

(g) A list of those persons or organisations that commented on this aspect of the Committee's *Discussion Paper* is attached to this Paper as Appendix 1.

(h) In addition to matters dealing specifically with human rights, the Committee has already dealt with a number of related issues in its *Discussion Paper*. In part, these concerned the strong belief in the need for a representative and democratic parliamentary system in the Northern Territory; in part these concerned the recommendations designed to ensure the independence of the Territory judiciary.

(i) In the case of the Parliament, it is of some relevance to note that the Committee tentatively advocated a fully representative unicameral legislature, directly elected by adult Territory residents to single member electorates by a system of secret ballots, for a term of a minimum of 3 years (subject to limited exceptions) with a maximum of 4 years.[10] Ministers would be drawn from elected members only. The Committee therefore envisaged a constitutionally entrenched form of democracy on Westminster lines.

(j) The Committee also envisaged that Judges of the Supreme Court of the Territory would be given constitutional guarantees of independence, such that they could only be removed from office by the Governor upon an address in the Parliament for proven misbehaviour or incapacity[11]. The independence of the judiciary is of course of great importance to the effectiveness of any constitutionally entrenched Bill of Rights.

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[10] 1987. Northern Territory Legislative Assembly Select Committee on Constitutional Development. *Discussion Paper on A Proposed New Constitution for the Northern Territory*, Legislative Assembly of the Northern Territory, Darwin: 28.

[11] 1987. Northern Territory Legislative Assembly Select Committee on Constitutional Development. *Discussion Paper on A Proposed New Constitution for the Northern Territory*, Legislative Assembly of the Northern Territory, Darwin: 78, 81.

(k) The subject of human rights was also briefly raised in the Committee's illustrated book on a proposed new State Constitution for the Northern Territory.[12]

(l) Apart from matters specific to the Aboriginal people of the Territory, the Committee has not since had cause to discuss a possible Northern Territory Bill of Rights. It is, however, an issue that must be addressed in greater detail, hence this Paper.

(m) To assist in deliberations, the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the USA *Bill of Rights* and the Canadian *Charter of Rights and Freedoms*, as well as the relevant provisions in New Zealand, the European Community, Papua New Guinea and South Africa, are set out in Appendices 2-9 of this Paper. These are examples of provisions that might be drawn upon if the Northern Territory was to proceed with its own Bill of Rights.

[12] 1988. Northern Territory Legislative Assembly Select Committee on Constitutional Development. *Proposals for a new State Constitution for the Northern Territory - Have your Say*!, Legislative Assembly of the Northern Territory, Darwin.

C. BACKGROUND AND PRESENT POSITION

1. Statements of human rights have a long history. In Australia, it is possible to look back to the English inheritance in the *Magna Carta* and the *Bill of Rights* 1688, neither of which have an entrenched constitutional status and both of which have limited contemporary application in Australia.

   The United Kingdom, unlike other countries such as France and USA, never adopted a Bill of Rights worded in more contemporary terms. As a consequence, Australia never inherited a similar document as part of its legal system.

2. The founders of the Australian Constitution, acting in accordance with this English inheritance, considered it unnecessary to frame a comprehensive statement of rights in the new Constitution. However, selected provisions of relevance were included in the Australian Constitution.[13]

3. In the past, the tendency of the High Court has been to give these few provisions in the Constitution a narrow, technical reading. There have, however, been recent indications on that Court of a more expansive approach to their interpretation.

4. The Australian Government has been active in recent decades in becoming a party to a wide range of United Nations Covenants and Conventions on human rights. An example is the *International Covenant on Civil and Political Rights*, a copy of which is at Appendix 2. In a number of cases it has domestically implemented these, in whole or part, by federal legislation, for example, the *Human Rights and Equal Opportunity Commission Act*, 1986. Such legislation, insofar as it is proportionate to and gives effect to the international instruments in question, will be valid under the external affairs powers (s51(xxix)) of the Australian Constitution. It will prevail over any inconsistent State or Territory legislation.

5. More recently, the Australian Government has acceded to the *Optional Protocol to the International Covenant on Civil and Political Rights*[14] and to some other international human rights instruments, giving individual Australians a remedy of last resort to international bodies set up under those instruments.

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[13]
- Provisions for the federal Parliament to be directly elected by the people (ss7 and 24).
- The right to vote (s41).
- Freedom from compulsory acquisition of property under Commonwealth laws otherwise than on just terms, s51(xxxi).
- Security of tenure for federal Judges (s72).
- Trial by jury for Commonwealth indictable offences (s80).
- No discrimination or preferences among the States in trade, commerce, and revenue (ss51(ii), (iii), 88, 90, 92, 99).
- Freedom of religion at the federal level (s116).
- No disability or discrimination between residents of different States (s117).
- No alteration of the Constitution without a national referendum of voters (s128).

[14] see Appendix 2.

6. There have been a number of attempts in recent years to introduce a Bill of Rights at a federal level in Australia by way of ordinary legislation, the last being the Bowen Bill of 1985. None were enacted.

7. Reference has already been made to proposed constitutional changes put to the people by national referendum in 1988 as part of a wider set of proposals. All these proposals failed to secure the necessary majorities.

8. Since 1988, support has slowly gathered for constitutional change on the subject of rights at the federal level. The Federal Government has not, at the time of writing, committed itself to any firm proposals. However, it is a matter now on the agenda for public discussion, particularly since the 1991 *Constitutional Centenary Conference* in Sydney.

9. At a State level, a proposal was made by the Queensland Nicklin Government in 1959 to enact a Bill of Rights in that State. It never proceeded to a vote.

10. In 1987, the Legal and Constitutional Committee of the Victorian Parliament produced a report advocating the enactment in the Victorian Constitution of a non-enforceable Declaration of Rights and Freedoms, with investigation and report mechanisms by a permanent Parliamentary Committee.[15] A Bill incorporating a Charter of Rights and Freedoms was introduced, but was criticised by the Opposition as having no teeth. It subsequently lapsed. However, in 1992, the *Parliamentary Committees Act* was amended to specifically vest in the *Scrutiny of Acts and Regulations Committee* the function of scrutinising every Bill that affects rights or freedoms.

11. More recently, the Queensland Electoral and Administrative Review Commission has advocated a constitutionally entrenched Bill of Rights in that State. [16]

12. In an Issues Paper[17] issued by the Attorney-General's Department (ACT) in late 1993 submissions were invited on a range of options, being firstly an entrenched Bill of Rights either through Commonwealth legislation for the ACT or by an ACT enactment entrenched by referendum (a position facilitated by section 26 of the *Australian Capital Territory (Self-Government) Act* 1988), or secondly a non-entrenched Bill of Rights on the New Zealand model, or thirdly an Assembly Declaration of Rights and Freedoms, with an Assembly Committee to scrutinise legislation for compliance with the Declaration. The other option was the status quo. In 1994, a bill in the form of an exposure draft for an ACT Bill of Rights was circulated.

13. New Zealand now has a statutory Bill of Rights - see Item D below and Appendix 3.

14. The failure to introduce a constitutional Bill of Rights in Australia may in part be responsible for developments in the High Court, both in giving a wider interpretation to the few existing

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15 1987. *Report on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights*, Government Printer, Melbourne.

16 1993. *Review of the Preservation and Enhancement of Individuals Rights and Freedoms*, The Queensland Electoral and Administrative Review Commission, Brisbane.

17 1993. *A Bill of Rights for the ACT?*, Attorney General's Department, Canberra.

express provisions of relevance (see above) and also in deciding that certain rights are to be implied in the Australian Constitution. Thus, the High Court by a majority has recently enunciated an implied right of freedom of communication in political matters in the *Australian Capital Television*[18] and the *Nationwide News*[19] cases and in the following cases; *Theophanous*[20] *Stephens v WA Newspapers*[21] and *Cunliffe*,[22] the exact scope of which is still somewhat uncertain. It appears that there may also be an implied doctrine of the underlying equality of all people under law; see *Leeth's*[23] case.

15. The High Court has also been active in developing the common law, such as in the *Mabo*[24] case as to recognition of native title and in a variety of cases extending the concept of natural justice in administrative law.

16. There have been frequent calls for Australian courts to make increased reference to international human rights principles - for example the Bangalore Principles of 1988.[25] Increasingly, Australian courts are making reference to these principles in their judgments, whilst not regarding themselves as bound thereby except in so far as Australian legislation so provides.

17. The territories of the Commonwealth (which at present include the Northern Territory) and their residents were previously thought not to have the benefit of any of the express guarantees in the Australia Constitution. For example, there is High Court authority for the proposition that the constitutional guarantee of acquisition of property only on just terms[26] does not apply to an acquisition pursuant to laws made for a territory.[27] However, more recent dicta of at least one member of the High Court has thrown some doubt on this position.[28] The result is one of some uncertainty in territories.

18. This position may change should the Northern Territory become a new State. Absent any valid terms or conditions to the contrary as part of the creation of that new State, there seems to be no reason why all the guarantees in the Australian Constitution applicable to a State or a State resident should not apply equally to a new State or a new State resident. Arguably, it is

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18 Australian Television Pty Ltd v Commonwealth (1992) 177 CLR 106.

19 Nationwide News Pty Ltd v Wills (1992) 177 CLR 1.

20 Theophanous v Herald & Weekly Times Ltd (1994) 124 ALR 1.

21 Stephens v West Australian Newspapers Ltd (1994) 124 ALR 80.

22 Cunliffe v Commonwealth (1994) 124 ALR 120.

23 Leeth v Commonwealth (1992) 174 CLR 455.

24 Mabo v Queensland (No. 2) (1992) 175 CLR 1.

25 1988. Human Rights Unit. *Developing Human Rights Jurisprudence: The Domestic Application of International Rights Norms*, Commonwealth Secretariat, London.

26 s51(xxxi) - The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

27 Teori Tau v Commonwealth (1969) 119 CLR 564.

28 Gaudron J in Capital Duplicators Pty Ltd v ACT (1992) 177 CLR 248.

not constitutionally possible to exclude the application of those guarantees to a new State and its residents.[29]

19. However, the limited scope of such express constitutional guarantees, even if given a wider interpretation, offers little comfort to those who advocate that a comprehensive Bill of Rights should be adopted and be applicable to the Territory.

20. It should be noted that the Committee is considering whether the Northern Territory should adopt its own, home grown constitution even before it becomes a new State.[30] This would include the question whether as a Territory it should have a Bill of Rights in that constitution.

21. The Committee points out that under the present *Northern Territory (Self-Government) Act* 1978, establishing the self-governing Northern Territory, there are some limited provisions of relevance to human rights. This includes the provisions for:

- the representative direct election of members of the Legislative Assembly of the Northern Territory;[31]
- freedom of trade, commerce and intercourse between the Northern Territory and the States;[32] and
- the requirement that Territory laws for the acquisition of property provide for just terms.[33]

However, these provisions can be overridden by a later ordinary Commonwealth statute.

22. The Legislative Assembly of the Northern Territory has also legislated on matters concerning human rights. For example, the *Anti-Discrimination Act* contains provisions similar to those in the States. Such legislation is supplemental to the common law, and operates in tandem with a variety of Commonwealth legislation, such as *the Human Rights and Equal Opportunity Commission Act* 1986 and the *Racial Discrimination Act* 1975. None of this federal or Territory legislation has an entrenched constitutional status.

23. There is no domestic legal obligation on a State or Territory to bring its legislation into conformity with internationally accepted minimum standards of human rights. However, if the Australian Government has entered into international agreements or has incurred international obligations in these matters, it can provide the necessary constitutional capacity under the

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29 1988. Toohey, J. 'New States and the Constitution: An Overview', in Loveday and McNab (eds), *Australia's Seventh State*, North Australia Research Unit and the Law Society of the Northern Territory, Darwin: 8-9.

30 1993. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *The Merits or Otherwise of bringing an NT Constitution into Force before Statehood*, Legislative Assembly of the Northern Territory, Darwin.

31 see Part III of the *Northern Territory (Self-Government) Act* .

32 s49 Trade, commerce and intercourse between the Territory and the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

33 s50 (1) The power of the Legislative Assembly conferred by section 6 in relation to the making of laws does not extend to the making of laws with respect to the acquisition of property otherwise than on just terms.

(2) Subject to section79, the acquisition of any property in the Territory which, if the property were in a State, would be an acquisition to which paragraph 51 (xxxi) of the Constitution would apply, shall not be made otherwise than on just terms".

external affairs power for the Commonwealth Parliament to enact legislation to implement same, with the resultant capacity to override any inconsistent State or Territory legislation.

24. Conversely, there is no objection to a State or Territory legislating on human rights, providing it does not do so inconsistently with the Australian Constitution or with valid Commonwealth legislation. This capacity extends to the inclusion of human rights provisions in a State (including a new State) constitution. Whether such new State constitutional provisions would override any inconsistent Commonwealth legislation in its operation in that new State, relying on section 106[34] of the Australian Constitution, is uncertain.

25. In the context of a home grown Northern Territory constitution adopted prior to any grant of Statehood, and assuming that the Commonwealth was prepared to give that constitution legal force pursuant to Commonwealth legislation, the same reasoning applies as in the previous paragraph, namely, there is no lack of capacity in the Northern Territory to adopt its own constitution with a Bill of Rights. It would be subject to the Australian Constitution and to any inconsistent Commonwealth legislation.

26. The question for consideration is therefore whether the Northern Territory, as a new State or otherwise, should adopt a Bill of Rights in its own, home grown constitution, and if so, in what form?

[34] s106 - The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

D. POSITION IN SELECTED OTHER COUNTRIES

1. UNITED STATES OF AMERICA

(a) The original USA Constitution did not contain a Bill of Rights. However the first 9 amendments inserted the Bill of Rights, effective in 1791. Subsequently, the 13th Amendment as to abolition of slavery was added in 1865, the 14th Amendment as to due process and equal protection of the laws was added in 1868, the 15th Amendment as to the right to vote without regard to race, etc was added in 1870, the 19th Amendment as to the right to vote without regard to sex was added in 1919, the 24th Amendment as to the right to vote irrespective of failure to pay a tax was added in 1964 and the 26th Amendment as to the right to vote of persons over 18 years of age was added in 1971. A copy of these provisions is set out in Appendix 4.

(b) Other proposed amendments, not yet ratified, include those dealing with child labour and as to the equal rights of the sexes.

(c) The USA Constitution emerged during a period of conflict, when the sentiment in favour of provisions designed to secure a measure of freedom was very strong, not only from the former colonial rulers, but also from USA governments of the future. The scenario was very different from that now applying in the Northern Territory. However, the underlying primary rationale is basically the same, in that the purpose of having entrenched rights was and is to secure the fundamental rights of the citizen against undue encroachment by government.

(d) It is said that for the first 150 years of the operation of the USA Bill of Rights, these provisions were given little force and effect by the USA courts. This position has changed in the last 50 years with a more "activist" Supreme Court. This is no doubt a result of a number of factors, including the more pervasive intrusion of contemporary government into virtually all aspects of society and life, the development worldwide of human rights jurisprudence and increasing concerns about the erosion of individual rights.

(e) Considerable controversy has surrounded the role of the USA Supreme Court in interpreting some of the provisions of the Bill of Rights, particularly those concerning rights of free speech and freedom of the press, the right to bear arms, provisions as to search and arrest and freedom of religion. In part, these concerns stem from the particular formulation of some rights considered appropriate over 200 years ago, but now of questionable value. In part, they stem from the entrenched nature of the rights, giving the Supreme Court a wide and virtually unchallengeable discretion (except in a political sense) in matters concerning their interpretation, a matter perhaps not assisted by the manner of appointment of members of the Court. The limited correlation with internationally accepted contemporary standards of human rights means that the Supreme Court has not always drawn great assistance from the developing international human rights jurisprudence. The absence of a provision guiding the courts in balancing the various rights and the lack of any provision indicating that the rights may to some extent be qualified in the wider public interest

has limited the degree of flexibility available. Notwithstanding the controversy, the Court enjoys a high reputation.

(f) Arguably, the USA Bill of Rights, while having had a profound affect on constitutional law in that country and while in many cases securing individual rights, has by some standards failed to ensure the kind of tolerant, moderate and open society that might be considered desirable in Australia. While it is difficult to argue by analogy from one country to another, it indicates the limitations of a constitutionally entrenched statement of rights. A Bill of Rights, no matter how carefully drawn, should not be seen as a panacea for all the ills of society. It is but one instrument among many.

(g) All USA State constitutions as distinct from the national Constitution contain a series of protections of specified rights for individuals. Most of the constitutions of the original States contained such provisions and the federal Bill of Rights was to a certain extent patterned on them. Interestingly, the Bills of Rights in State constitutions usually appear at the beginning of the constitutions in question, rather than at the end as in the federal Bill of Rights. This structural difference has been said to be significant. The last two States to be admitted into the Union, Alaska and Hawaii, included a Bill of Rights in their new State constitutions.

(h) These State Bills of Rights were largely ignored until the 1970's when courts started to utilise their provisions in deciding cases. Many of these Bills of Rights contain provisions going further than the federal Bill of Rights. For example, they sometimes protect rights against private intrusion and not just against governments. This has led to somewhat of a rebirth of State constitutional law. It is complicated by the fact that the USA Supreme Court does not have a general appellate jurisdiction in State matters. By way of comparison, the Australian High Court does.

(i) Some USA territories also have a constitutional Bill of Rights of their own, such as the Commonwealth of Puerto Rico (the residents of which recently voted against admission as a new State) and American Samoa.

2. CANADA

(a) Initially, the Imperial *British North America Act* of 1867 had no provisions equivalent to a Bill of Rights. In 1960, Canada adopted a Bill of Rights by ordinary federal legislation, applicable only federally. It has only a limited effect. It provides that every federal law, unless expressly declaring otherwise, is to be interpreted consistently with that Bill of Rights.

(b) In 1982, the *British North America Act* was patriated to Canada and became the *Constitution Act* 1982 of Canada. It incorporated a *Charter of Rights and Freedoms* (*The Charter*), applicable both at a federal and provincial level, a copy of which is also set out at Appendix 5. It was introduced alongside the statutory Bill of Rights, and presumably overrode that Bill of Rights to the extent of any inconsistency. Two aspects of the Bill of Rights were said to survive, namely, the provision for due

process, extending to protection of property, and the guarantee of a fair hearing in the determination of rights and obligations.

(c) *The Charter* incorporates not only traditional individual human rights, but also mobility rights and language rights. It is an enforceable document. It provides that it does not abrogate or derogate from Aboriginal rights, but subject to the guarantee of equality based on gender. Most of the rights are subject to a right of express exceptions by statute, which can only be operative for a maximum of 5 years. It is subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. In other respects, *The Charter* is constitutionally entrenched, involving a complicated amendment procedure.

(d) *The Charter* has precipitated a great volume of litigation (mostly concerning criminal matters) and has generated considerable controversy. It has been widely excluded in Quebec by Provincial statutes.

(e) Canadian Provinces have been active in the area of civil liberties longer than the federal Canadian Government. Provincial anti-discrimination legislation has existed for many years. In 1962, Ontario consolidated this into a *Human Rights Code*, administered by a Human Rights Commission. All Provinces followed suit, and these continue notwithstanding the adoption of *The Charter*. The Codes have a wider application than *The Charter*, extending to private individuals and firms in certain cases. The informal procedure under the Codes has no counterpart in *The Charter*.

(f) A number of Provinces also have statutory Bills of Right, commencing with Saskatchewan in 1947. Quebec adopted one in 1975. These Provincial Bills of Rights have lost most of their importance since the introduction of *The Charter*, although in some cases they are broader in scope than *The Charter*.

(g) The Yukon Territory adopted a statutory *Human Rights Act* in 1987. In the case of the Northwest Territories, the Commission for Constitutional Development for the Northwest Territories of Canada, recommended that the "New Western Territory" should reaffirm the rights and freedoms that are set out in *The Charter*.[35]

3. NEW ZEALAND

(a) The present Bill of Rights found its origins in a Government White Paper of 1985,[36] That Paper followed to some extent the design of the Canadian *Charter of Rights and Freedoms*, and also of the *International Covenant on Civil and Political Rights*. In its draft form it incorporated recognition of Maori rights under the *Treaty of Waitangi*, but this provision has not survived. The Paper proposed that it be enacted as an ordinary Act of Parliament, but with a statement that it was the supreme law of New Zealand such that it overrode any inconsistent law. It was to be

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[35] 1992. *Working Toward a Common Future*, Commission for Constitutional Development, Yellowknife, Northwest Territories, Canada: 12.

[36] 1985. *A Bill of Rights for New Zealand*, Government Printer, Wellington, New Zealand.

entrenched to the extent that any amendment was to require a 75% majority of the members of the Parliament or a majority of electors at a poll.

(b) The New Zealand *Bill of Rights Act*[37] was subsequently enacted in 1990. It omits any statement as being the supreme law and is not constitutionally entrenched. It operates merely as a statement of preferred interpretation in relation to public legislation and public actions. It cannot override other inconsistent legislation, either expressly or by implication.

(d) Notwithstanding its limitations, it is clear that it constitutes a major break with tradition. There are signs that the New Zealand courts may be prepared to give the Bill some significant practical effect notwithstanding these limitations.

4. PAPUA NEW GUINEA

(a) Prior to independence, the legislature enacted a *Human Rights Ordinance* 1971, enforceable as an ordinary statute in the Supreme Court.

(b) The Constitution of independent Papua New Guinea (PNG), proclaimed in 1975, was prepared in a manner that in some ways is similar to that proposed by this Sessional Committee for the Northern Territory.[38] The PNG Constitution evolved from a motion of the House of Assembly to establish a Constitutional Planning Committee in 1972. Its task was to recommend a constitution for full internal self-government with a view to eventual independence. The Committee engaged in widespread public consultation and produced a Final Report in two parts in 1974.[39]

(c) That Final Report advocated a comprehensive constitutional *Declaration of Fundamental Rights and Freedoms*, preferring such a statement to counter arguments that this is a matter best left to the legislature and the courts. It was to be constitutionally entrenched, but subject to exceptions reasonably justifiable in a democratic society.

(d) Following receipt of the Final Report, the House of Assembly resolved itself into a Constituent Assembly for the purpose of establishing and adopting the Constitution of Papua New Guinea as part of the transition to independence.

(e) The PNG Constitution contains an enforceable statement of *Basic Rights* — see Appendix 6 to this Paper. A prohibition on slavery is also contained in section 253.[40] The provisions are entrenched and require a special procedure for amendment,

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37 see Appendix 3.

38 see 1987. Northern Territory Legislative Assembly Select Committee on Constitutional Development. *Options for a Grant of Statehood*, Legislative Assembly of the Northern Territory, Darwin.

39 1974. *Final Report of the Constitutional Planning Committee - Parts 1 and 2*, Government Printer, Port Moresby, Papua New Guinea.

40 s253 - Slavery, and the slave trade in all their forms, and all similar institutions and practices, are strictly prohibited.

involving two separate Parliamentary resolutions at least 2 months apart, and requiring a 2/3rds or 3/4's absolute majority vote, plus publication and opportunities for debate. The suggested qualification as to laws that are reasonably justifiable in a democratic society is preserved for certain qualified rights.

(f) In addition, the PNG Constitution contains a statement of *Basic Social Obligations* and a statement of *National Goals and Directive Principles* relating to economic, social and cultural goals for the nation, basically in a non-justiciable form.[41] These statements, together with the United Nations Charter, the *Universal Declaration of Human Rights* — see Appendix 7 — and other international human rights instruments and judgments, reports and opinions thereon and a variety of other source materials, may be taken into account in determining whether or not a matter is reasonably justifiable in a democratic society.[42]

(g) These provisions and other related provisions in the PNG Constitution are complicated and lengthy, and it is not clear whether the high principles upon which they are based have been fully translated into practice.

5. UNITED KINGDOM

(a) Traditionally, the United Kingdom has not espoused the cause of an entrenched written constitution, relying instead on the principle of the supremacy of Parliament and on ordinary statutes passed by that Parliament and a range of unwritten conventions supplementing the common law which for present purposes includes equitable rules. It is now firmly established that an ordinary statute can override the common law, there being no fundamental natural law principles that are beyond Parliamentary reach. Subject to changes resulting from entry into the European Community, there have been no real developments in the form of a comprehensive constitutional statement of rights since the *Bill of Rights* in 1688.

(b) It is widely considered that this Century has seen a significant transfer of real power away from the legislature and towards the executive, with an accompanying erosion of Parliamentary authority through the party system. This has lead to concerns in the United Kingdom and elsewhere that the traditional rights and freedoms of the citizen are perhaps no longer protected as much as they should be and that the rights of the citizen have come to depend too much on the exercise of executive discretions. The courts of the common law world have endeavoured to develop that common law to meet this new challenge, particularly in the area of administrative law. However, this approach clearly has its limitations. It has been supplemented by particular legislative reforms from time to time, although instigation of these reforms is now largely dependant on the will of the executive.

(c) There has been a developing view that these traditional rights and freedoms are not sufficient of themselves to protect basic rights. This debate has received some impetus from the entry of the United Kingdom into the European Community, most of

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41 see Appendix 6.

42 see Papua New Guinea Constitution, section 39 in Appendix 6.

the members of which are a party to the *European Convention on Human Rights* of 1950. A copy of this Convention is set out at Appendix 8 to this Paper.

(d) That Convention incorporates a detailed statement of rights and establishes the machinery for their enforcement. There is a right for any person or group who claims to be a victim of a violation of the rights by a national contracting party that has recognised the competence of the Commission to petition the European Commission of Human Rights. This right extends to the United Kingdom. The Commission can only deal with the matter after all domestic remedies are exhausted and within a period of 6 months from the final decision. The Commission reports with its recommendations to the Committee of Ministers. There is also a European Court of Human Rights, but only the national contracting parties or the Commission can bring a case before that Court. Its jurisdiction has been accepted by the United Kingdom. The Court can only deal with the matter if the Commission's settlement attempts have not succeeded. The Court can make binding, final decisions. European Community States also have access to the European Court of Justice in human rights and other matters.

(e) In a number of cases originating from the United Kingdom, it has been found that the law or practice of that country does not meet the standards set by the Convention.

(f) United Kingdom courts have not accepted that the Convention is part of the domestic law of that country, and as a result the Convention cannot found a cause of action in those courts. It is clear that the Convention and the decisions under it are having a profound affect on the law of that country.

(g) The *Maastricht Treaty* of 1992 affirmed the resolve of the members of the European Union to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law. It provides in *Article F2* that the Union shall respect fundamental rights, as guaranteed by the European Convention of 1950 and as they result from the constitutional traditions common to the member states, as general principles of community law.

(h) A number of draft Bills of Rights have been put forward in the United Kingdom, based on the European Convention and designed to give them the force of domestic law. None have yet come into force.

6. SOUTH AFRICA

(a) As a result of plans for the abolition of apartheid, the Republic of South Africa has had cause to consider the need for an entrenched constitutional Bill of Rights. In the South African Law Commission's *Interim Report into Group and Human Rights* of 1991, it concluded that the advantages and necessity of such a Bill far outweighed the alleged disadvantages and dangers. It was envisaged that the process of negotiations should go hand in hand with the formulation of such a Bill and the elimination from the statute book of existing inconsistent provisions.

(b) As a consequence, the negotiation of a Bill of Rights became critical to the constitutional settlement that followed.

(c) The new South African Constitution was introduced by an Act in 1993, in force from 1994, and repealing the whole of the previous constitution. It is expressed to be a transitional document, in that it establishes both Houses of Parliament as a Constituent Assembly to draft and adopt a future new constitution. This must conform to the *Constitutional Principles* in Schedule 4 to the 1993 new South African Constitution — see Appendix 9.

(d) The 1993 new South African Constitution also entrenches a broad statement of enforceable fundamental rights, effective immediately.[43] These may be limited by provisions that are reasonable and justifiable in an open and democratic society based on freedom and equality, and in some cases providing they are necessary. They may also be qualified under certain conditions by a state of emergency and suspension and by a process of interpretation which promotes the values that underlie an open and democratic society based on freedom and equality, having regard to international law and comparable foreign case law. These provisions may only be amended at a joint sitting of both Houses by a 2/3rds absolute majority of the total number of members of both Houses.

(e) No amendment of the *Constitutional Principles* and the requirement to comply with same is permissible.

(f) The 1993 new South African Constitution provides for the establishment of a Constitutional Court which must certify that a future new constitution does so conform. The *Constitutional Principles* specify that South Africa is to have a democratic system of government committed to achieving equality between men and women and people of all races. Everyone is to enjoy all universally accepted fundamental rights, freedoms and civil liberties, which are to be protected by entrenched and justiciable provisions in the future new Constitution. These entrenched and justiciable provisions are to be drafted after due consideration to the fundamental rights in the 1993 new South African Constitution. The legal system is to ensure equality of all before the law and an equitable legal process, including laws, programs or activities that have as their object the amelioration of the conditions of the disadvantaged, including those on the grounds of race, colour and gender. There is to be a qualified, independent and impartial judiciary. A variety of other provisions relate to the democratic process.

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[43] see Chapter 3 - Fundamental Rights in Appendix 9.

E. MERITS OR OTHERWISE OF A BILL OF RIGHTS IN A NORTHERN TERRITORY CONSTITUTION

1. There are a variety of arguments that have been advanced for and against a Bill of Rights and these are discussed below. In the end, it is a matter of personal assessment, having regard to these arguments. It is not a matter upon which the Committee has any fixed views at this stage. It is anxious to assess the prevailing feeling in the Territory community on the matter.

2. There is the secondary, but important, question of whether it is appropriate to have a Bill of Rights in a new Northern Territory constitution, irrespective of whether there is a comparable document at either the federal or any of the State levels in Australia. On this point, the Committee refers to the experience in USA and Canada, discussed above, indicating that Bills of Rights are not always confined to the national constitutional levels. In the absence of any national Bill of Rights and any existing firm proposals for a Bill of Rights elsewhere in Australia, the Committee does not see this as a reason why the Territory should not "go-it alone", if this is what is decided as being best for all Territorians. If the object is to ensure that the Territory operates in the future under a free and democratic system of government with a guarantee of equal rights for all Territorians, then there may be good arguments for acting in these circumstances. Any alleged deficiencies in the protection of rights elsewhere in Australia does not provide a reason for not proceeding in the Territory unless the Territory would itself be clearly disadvantaged thereby.

3. A decision on whether the Territory should adopt its own Bill of Rights will in part be influenced by the nature of the rights contained in that Bill and the manner of their enforcement and the degree of entrenchment. No doubt some people would be concerned if the Territory should, contemporaneously with the adoption of a new constitution, thereupon move into a new system of government with a rigidly entrenched and enforceable Bill of Rights, which is very difficult to change later. The consequences of such an action may (to some extent at least) be difficult to predict, with limited opportunities for correction of any mistakes. Other people may be concerned if the Territory was to adopt a statement of rights which was not enforceable by Court at the instigation of the individual, which could be easily changed and which had little influence upon existing or future laws and practices. This may be seen as too weak. There is also likely to be debate over particular categories of rights, and whether they should be included in a Bill of Rights, for example, as to the rights of unborn children as against the rights of women. A decision either way may affect some peoples' attitudes to the whole Bill of Rights.

4. The possible content of a Northern Territory Bill of Rights is dealt with in Item F below, the possible methods of enforcement of a Northern Territory Bill of Rights are dealt with in Item G below, whilst possible forms of entrenchment are also dealt with in Item G below.

5. Putting these three issues aside for the moment, it is possible to briefly summarise the main arguments for and against a Bill of Rights. The arguments for and against include :

(a) Parliamentary supremacy and the relationship with the judiciary

(i) One of the main arguments against an entrenched Bill of Rights is that the democratically elected Parliament, chosen by and representing the people, should make any decisions on the matter of rights, and not be fettered by constitutional restraints of a rights nature on the scope of the Parliament's legislative power. The opposite of this argument is that fundamental rights are not adequately protected by a vote in Parliament and should be guaranteed by the constitution.

(ii) Under prevailing English constitutional theory, Parliament is said to be supreme and can make any law it chooses in respect of the particular jurisdiction which it represents. This theory is mitigated in many countries by the forces of constitutionalism; that is, where there is a written, entrenched constitution which incorporates limitations on what would otherwise be regarded as a supreme form of legislative power. But subject to those restraints, the view is often taken that ultimate power in a democratic system should be vested in the elected representatives of the people through the Parliament.

(iii) The fact is that most countries of the World now have written constitutions, and the greater majority of these contain statements of rights. Australia is one of the few countries that has a written constitution without a comprehensive statement of rights. Nevertheless, the Australian Constitution already contains a number of significant restraints on the federal Parliament's grant of legislative power, some of which relate to the federal system, others of which relate to democratic and other rights, either expressed or implied.[44] They are already enforced by the courts. In this sense, a comprehensive Bill of Rights, if inserted into the Australian Constitution, would only be an extension of the constitutional restraints that already exist, although depending on the content of the Bill of Rights, it could be a considerable extension.

(iv) The Legislative Assembly of the Northern Territory at present is similarly restrained by certain provisions in the *Northern Territory (Self-Government) Act* 1978, by the subordinate nature of that legislature to the federal Parliament and Government, and to some extent by the Australian Constitution. Again, there is no comprehensive Bill of Rights applicable to the

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[44]
. Provisions for the federal Parliament to be directly elected by the people (ss7 and 24).
. The right to vote (s41).
. Freedom from compulsory acquisition of property under Commonwealth laws otherwise than on just terms, s51(xxxi).
. Security of tenure for federal Judges (s72).
. Trial by jury for Commonwealth indictable offences (s80).
. No discrimination or preferences among the States in trade, commerce, and revenue (ss51(ii), (iii), 88, 90, 92, 99).
. Freedom of religion at the federal level (s116).
. No disability or discrimination between residents of different States (s117).
. No alteration of the Constitution without a national referendum of voters (s128).

Northern Territory, but the adoption of such a Bill in an entrenched form would only be an extension of these present restraints.

(v) The practical operation of the theory of the supremacy of Parliament has to accommodate the doctrine of the separation of powers between the legislature, the executive and the judiciary. This doctrine postulates that each of these three arms will confine itself to a particular type of governmental function and will not encroach unduly on the others. The tension between them contributes to the checks and balances in the overall system of government and itself is said to guarantee a measure of freedom and democracy. This doctrine has never been fully applied in the Australian federal sphere, and does not apply at all at a State level. However, there remains a strong attachment to the notion that there should be an independent judiciary to check on the excesses of the legislature and the executive by way of judicial rulings in particular cases, particularly within the framework of a written constitution.

(vi) The practical operation of the theory of the supremacy of Parliament has also been undermined in recent times by the great extension of the powers of executive government, a process assisted by the two-party system and other factors. This has been associated with the great expansion in the range of functions performed by governments. It is also a fact that substantial control can be exercised by the executive government over the legislative program in a Westminster type of system. This capacity is usually greater in a unicameral system. While significant elements of accountability of the executive government to the legislature remain in such a system, it is now not uncommon for concerns to be expressed about the excessive width of the powers and discretions now exercised by executive governments, largely free of legal restraint and oversight. The potential for the abuse of power and the infringement of rights and freedoms has become apparent, as indicated by a number of recent cases involving high officials.

(vii) It is not surprising in such a scenario that there should be increasing support for entrenched statements of certain minimum standards in the form of an enforceable Bill of Rights.

(viii) Such a Bill of Rights would obviously result in a change in the balance of power between the legislature (and also the executive) on the one hand, and the judiciary on the other hand. This is because it would be the judiciary that would have to interpret and apply the Bill of Rights in particular cases. The concern often expressed is that the Judges are not elected and are not well equipped to deal with broad policy issues, are not accountable in the same way as politicians, and should not have the ability to make decisions binding on the other two arms of government on such generalised issues as fundamental rights. It is sometimes viewed as being anti-democratic.

(ix) A response to this view was provided by His Honour Justice Toohey in his address to the 1992 Darwin conference on *Constitutional Change in the*

1990s.[45] In that paper, he asserted that judicial review under a written constitution is not anti-democratic, but in fact an essential element in the maintenance of democracy and the rule of law. Majoritarianism through elected representatives may not necessarily equate with democracy. The entrenchment of fundamental principles, enforced by an independent judiciary, does not, in his view, entirely prevent the destruction or diminution of a society's liberal-democratic character, but it can place hurdles in the path of regressive change and provide a means both of protection against misuse of legislative and executive power and in the promotion of fundamental rights and freedoms.

(x) The public debate following that address has tended to concentrate on the development by the High Court of implied constitutional rights, a matter of considerable controversy based on their alleged arbitrary nature. This is a separate matter from the question of the adoption of a written statement of rights. A question of judicial discretion remains in the latter case, but that discretion is not as uncontrolled as it may be for implied rights. The degree of judicial discretion in interpreting an express statement of rights may be reduced over time with the developing national and international human rights jurisprudence in any event and the consequent build up of case precedents.

(xi) The Committee is anxious to ascertain the strength of feeling in the Northern Territory in support of an enforceable Bill of Rights in a new Territory constitution, or whether it is felt that the safeguards provided through the common law, plus a single chamber Parliament and its elected members, the Parliament being vested with very wide powers largely free of express constitutional restraints as to fundamental rights, is sufficient to continue to guarantee the rights and freedoms we have inherited in the Territory.

(b) Politicisation of the judiciary

(i) It is argued that because of the generalised nature of statements of rights, which if given enforceable constitutional status can result in a shift in power to the courts in matters of their interpretation and application, there is much greater potential for the courts to become involved in policy and political issues than previously. This in turn might impair the standing of courts and their reputation for impartiality. An enforceable Bill of Rights would increase the potential for the court to be drawn into political controversy. It might also lead to more controversy over judicial appointments.

(ii) In contrast to this view is the school of thought that says that all judicial acts are, to some extent at least, value laden , and that it is quite appropriate for courts within proper judicial limits to be involved in making value judgments in applying the law to particular cases, providing they have proper regard to legal

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[45] 1994. Toohey, J. 'A Government of Laws, and Not of Men?' in R. Gray et al, *Constitutional Change in the 1990s*, North Australian Research Unit, Australian National University and the Sessional Committee on Constitutional Development, Legislative Assembly of the Northern Territory, Darwin: 12-25.

precedents and that their decisions are based on published, reasoned arguments.

(iii) There are indications that the High Court in particular has in recent times come under more public scrutiny because of the controversial nature of some of its decisions. The former Chief Justice has rejected the view that the work of the Court should be confined to non-controversial issues or that it should not be subject to public scrutiny.

(c) Workload

A concern often expressed is whether the courts would be able to deal adequately with the increased workload resulting from an entrenched Bill of Rights. This might be a particular concern with the High Court if there was a federal Bill of Rights, given its present heavy load. In the case of an entrenched Northern Territory Bill of Rights, there would also be an increase in the workload for the Northern Territory Supreme Court, but the exact extent of this increase is difficult to quantify. This would include some increase in appellate work in that Court.

(d) Entrenched values

(i) Because Bills of Rights are heavily based on contemporary values, there is a concern that entrenchment may result in the adoption of values which may change with time, but which will continue unchanged in the law. The common example cited is the USA right to keep and bear arms.

(ii) To some extent this question can be addressed by provisions for review or constitutional change. However, too much flexibility defeats the arguments in favour of constitutional entrenchment. In addition, changing interpretations by the courts can to some extent also accommodate widely accepted changes in values. Some flexibility may be achieved by giving courts, in interpreting a particular statement of rights, the capacity to have regard to the developing human rights jurisprudence in comparable jurisdictions for this purpose.

(e) Access to courts

It might be argued that the insertion of a Bill of Rights in a Northern Territory constitution could be counter productive, to the extent that only those persons who can afford access to the courts will be able to derive any benefit. There are, however, methods of minimising any such limitations on access. In any event, it is an argument that assumes that only those parties to a case before the Courts involving the Bill of Rights will benefit, whereas clearly the affect of a binding judicial determination can have considerable consequences for the community at large.

(f) Community standards

Arguably, the adoption of a Bill of Rights can have an educative effect on the community by making people more aware of both their rights and the rights of others,

and may encourage their promotion and the improvement of community standards generally. The opposite view is that it may tend to promote minority or sectarian views or encourage what might be thought to be undesirable attitudes or conduct. This is a controversial matter, upon which the Committee expresses no opinion at this time, but would welcome submissions.

(g) Protection of the disadvantaged and minorities

(i) One of the principle arguments for a Bill of Rights is that in a majoritarian democracy, the rights of smaller groups can sometimes fail to receive the attention they deserve and in fact they may sometimes be discriminated against by weight of decisions favouring the majority. On one view, this might be considered to be an acceptable result in that it tends to preserve the majority position and the social, religious, political and cultural values on which that majority position is based. However it has to be asked whether this is a legitimate form of justification in a diverse and multicultural Northern Territory community. The recent experiences of violence overseas, in so far as they have resulted from the inability of majorities to accept a proper role for minorities, must be considered in this context.

(ii) The extent to which this issue is presently a concern in the Northern Territory, other than perhaps for Aboriginal Territorians — a matter for separate consideration by the Committee — is difficult to assess.[46] The Committee would welcome comments from all sections of the Territory community.

(h) The Need for a Northern Territory Bill of Rights

(i) On one view, there is no real need for a Bill of Rights in the Northern Territory, on the assumption that the Northern Territory is already a free and tolerant society. Arguably, the rights of Territorians are already adequately protected by the legislation of both the federal and Territory Parliaments, supplementing the common law, and by the democratic forces operating on and within society generally on politicians, administrators and law enforcement officers in observing proper limits.

(ii) The difficulty with this argument is that it fails to take into account, not only any current deficiencies in law and administration, (even if few in number), but more importantly, the possibility of future aberrant action by law-makers or in matters of administration, unchecked by any (or few) constitutional limitations on government setting minimum standards of a fundamental nature.

(i) Conclusion

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[46] For further information in respect of possible entrenchment of Aboriginal rights, see

(a) 1992. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Recognition of Aboriginal Customary Law*, Legislative Assembly of the Northern Territory, Darwin; and

(b) 1993. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Aboriginal Rights and Issues - Options for Entrenchment,* Legislative Assembly of the Northern Territory, Darwin.

(i) The Committee has not yet decided to adopt any of these arguments, or any other arguments for that matter, either for or against a Bill of Rights in the Northern Territory. It would welcome public comment and discussion on any arguments of relevance either way. A Bill of Rights, at least in a firmly entrenched form, would be likely to result in considerable changes in Territory law and practice. Much more emphasis would be placed on the courts in the protection of rights, and much would depend upon the response of the courts, and the capacity of the Judges to effectively interpret and apply the Bill of Rights. The resultant limitations on the capacity of the legislature and the Government to carry out their respective tasks must be taken into account. The need for flexibility for the Territory to respond appropriately to the rapidly changing national and international scene is of no small importance in this regard. But so is the need to retain the fundamental values of our system of government, not to be lightly thrown away in the pursuit of some transient objective or under the political pressures of the moment. It is ultimately a question of getting the right balance.

(ii) The Committee suggests that careful thought must be given to the other three issues already mentioned before a decision on the merits is taken — these three matters are the nature of the rights to be included, the manner of their enforcement and the degree of entrenchment. These are discussed in Items (F) and (G) below.

F. POSSIBLE CONTENT OF A NORTHERN TERRITORY BILL OF RIGHTS

1. Introduction

(a) In very broad terms, there are said to be three groups of rights:[47]

(i) political and civil rights -

Political rights are those that relate to an individual's right of active participation in society and government. Civil rights are those that relate to an individual's right to protection and freedom.

(ii) economic and social rights -

These rights relate to basic economic independence, including an individual's right to work and receive equal pay for equal work, and an individual's right to an adequate standard of living and freedom of family structure.

(iii) community and cultural rights -

These rights may be exercised individually or in community with others and include cultural and artistic rights, environmental rights and rights that relate to indigenous peoples.

(b) There is no fixed concept of rights, although internationally accepted statements of minimum standards of certain fundamental rights provide a guide.[48] There is much controversy in the community about the content and scope of rights and the relationship between different rights.

(c) Notwithstanding the confusion and the debate in this area, a survey of various national constitutions indicates that the type of rights most commonly given constitutional status are those in the first group, namely political and civil rights. These rights are designed to secure certain basic individual rights and freedoms in an open and democratic society and are more likely to be amenable to judicial methods of enforcement. They are particularly directed at securing these rights and freedoms against undue encroachment by government. They encompass the rights to freedom of speech and public debate, freedom to hold and practice a religion or belief, freedom from arbitrary search, arrest or imprisonment and other matters, commonly taken for granted in Australia but not necessarily fully protected by Australian law. It is difficult to conceive of how a Bill of Rights could be adopted within Australia if it did not, to some extent at least, incorporate that group of rights.

(d) If a Bill of Rights is to be included at all in a new Northern Territory constitution, then arguably what might be considered to be the most fundamental of these civil and political rights should be included in that Bill of Rights in so far as they are relevant in the position of the Northern Territory. Some examples of particular categories of civil and political rights that might be so included are discussed below.

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47 1993. *Report on the Review of the Preservation and Enhancement of Industrial Rights and Freedoms,* The Queensland Electoral and Administrative Review Commission, Brisbane: 17-18.

48 see for example, Appendices 2 and 7.

(e) There is a question whether a Bill of Rights in a new Northern Territory constitution should go further. In this respect, the Committee has discussed elsewhere the matter of entrenchment of Aboriginal rights including as to self determination.[49] The other rights in groups — paragraph 1(a) (ii) and (iii) above could be considered for inclusion, although the case for their inclusion is generally much less compelling. The onus is on those who would assert that any of these other rights should be included to clearly demonstrate that their inclusion is necessary or desirable, that their inclusion would be likely to achieve the desired outcomes, that they would be likely to receive community acceptance and that they would not unduly limit the possibility of detailed political solutions in the future implemented where necessary by specific legislation and tailored to meet the particular needs of the Territory at that time.

(f) One view is that a Northern Territory Bill of Rights, if one is to be adopted, should not go beyond the most fundamental of those civil and political rights that are generally accepted throughout the world. This would avoid creating the impression that it is able to provide the solutions to a wide range of community, social and economic concerns by a simple constitutional statement. It would, to some extent at least, also avoid the incorporation of particular rights the subject of considerable controversy. To do otherwise may condemn the whole exercise to failure from the start. It may be considered to be more important initially to establish certain minimum standards in matters of clear fundamental importance in a free and democratic society. Other matters might be considered later by way of amendment.

(g) The following is a discussion of those heads of civil and political rights to be found in the *International Covenant on Civil and Political Rights* (ICCPR)[50] that could possibly be of relevance to a Northern Territory Bill of Rights. These are not exhaustive of the rights that could be considered for inclusion. Some rights are not discussed because they are primarily a Commonwealth responsibility — for example marriage. The Committee welcomes comments and suggestions on these and any other rights considered appropriate to the Northern Territory.

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[49] For further information in respect of possible entrenchment of Aboriginal rights, see

(a) 1992. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Recognition of Aboriginal Customary Law*, Legislative Assembly of the Northern Territory, Darwin; and

(b) 1993. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Aboriginal Rights and Issues - Options for Entrenchment,* Legislative Assembly of the Northern Territory, Darwin.

[50] see Appendix 2.

2. Right to Life

(a) The ICCPR provides in *Article 6.1* that every human being has the inherent right to life, to be protected by law, and that no one is to be arbitrarily deprived of life.[51]

(b) In broad terms the right to life is already recognised in particular ways in the common law as supplemented by legislation. Various rights and remedies exist in that law designed around the upholding of this principle, although the principle itself is not part of the law. As pointed out in the Issues Paper of the ACT Attorney-General's Department on a Bill of Rights for the ACT most of the debate is concerned with particular issues at the boundaries of life, such as abortion, the use of reproductive technology, euthanasia and capital punishment.[52] It is not appropriate in this Paper to enter into a detailed discussion of these particular issues, although readers are referred to the helpful discussion in that Issues Paper[53] and in the Queensland Electoral and Administrative Review Commission Report.[54]

(c) As to the current legal position in the Northern Territory on the legality of abortion, see the Northern Territory *Criminal Code*, sections 172-174.[55] As to termination of

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51 see also the Universal Declaration on Human Rights, Article 3, USA Constitution, 14th Amendment, Canadian Charter of Rights and Freedoms, section 7, New Zealand Bill of Rights Act, section 8, PNG Constitution, section 35 and note the National Goals and Directive Principles, Item 5, Basic Rights paragraph (a), European Convention on Human Rights, Article 2, Constitution of the Republic of South Africa, section 9.

52 1993. *A Bill of Rights for the ACT?*, ACT Attorney-General's Department, Canberra.

53 1993. *A Bill of Rights for the ACT?*, ACT Attorney-General's Department, Canberra: 8-14.

54 1993. *Report on the Review of the Preservation and Enhancement of Individuals Rights and Freedoms,* The Queensland Electoral and Administrative Review Commission, Brisbane: 101-139.

55 Sections 172-174:

s172. PROCURING ABORTION

Subject to section174, any person who, with the intention of procuring the miscarriage of a woman or girl, whether or not the woman or girl is pregnant, administers to her, or causes to be taken by her, a poison or other noxious thing, or uses an instrument or other means is guilty of a crime and is liable to imprisonment for 7 years.

s173. SUPPLYING DRUGS, & c., TO CAUSE ABORTION

Subject to section 174, any person who unlawfully supplies or obtains a poison or other noxious thing, or instrument or other thing, knowing that it is intended to be used or employed with the intention of procuring the miscarriage of a woman or girl, whether or not the woman or girl is pregnant, is guilty of a crime and is liable to imprisonment for 7 years.

s174. MEDICAL TERMINATION OF PREGNANCY

(1) It is lawful -

(a) for a medical practitioner who is a gynaecologist or obstetrician to give medical treatment with the intention of procuring the miscarriage of a woman or girl who, he has reasonable cause to believe after medically examining her, has been pregnant for not more than 14 weeks if the medical treatment is given in hospital and the medical practitioner and another medical practitioner are of the opinion, formed in good faith after medical examination of the woman or girl by them, that -

(i) the continuance of the pregnancy would involve greater risk to her life or greater risk of injury to her physical or mental health than if the pregnancy were terminated; or

life sustaining measures, see the Northern Territory *Natural Death Act* of 1988. As to capital punishment, see the *Death Penalty Abolition Act* 1973 of the Commonwealth. Capital punishment does not currently exist in the Northern Territory as a lawful penalty.

(d) A guarantee in a Northern Territory Bill of Rights of a right to life may not alter the law in respect of the particular issues in the last subparagraph. Thus, for example, the inherent right to life in *Article 6* of the ICCPR also provides that no one is to be arbitrarily deprived of life. Capital punishment, if authorised by law, is still contemplated as a possibility in that Article on certain conditions.

3. Torture, cruel, inhuman or degrading treatment or punishment

(a) The ICCPR provides in *Article 7* that no one shall be subjected to torture or to cruel, inhuman, degrading treatment or punishment, including medical or scientific experimentation without the person's free consent.[56]

(ii) there is a substantial risk that, if the pregnancy were not terminated and the child were to be born, the child would have or suffer from such physical or mental abnormalities as to be seriously handicapped;

(b) for a medical practitioner to give medical treatment with the intention of procuring the miscarriage of a woman or girl who, he has reasonable cause to believe after medically examining her, has been pregnant for not more than 23 weeks if the medical practitioner is of the opinion, formed in good faith after his medical examination of her, that termination of the pregnancy is immediately necessary to prevent grave injury to her physical or mental health; or

(c) for a medical practitioner to give medical treatment with the intention of procuring the miscarriage of a woman or girl if the treatment is given in good faith for the purpose only of preserving her life.

(2) No person is under a duty, whether by contract or otherwise, to procure or to assist in procuring the miscarriage of a woman or girl or to dispose of or to assist in disposing of an aborted foetus if he has a conscientious objection thereto, but, in any legal proceedings, the burden of proving such a conscientious objection shall rest upon the person claiming to have it.

(3) Nothing in this section relieves a medical practitioner from his liability, in carrying out medical treatment or performing an operation with the intention of procuring the miscarriage of a woman or girl, to carry out or perform it -

(a) if the consent of a person is required by law to the carrying out of the medical treatment or the performance of the operation - with that consent;

(b) with professional care; and

(c) otherwise according to law.

(4) A medical practitioner shall be deemed to have met his liability under subsection (3)(a) in carrying out the medical treatment or performing the operation if he carries it out or performs it -

(a) except where the woman or girl is incapable in law (otherwise than by being an infant) of giving the consent - with the consent of the woman or girl; and

(b) if the girl is under the age of 16 years or is otherwise incapable in law of giving the consent - with the consent of each person having authority in law, apart from this subjection, to give the consent.

[56] see also Universal Declaration of Human Rights, Article 5, Canadian Charter of Rights and Freedoms, section 12, New Zealand Bill of Rights Act, sections 9 and 10, PNG Constitution, section 36, European Convention on Human Rights Article 3, Constitution of the Republic of South Africa, section 11(2).

(b) The legal position on the matter of torture in Australia is covered by the *Crimes (Torture) Act* 1988 of the Commonwealth. However there is no constitutional guarantee against torture and no prohibition of other forms of treatment or punishment which might not constitute torture, but which might otherwise be cruel, inhuman or degrading.

(c) It might be thought that any such guarantee in a new Northern Territory constitution could conflict with certain forms of traditional Aboriginal punishment, such as spearing. At the moment, it is clear that the law in the Northern Territory does not recognise the legality of such forms of punishment, although the courts may take into account the fact of Aboriginal traditional punishments. The Committee has addressed this matter and has expressed the view that if Aboriginal customary law is to be recognised as a source of law in the Northern Territory, there would be merit in a provision that it should only be such a source in so far as that law is consistent with international human rights norms.[57]

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[57] 1992. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Recognition of Aboriginal Customary Law*, Legislative Assembly of the Northern Territory, Darwin: 44-45.

"3. *General Constitutional Recognition*

Should there be any exceptions

(d) The Committee refers to the first of the five factors mentioned in paragraph (b), that is, whether there should be any exceptions to the types of customary law to be recognised. In this regard, the diversity and complexity of Aboriginal customary law has already been noted in this paper. Also noted is the fact that it is based on ideas and concepts radically different from "Western" ideas and concepts. The tendency to judge whether certain aspects of customary law are appropriate for recognition in the wider legal system, viewed from the perspective of a different cultural and legal background, has to be kept in mind to avoid any prejudicial judgment. On the other hand, there are an emerging set of international standards by which to judge the validity of any law, standards which are increasingly transcending particular cultural or legal derivations. These standards are becoming evident in the developing jurisprudence of human rights.

(e) In most cases, there will be no clash between indigenous customary law and these wider international standards. This is in part because the relevant international instruments give some prominence to cultural and indigenous rights. This is recognised, for example, in Article 27 of the International Covenant on Civil and Political Rights, guaranteeing to members of ethnic, religious or linguistic minorities the right, in community with other members, to enjoy their own culture, to profess and practice their own religion, and to use their own language.

(f) However, all such indigenous rights have to balance against other fundamental rights and to any reasonable restrictions arising therefrom. There may be isolated examples where insistence upon the full application of existing indigenous rights under customary law could lead to an infringement of individual human rights. For example, certain forms of traditional punishment, such as spearing, may be seen as offending against the individual's right not to be subject to "cruel, inhuman or degrading treatment or punishment" (ICCPR, Article 7).

(g) These are very difficult issues, involving contemporary notions and values. It is a matter discussed in the Australian Law Reform Commission's Report, Vol I @ paragraphs 179-193, where the Commission, while accepting a need for adherence to international human rights norms, stressed the need to determine the application of those norms in the context of the particular society and not in the abstract or by reference to "western" expectations.

(h) Subject to this last-mentioned consideration, the Committee sees merit in a provision that would only recognise customary law as a source of law (if in fact it is to be so recognised) in so far as that law was consistent with international human rights norms or, as expressed in Papua New Guinea, the general principles of humanity (see also ILO Convention No 169, discussed in Item C.4 above). The inter-relationship between the two would of course be a matter to be worked out by the appropriate judicial institutions".

4. Slavery

(a) The ICCPR, in *Article 8,* prohibits slavery and all forms of slave trade. No one is to be held in servitude. With specified exceptions, no one may be required to perform forced or compulsory labour.[58]

(b) Although Australia is a party to various international agreements on slavery, there is no Australian legislation specifically prohibiting same. The power of the federal Parliament to make laws relating to various welfare benefits is expressly stated not to authorise any form of civil conscription in dental and medical services,[59] but otherwise there are no constitutional guarantees. The Northern Territory *Criminal Code* makes it an offence to deprive someone of their liberty against their will.[60]

(c) There would not seem to be strong objections to a general prohibition on slavery, servitude and forced labour, providing there are appropriate exceptions such as contained in *Article 8* of the ICCPR.

5. Rights to Liberty and Security of Person

(a) The ICCPR states in *Article 9* that everyone has the right to liberty and security of the person. No one is to be subjected to arbitrary arrest or detention. Any deprivation of liberty is to be on such grounds and in accordance with such procedure as is established by law. An arrested person is to be informed, at the time of arrest, of the reasons for arrest and to be promptly informed of any charges. In addition that person is to be promptly brought before a judicial officer and to be entitled to a trial within a reasonable time. There can be no presumption of detention. There must be a right of judicial review as to the lawfulness of detention and an enforceable right to compensation for unlawful arrest or detention.[61]

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58 see also Universal Declaration of Human Rights, Article 4, USA Constitution, 13th Amendment, PNG Constitution sections 43 and 253, European Convention on Human Rights, Article 4, Constitution of the Republic of South Africa, section 12.

59 s51 (xxiiiA) - The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances.

60 s196 - DEPRIVATION OF LIBERTY:

(1) Any person who confines or detains another in any place against his will, or otherwise deprives another of his personal liberty, is guilty of a crime and is liable to imprisonment for 7 years.

(2) It is lawful for a parent or guardian, or a person in the place of a parent or guardian, or for a school teacher, by way of correction, to impose such confinement or detention, or to cause such deprivation of personal liberty of a child, as is reasonable under circumstances.

(3) A person is excused from criminal responsibility for an offence defined by this section if he believes, on reasonable grounds, that the person confined, detained or deprived of his personal liberty needs to be confined, detained or deprived of his personal liberty for his own protection or benefit.

61 see also Universal Declaration of Human Rights, Articles 3 and 9, USA Constitution, 6th Amendment and note Article 1 section 9 of the Constitution as to habeas corpus, Canadian Charter of Rights and Freedoms, sections 7, 9, 10 and 11, New Zealand Bill of Rights Act, sections 21, 22, 23 and 24, Papua New Guinea Constitution, section 42,

(b) The framing of such a right concerning detention must take into account both the legitimate interests of society in protecting itself from individuals whose conduct deserves approbation and necessitates restraining action, and the right of the individual to fair treatment and liberty, which cannot be arbitrarily interfered with.

(c) Relevant Northern Territory provisions are contained in Part VII of the *Police Administration Act*, and in the *Bail Act*. Arguably, these provisions would comply with *Article 9* of the ICCPR. These are supplementary to the common law, such as for example, the rule that although there is no common law right to a speedy trial, undue delay is a factor that can be taken into account in deciding whether there has been a fair trial.[62] Wrongful arrest or detention can give rise to a prerogative remedy for release (habeas corpus) and a right to damages at common law.

(d) These Northern Territory provisions may be compared with the relevant Commonwealth provisions in the *Crimes Act* 1914, Part 1A. These have now been supplemented by the provisions of Part 1C of that Act, introduced by the *Crimes (Investigation and Commonwealth Offences) Amendment Act* 1991, and which impose what might be considered to be a more vigorous procedural regime for dealing with offenders against Commonwealth offences than those for Northern Territory offences.

(e) While it is a matter for debate as to whether the new Commonwealth provisions go beyond what is reasonably practicable in a vast area such as the Northern Territory, with its associated difficulties of policing and communication, there is an issue whether there should be a specified minimum standard to be observed for the arrest and detention of all persons. It is clear that adequate legal protection from arbitrary arrest and detention is a hallmark of a free society, and arguably a minimum standard in these matters deserves constitutional protection such that that standard cannot be derogated from in any circumstances in the future.

6. Rights of Detainees

(a) The ICCPR in *Article 10* provides that all detained persons are to be treated with humanity and respect for their inherent dignity. Accused persons are to be separated from convicted persons except in exceptional circumstances. Accused and convicted juvenile persons are to be separated from adults, their case adjudicated as speedily as possible and they are to be accorded treatment appropriate to their age and legal status. The penitentiary system is to aim at reformation and social rehabilitation.[63]

European Convention on Human Rights, Article 5, Constitution of the Republic of South Africa, sections11 (1) and 25.

62 Jago v District Court (NSW) (1989) 168 CLR 23.

63 see also Papua New Guinea Constitution, s37 (17), (18) (19), (20), Constitution of the Republic of South Africa, section 10.

(b) In addition, the United Nations has issued the *Standard Minimum Rules for the Treatment of Prisoners* (1955) and the *Body of Principles for the Protection of all persons under any form of Detention or Imprisonment* (1988).

(c) In the Northern Territory, detention of prisoners is dealt with in the *Prisons (Correctional Services) Act.* There is no general law guarantee of humane treatment of detained persons, except in so far as the conduct in question may give rise to a common law cause of action in tort or may constitute a criminal offence. Convicted prisoners not yet sentenced and prisoners on remand are to be kept apart from prisoners under sentence unless the Northern Territory Minister otherwise directs.[64]

(d) The arrest and detention of juveniles (under 17 years of age) is dealt with in the *Juvenile Justice Act.* They are to be held in approved detention centres and persons cannot be admitted to those centres except in accordance with that Act.[65] In other circumstances, juveniles are to be kept apart from other persons under detention as far as practicable.[66] Juveniles charged with an offence are required to be brought before a court promptly.[67]

(e) There may be practical difficulties in a place like the Northern Territory to ensure the complete separation of accused persons from convicted persons and juveniles from adults in all circumstances. Thus any right to separate detention should be expressed to be a qualified right.

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64 s10 (5) - In a prison, convicted prisoners not yet sentenced and prisoners on remand shall be kept separate and apart from prisoners under sentence, unless the Minister otherwise directs.

65 s63 - A person shall not be admitted to a detention centre except in accordance with this Act.

66 s32(5) -

(1) Subject to this section, a juvenile who has been charged with an offence and is not admitted to bail shall, as soon as practicable, be taken to a detention centre or other place approved by the Minister for the purpose, and shall be detained there on an order to that effect having been made by the Court or a magistrate.

(1A) A member of the Police Force may make an application for an order under subsection (1) in person or, if it is not practicable for an application to be made in person, it may be made by telephone to a magistrate.

(2) Where a juvenile referred to in subsection (1) requires medical attention, instead of being taken to a detention centre or other place referred to in that subsection he may be taken to a hospital within the meaning of the Medical Services Act or a private hospital within the meaning of the Private Hospitals and Nursing Homes Act and, if the person in charge of the hospital or private hospital consents, be detained there.

(3) A juvenile taken to a hospital in accordance with subsection (2) shall, while in that hospital, remain in the custody of the Police Force.

(4) Upon his being discharged from hospital, a juvenile referred to in subsection (2) shall be taken to a detention centre or other place approved by the Minister for the detention of juveniles, unless he has in the meantime been admitted to bail.

(5) Where it is necessary to take a juvenile from the place at which he is detained to a court, or from a court to that place, he shall, as far as practicable, be kept apart from other persons under detention who are not juveniles.

67 s33 - (1)Where a juvenile has been charged with an offence and has not been released from custody, he shall be brought before the Court as soon as practicable and in any case within 7 days after the arrest.

(2) Where a juvenile referred to in subsection (1) is not brought before the Court in accordance with that subjection, he shall immediately be released from custody.

7. Imprisonment for Contractual default

(a) The ICCPR in *Article 11* prohibits imprisonment merely on the ground of inability to fulfil a contractual obligation.

(b) This is not a provision usually found in Bills of Rights. The nearest equivalent is in section 42 (1)(c) of the Papua New Guinea Constitution.[68] It prevents imprisonment for civil debt except where there are other relevant factors involved.

(c) In the Northern Territory, the *Local Court Act* enables a summons to issue for examination of a judgment debtor. If the debtor does not attend the examination hearing, the court may issue an arrest warrant to bring the debtor before the court. An instalment order operates as a stay of the arrest warrant while it is complied with. Failure to comply with the order constitutes contempt of the court. It seems these provisions would not breach *Article 11*.

8. Freedom of Movement

(a) The ICCPR in *Article 12* guarantees to a person lawfully within a territory, liberty of movement within the national state and freedom to choose a residence. It also deals with freedom to leave any country, and a prohibition on arbitrarily being deprived of the right to enter the country of nationality.[69] The latter rights are not directly relevant in the context of a Northern Territory constitution. The right is implied in the USA Constitution.

(b) Within Australia, there is a guarantee of absolute freedom of intercourse between States and with mainland territories.[70] However there is no such guarantee purely within the Northern Territory. In fact, the federal *Aboriginal Land Rights (Northern Territory) Act* and the *Aboriginal Land Act* (NT) require a permit for movement over Aboriginal land under the former Act or on some public roads within Aboriginal land, with limited exceptions.

(c) There is no constitutional guarantee of a right of residence in the Northern Territory.

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[68] s42 (1)(c) -

(1) No person shall be deprived of his personal liberty except —

(c) by reason of his failure to comply with the order of a court made to secure the fulfilment of an obligation (other than a contractual obligation) imposed upon him by law.

[69] see also Universal Declaration of Human Rights, Article 13, Canadian Charter of Rights and Freedoms, section 6, New Zealand Bill of Rights Act, section 18, Papua New Guinea Constitution section 52, Constitution of the Republic of South Africa, section 18.

[70] (a) Australian Constitution, s92 - On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

(b) Northern Territory (Self-Government) Act 1978, s49 - Trade, commerce and intercourse between the Territory and the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

(d) It is not likely that any constitutional guarantee of movement and residence within the Northern Territory would be interpreted as being capable of overriding any existing proprietary rights, including presumably those in respect of Aboriginal land. Any review of the permit system on Aboriginal land would need to be undertaken in the context of the issues concerning Aboriginal people and the possible entrenchment of their rights. This will not be considered in this Discussion Paper as it is an issue of specific relevance to Aboriginal people, dealt with elsewhere.[71]

[71] 1993. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Aboriginal Rights & Issues - Options for Entrenchment*, Legislative Assembly of the Northern Territory, Darwin.

9. Right to a Fair Trial

(a) The ICCPR, in *Article 14*, sets out a range of minimum standards required to be observed in the criminal process against an individual. These may be summarised as follows:

(i) All persons to be equal before courts and tribunals;

(ii) All persons entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law, but the press and public may be excluded on grounds of morals, public order or national security in a democratic society, or where in the interests of the private lives of the parties, or where strictly necessary in special circumstances where publicity would prejudice the interests of justice;

(iii) The judgment is to be given publicly except where the interests of a juvenile otherwise require it or where it concerns a matrimonial dispute or guardianship of children;

(iv) The person charged is to be presumed innocent until proved guilty according to law;

(v) In determining a criminal charge, the person is to be informed of the charge in a language the person understands, to be given adequate time and facilities to prepare a defence and to communicate with own counsel, to be tried without undue delay, to be tried in the person's presence and to mount his/her own defence or through legal assistance of his or her own choosing, to be informed of his or her right to legal assistance, to have legal assistance assigned if justice so requires and without payment if without sufficient means, to examine and cross examine witnesses and require their attendance, to have the free assistance of an interpreter where necessary and not to be compelled to testify against himself or herself or to confess guilt;

(vi) In case of juveniles, the procedure is to take into account the age and the desirability of promoting rehabilitation;

(vii) There is to be a right to have any conviction and sentence reviewed by a higher tribunal;

(viii) There is to be a right to compensation if the conviction is subsequently reversed or he or she has been pardoned where new facts are conclusive of a miscarriage of justice;

(ix) The person is not to be tried or punished again for the same offence where already finally convicted or acquitted.[72]

(b) In the Northern Territory, some of the provisions in *Article 14* are reflected in Territory statute law — for example, in the *Justices Act*, the *Criminal Code*, the *Juvenile Justice Act* and the *Legal Aid Act.* More commonly, it is necessary to refer

[72] see also Universal Declaration of Human Rights, Articles 10, and 11(1), USA Constitution, 5th and 6th Amendments, Canadian Charter of Rights and Freedoms, sections 10, 11 and 14, New Zealand Bill of Rights Act, sections 23, 24 and 25, Papua New Guinea Constitution, section 37, European Convention on Human Rights, Articles 6 and 7, Constitution of the Republic of South Africa, section 25.

to the common law. In a number of ways, the common law incorporates guarantees equivalent to the Article, although there remains a few of the rights in the Article not protected by the common law. Thus for example there is no right to legal counsel at public expense, although the failure to grant an adjournment to enable the accused to obtain legal representation may, in appropriate cases, be grounds for staying the proceedings on the basis that it will result in an unfair trial.[73]

(c) It is clear that a right to a fair trial is fundamental to the system of criminal justice that has been inherited in Australia. Such a right is part of the common law in a general sense, although the incidents of that common law right may not in all respects correspond with the provisions of *Article 14*. There is also the possibility that the common law might have been modified by statute or could be so modified in the future.

(d) Provisions for a fair trial are common in statements of rights. It is difficult to conceive of any Bill of Rights for the Northern Territory without such provisions. Assuming there is to be a Bill of Rights in a Northern Territory Constitution, the question becomes one of the extent to which the detail as to fair trials is to be incorporated therein. Any such detail should take into account any special features of the Northern Territory criminal justice system and the difficulties encountered in administering that system. It should also have regard to any indigenous Aboriginal demands for modifications to that system.

(e) Such a consideration may also need to take into account the need for other guarantees not in *Article 14*, such as trial by jury.[74]

(f) Detailed discussion of all these matters would be very lengthy and is beyond the scope of this Paper. Reference can, however, be made to the Report of the Queensland Electoral and Administrative Review Commission.[75]

10. Retrospective offences/penalties

(a) The ICCPR, in *Article 15*, deals separately with this matter. It provides that no one is to be held guilty of criminal offence that did not exist at law when committed. Nor can a penalty be imposed that is heavier than that in force at the time when the offence was committed. However, if the penalty is later lightened, the offender shall benefit.[76]

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73 Dietrich v the Queen (1992) 177 CLR 292.

74 see para 18(b)(vi), p46.

75 1993. *Report on the Review of the Preservation and Enhancement of Individuals Rights and Freedoms,* The Queensland Electoral and Administrative Review Commission Report, Brisbane: 183-213.

76 see also Universal Declaration of Human Rights, Article 11.2, USA Constitution, Article 1 section 9.3, Canadian Charter of Rights and Freedoms, section 11 (g) and (i), New Zealand Bill of Rights Act, section 26(1), Papua New Guinea Constitution, section 36(7), European Convention on Human Rights, Article 7, Constitution of the Republic of South Africa, section 25(3)(f).

(b) In Australia, this position is governed by the common law. There may be no common law or constitutional prohibition on retrospective criminal offences per se.[77] Ex post facto criminal laws have been held to offend against the USA Constitution.

(c) The Queensland Electoral and Administrative Review Commission Report considered that it was clearly unfair and unjust to make criminal laws with retrospective effect, and recommended a Bill of Rights provision against it.[78]

11. Right to Privacy

(a) The ICCPR provides in *Article 17* that no one is to be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation, and that everyone has a right to the protection of the law against same.[79]

(b) In Australia, there is no general right of privacy at common law or under statute, although reference should be made to the *Privacy Act* 1988 of the Commonwealth. A great variety of laws, either common law, equity or statute, bear upon particular aspects of privacy protection, for example, the *Defamation Act* of the Northern Territory.

(c) The desirability of protecting personal privacy has to be balanced against the wider interests of the public generally. For example in the *Police Administration Act*, there are powers of entering onto premises by police in order to search where there are grounds to believe that an offence is being committed or that evidence of an offence exists on those premises or that an offender is on those premises.

12. Freedom of thought, conscience and religion

(a) Freedom of thought, conscience and religion is guaranteed by *Article 18* of the ICCPR. This includes freedom to have or to adopt a religion or belief, to manifest that religion or belief, in worship, observance, practice and teaching. This freedom is only to be subject to limitations as prescribed by law and necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others. It includes the liberty of parents/legal guardians to ensure the religious and moral education of their children.[80]

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77 Polyukhovich v Commonwealth (1991) 172 CLR 501; and also R v Kidman (1915) 20 CLR 425.

78 1993. *Report on the Review of the Preservation and Enhancement of Individuals Rights and Freedoms,* The Queensland Electoral and Administrative Review Commission, Brisbane: 207.

79 see also, Universal Declaration Human Rights, Article 12, Papua New Guinea Constitution, section 49, European Convention on Human Rights, Article 8, Constitution of the Republic of South Africa, section 13.

80 see also Universal Declaration of Human Rights, Article 18, USA Constitution, first Amendment, Canadian Charter of Rights and Freedoms, section 2(a), New Zealand Bill of Rights Act, sections 13 and 15, Papua New Guinea Constitution, section 45, European Convention on Human Rights, Article 9, Constitution of the Republic of South Africa, section 14.

(b) It has been said by the High Court that freedom of religion, the paradigm freedom of conscience, is of the essence of a free society.[81] Notwithstanding this, it has been held that there is no common law guarantee of freedom of religion and belief.[82] There is a limited guarantee in section 116 of the Australian Constitution, applicable only to the Commonwealth and probably extending to Commonwealth territories. The concept of 'religion' has been given a wide meaning by the High Court, but the guarantee itself has been given a narrow meaning.

(c) The Committee has already received submissions that these should be a guarantee of freedom of religion and belief in a new Northern Territory constitution.

(d) Undoubtedly any constitutional guarantee of freedom of religion and belief would be of relevance to Aboriginal people pursuing traditional patterns of life. For example, there is the question of Aboriginal sacred sites. The Committee in its *Discussion Paper* suggested that it would be preferable that any constitutional recognition of Aboriginal language, social, cultural and religious customs and practices should be in a form acceptable to the broader community and compatible with the Territory's multi-racial, multi-cultural nature and the principles of equality and non-discrimination.[83] The Committee also expressed its tentative view against any guarantee of religion applicable to Aboriginal religion only. If there was to be a guarantee, it should apply to all religions equally.[84]

(e) The guarantee in section 116 of the Australian Constitution has been held not to exclude state aid to private schools.[85] A narrow approach to this section has so far been taken by the High Court compared to the approach of the USA Supreme Court based on a similar constitutional provision. A new guarantee in wider terms in a Northern Territory constitution would need to consider whether the position as to state aid is to be expressly maintained.

13. Freedom of Expression

(a) The ICCPR, in *Article 19*, gives everyone the right to hold opinions without interference. There is also a right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds in any medium of choice, but subject to such restrictions provided by law as are necessary for respect for the

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81 Church of the New Faith v Commissioner of Payroll Tax (Vict.) (1983) 154 CLR 120.

82 Grace Bible Church Inc v Reedman (1984) 54 ALR 571.

83 1987. Northern Territory Legislative Assembly Select Committee on Constitutional Development. *Discussion Paper on a Proposed New State Constitution for the Northern Territory,* Legislative Assembly of the Northern Territory, Darwin.

84 1993. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Aboriginal Rights and Issues - Options for Entrenchment,* Legislative Assembly of the Northern Territory, Darwin.

85 Black v Commonwealth (1981) 146 CLR 559.

rights or reputations of others, for the protection of national security or public order or of public health or morals.[86]

(b) Freedom of expression (sometimes called freedom of speech) is another principle that is usually regarded as one of the fundamentals of individual human rights. As *Article 19* contemplates, it is not an absolute right, but has to be balanced against the rights of others and the public interest as a whole.

(c) In Australia, while the High Court has been slow to recognise any general common law guarantee of this right, it has now recognised that there is implied constitutional right of freedom of communication in political matters as an adjunct to the representative, democratic nature of the Australian constitutional system.[87] To some extent, this development, applying Australia-wide, may have lessened the need for an express constitutional right on this matter.

(d) While it might be said that the right to freedom of expression is widely observed in Australia in practice, it is subject to many common law and legislative restrictions. Examples of these are the law of defamation — both at common law and statute — censorship laws, anti-discrimination legislation, the law of contempt, criminal interception laws, correctional service laws, the law as to breach of confidence and fiduciary duties, and other matters. The electronic media in Australia is largely controlled by federal legislation. Broadly speaking, these controls would mostly seem to fall within the ICCPR exceptions to the right. The right, if it was to be given constitutional force, would be directed at more blatant restrictions on freedom of expression which cannot reasonably be justified in a free and democratic society.

(e) There has in recent times been a concentration of media ownership in Australia under the wide legal freedoms that already exist, controlled to some extent by legislation on the electronic media and by cross-media and foreign investment rules. The concept of the freedom of the press has (to some extent at least) been impeded by this concentration. This is however, a development with national and international implications, largely beyond the control of the Northern Territory.

(f) Notwithstanding these developments on the High Court mentioned above, and the limited capacity of the Northern Territory to affect the media and other wider developments, it is difficult to conceive of a Bill of Rights in a new Northern Territory constitution without a provision for freedom of expression, at least in a qualified form.

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86 see also Universal Declaration of Human Rights, Article 19, USA Constitution first Amendment, Canadian Charter of Rights and Freedoms, section 2(b), New Zealand Bill of Rights Act, section 14, Papua New Guinea Constitution, section 46, European Convention on Human Rights, Article 10, Constitution of the Republic of South Africa, section 15.

87 see Item C14 above, p11.

14. Freedom of Assembly

(a) The ICCPR, in *Article 21*, recognises a right of peaceful assembly, to be restricted only in conformity with law where necessary in democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.[88]

(b) This right is closely associated with the right to freedom of expression and the right to freedom of association — see below. It is a contentious right, in that public assemblies can in certain circumstances develop into demonstrations, and demonstrations can sometimes cease to be peaceful. However, the right to peaceful assembly has traditionally long been accepted as one of the fundamental rights.

(c) At common law, it was an offence to engage in an unlawful assembly of 3 or more persons where it gave grounds for apprehension of a breach of the peace or the commission of a crime by force. In the Northern Territory, the relevant provisions are now contained in the *Criminal Code*, the *Police Administration Act* and note the *Summary Offences Act.*[89] Reference should also be made to the *Public Order (Protection and Persons and Property) Act* 1971 of the Commonwealth in relation to Commonwealth diplomatic and consular premises.

(d) Clearly the right has to be a restricted right in order to maintain peace and public security. This is reflected in *Article 21* of the ICCPR. It is a matter of balancing the right of peoples to peaceful assembly and to express their views against the wider public interest.

15. Freedom of Association

(a) The ICCPR contains in *Article 21* a right for everyone to freedom of association with others, including as to trade unions. It is subject to the same restrictions as is the right of peaceful assembly in *Article 21*, except that this is not to prevent the imposition of lawful restrictions on members of the armed forces or the police.[90]

(b) *Article 22.3* of the ICCPR states that nothing in *Article 22* authorises legislative measures which would prejudice the 1948 ILO *Convention Concerning Freedom of Association and Protection of the Right to Organise*.[91] That Convention came into

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88 see also the Universal Declaration of Rights, Article 20, USA Constitution, first Amendment, Canadian Charter of Rights and Freedoms, section 2(c), New Zealand Bill of Rights Act, section 16, Papua New Guinea Constitution, section 47, European Convention on Human Rights, Article 11, Constitution of the Republic of South Africa, section 16.

89 see Part III Division 4 of the Criminal Code, section 148 of the Police Administration Act and note the Summary Offences Act.

90 see also Universal Declaration of Human Rights, Article 20.2, Canadian Charter of Rights and Freedoms, section 2(d), New Zealand Bill of Rights Act, section 17, Papua New Guinea Constitution, section 47, European Convention on Human Rights, Article 11, Constitution of the Republic of South Africa, section 17.

91 ILO No. 87.

operation in Australia on 28 February 1974 and contains 9 Articles on freedom of association with respect to workers and employers' organisations, their membership, establishment and administration, plus an Article on protection of the right to organise.

(c) *Article 22* is clearly not limited to employer or employee associations and has very wide application. Again it is a restricted right, to be balanced against the wider public interest.

(d) There is no common law right of freedom of association as such. Controls on the formation of trade unions and their membership are contained in the *Industrial Relations Act* 1988 of the Commonwealth and are not at present directly relevant to the self-governing Northern Territory, which has very limited industrial powers. Whether this position will continue if further constitutional development takes place in the Territory is as yet uncertain. It should also be noted that the Northern Territory *Anti-Discrimination Act* prohibits discrimination on the ground of trade union or employer association activity, with limited exceptions. Clubs are not permitted to discriminate under that Act on any of the specified grounds except in certain circumstances on the basis of the preservation of a minority culture, the prevention or reduction of disadvantage, or age or sex.

(e) Much of the controversy over this right revolves around the alleged right not to associate. This is not expressly dealt with in *Article 22* of the ICCPR, although it is expressed in *Article 20.2* of the *Universal Declaration of Human Rights*.[92] However this latter provision may not apply to trade unions.

16. Right to Participate in Public Affairs

(a) *Article 25* of the ICCPR provides that every citizen has the right and opportunity, without discrimination and without unreasonable restrictions, to take part in public affairs directly or through freely chosen representatives, to vote at periodic elections by universal and equal suffrage and by secret ballot guaranteeing the free expression of the will of electors and to have access on general terms of equality to the public service.[93]

(b) The matter of the electoral system and the qualifications of electors and candidates for the proposed new Northern Territory Parliament have been dealt with in the Committee's *Discussion Paper*.[94] This included tentative recommendations as to a form of direct Parliamentary representation, with single member electorates, adult suffrage and secret ballots.

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92 see Appendix 7.

93 see Universal Declaration of Human Rights, Article 21, USA Constitution as to various provisions for the election of the President and Congress, and see the 15th, 19th, 24th and 26th Amendments, Canadian Charter of Rights and Freedoms, section 3, New Zealand Bill of Rights Act, section 12, Papua New Guinea Constitution, section 50, Constitution of the Republic of South Africa, sections 6 and 22.

94 1987. Northern Territory Legislative Assembly Select Committee on Constitutional Development. *Discussion Paper on A Proposed New State Constitution for the Northern Territory,* Legislative Assembly of the Northern Territory, Darwin.

(c) Questions of access to the Northern Territory Public Sector are dealt with in the *Public Sector Employment and Management Act* and the *Anti-Discrimination Act* of the Northern Territory.

17. Non Discrimination and Equal Protection of the Law

(a) The ICCPR contains a number of provisions of relevance in this regard. *Article 2* places an obligation on state parties to the Convention to respect and ensure the rights therein without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. *Article 3* provides for the equal rights of men and women to the enjoyment of the rights in the Convention. *Article 14* includes a provision that all persons are equal before courts and tribunals. *Article 16* gives everyone a right to recognition as a person before the law. *Article 26* provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. The law is to prohibit discrimination and to guarantee the equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[95]

(b) In the Northern Territory, discrimination on stated grounds is prohibited under the *Anti-Discrimination Act* (with certain exceptions), and various Commonwealth Acts also prohibit certain forms of discrimination — for example, the *Racial Discrimination Act* 1975. The above rights in the ICCPR are expressed in a more positive form and are based on the concepts of equality and non-discrimination. In some of the other instruments in the Appendices, it is a right qualified by an affirmative action provision in favour of the disadvantaged.[96]

(c) The Australian Constitution itself contains certain principles based on equality and non-discrimination across mainland Australia.[97] However these fall far short of a

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95 see Universal Declaration of Human Rights, Articles 2 and 7, USA Constitution, 14th Amendment Section 1, Canadian Charter of Rights and Freedoms, section 15, New Zealand Bill of Rights Act, section 19, Papua New Guinea Constitution, section 55, European Convention on Human Rights, Article 14, Constitution of the Republic of South Africa, section 8.

96 see para 19(c) below, p.47.

97 see :

. s51 (ii) Taxation; but so as not to discriminate between States or parts of States:

. s51 (iii) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth.

. s88 Uniform duties of customs shall be imposed within two years after the establishment of the Commonwealth.

. s92 On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

. s99 The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.

. s117 A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

general principle of equality before the law and non discrimination. Some members of the High Court have propounded an implied principle of equality under the law, of uncertain scope.[98]

(d) A constitutional provision against discrimination on stated grounds is likely to be less controversial that a constitutional provision for equality before or under the law, or a right to the equal protection of the law. The concept of equality can be a difficult concept to apply in practice. In the USA, the equal protection provision in the *14th Amendment* has given rise to considerable litigation and controversy. In Canada, section 15 of *The Charter* has become one of the most litigated provisions. Such provisions can raise very broad issues such as integration and segregation, access to public benefits and services, entitlements to professional and trade qualifications, access to the courts and legal aid and many other matters.

(e) A distinction may need to be drawn between equality before the law, and equality under the law. The former may be limited to formal equality, whereas the latter may imply substantive equality and is of much wider application. The concept of equal protection extends to substantive equality.

(f) An alternative would be to only have a constitutional provision against discrimination, such as in the New Zealand *Bill of Rights Act*[99] and in the *European Convention on Human Rights*.[100]

(g) This discussion leaves aside the special position of the Aboriginal inhabitants of the Northern Territory, being the subject of separate Committee Discussion Papers.[101] To the extent that a new Northern Territory constitution makes any specific provision for Aboriginal rights, these should, in the Committee's view, be compatible with the multi-racial and multi-cultural nature of the Territory and the broad principles of equality and non-discrimination, subject perhaps to recognition of the principle of affirmative action.[102] In the view taken by the Supreme Court in the USA, justifiable forms of affirmative action are non discriminatory in character, although some members at least of the High Court appear to have taken a different view.[103]

18. Other Rights

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98 Leeth v Commonwealth (1992) 174 CLR 455.

99 see Appendix 3.

100 see Appendix 8.

101 (a) 1992. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Recognition of Aboriginal Customary Law,* Legislative Assembly of the Northern Territory, Darwin*;* and

(b) 1993. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Aboriginal Rights and Issues - Options for Entrenchment*, Legislative Assembly of the Northern Territory, Darwin.

102 1987. Northern Territory Legislative Assembly Select; Committee on Constitutional Development. *Discussion Paper on a Proposed Constitution for the Northern Territory,* Legislative Assembly of the Northern Territory, Darwin: 94.

103 Gerhady v Brown (1985) 159 CLR 70.

(a) The enumerated list of rights discussed above are not to be taken as exhaustive of those civil and political rights that could be considered for inclusion in a new Northern Territory constitution. The Committee would welcome comments and suggestions, not only as to these enumerated rights, but also as to any other rights that might be considered for inclusion.

(b) Particular rights that might be considered in this regard include:

(i) The right to own property and to fair compensation for the arbitrary deprivation of property.[104]

(ii) The right to freedom from arbitrary or unreasonable searches, entry and seizures.[105]

(iii) Equality of the sexes.[106]

(iv) Rights of the Child.[107]

(v) The Right to Petition Government.[108]

(vi) The right to trial by jury.[109]

(vii) The right to freedom of information.[110]

(viii) Language and Cultural Rights of Minorities.[111]

(ix) Administrative Rights and Natural Justice.[112]

(x) The Right to Education.[113]

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104 see the Universal Declaration of Human Rights, Article 17, USA Constitution 5th and 14th Amendments, Papua New Guinea Constitution, section 53, Constitution of the Republic of South Africa, section 28, section 51 (xxix) of the Australian Constitution and section 50 of the Northern Territory (Self-Government) Act 1978.

105 see USA Constitution, 4th Amendment, Canadian Charter of Rights and Freedoms, section 8, New Zealand Bill of Rights Act, section 21, Papua New Guinea Constitution, section 44, Constitution of the Republic of South Africa, section 28.

106 This has been already mentioned under in paragraph 17 - p.46-48, as to equality and non-discrimination. In at least one the instruments in the Appendices, it is treated separately and given superior force over other rights — see Canadian Charter of Rights and Freedoms, section 28.

107 see ICCPR Article 24, Constitution of the Republic of South Africa, section 30, and the Convention on the Rights of the Child).

108 see USA Constitution, first Amendment, Constitution of the Republic of South Africa, section 16.

109 see USA Constitution, 5th and 7th Amendments, Australian Constitution, section 80.

110 see Papua New Guinea Constitution, section 51, Constitution of the Republic of South Africa, section 23 and the Freedom of Information Act 1982 of the Commonwealth.

111 see ICCPR, Article 27, Canadian Charter of Rights and Freedoms, sections 16-23, New Zealand Bill of Rights Act, section 20, Constitution of the Republic of South Africa, section 31.

112 see New Zealand Bill of Rights Act, section 27, Papua New Guinea Constitution, sections 59-62, Constitution of the Republic of South Africa, section 24.

113 see Universal Declaration of Human Rights, Article 26, Constitution of the Republic of South Africa, section 32.

19. General Qualifications to Rights

It is normally accepted that particular human rights are not absolute in nature. That is, they can be qualified in certain respects having regard to the rights of others and the wider public interest. The following is a discussion of possible qualifications to any Northern Territory Bill of Rights for consideration.

(a) Should a Bill of Rights bind other than government?

One question is whether any new Northern Territory Bill of Rights should only be applicable to the institutions of government and its agencies, and persons acting or purporting to act on its behalf, or whether it should be capable of having a wider application to the public generally. In part, this question is related to that of enforcement, discussed in the next item. It is not uncommon for Bills of Rights to be linked to government only in the former manner.[114] On the other hand, the Committee understands that in the States of the USA and the Provinces of Canada, some Bills of Rights can have a wider application.[115] In a sense, the primary goal of a Bill of Rights can be said to be to impose limitations on government, based on what are considered to be minimum standards of conduct of a fundamental nature. The fact is that government has potentially autocratic powers which it can lawfully exercise under legislation or at common law unless otherwise limited. However it has to be recognised that gross violations of human rights are not limited to actions by governments. The Committee would welcome comment on this issue.

(b) Should a Bill of Rights refer to Aboriginal Rights?

Another question to be addressed in any Northern Territory Bill of Rights is that of specific Aboriginal rights. As discussed, the Committee does not intend to deal with Aboriginal rights in this Paper. However, it has considered elsewhere the possible constitutional entrenchment of Aboriginal rights.[116] It would therefore seem desirable, in any Northern Territory Bill of Rights, to include a provision to the effect that, except as otherwise provided in that Bill of Rights, a right elsewhere provided by the constitution as to particular rights of Aboriginal people is not adversely affected by the provisions of the Bill of Rights.

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114 see, for example, the New Zealand Bill of Rights Act, section 3.

115 see also the Papua New Guinea Constitution section 34.

116 (a) 1992. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Recognition of Aboriginal Customary Law*, Legislative Assembly of the Northern Territory, Darwin; and

(b) 1993. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Aboriginal Rights and Issues - Options for Entrenchment*, Legislative Assembly of the Northern Territory, Darwin.

(c) Should a Bill of Rights have affirmative action provisions

Another issue is that of a possible constitutional provision that legally permits forms of affirmative action for the benefit of particular persons or groups who are disadvantaged, a matter already discussed. This is particularly important if there is to be a provision in the Bill of Rights against discrimination and/or about equality. A number of the national and international instruments considered in this Paper have express affirmative action provisions.[117]

(d) Should express qualifications to a Bill of Rights be permitted?

(i) A most important issue is the extent to which any Bill of Rights should have any provisions which legally permits the qualification of any express rights for justifiable reasons. This is in part related to the need to balance the application of particular rights with each other, arising from the principle of the indivisibility of rights. In part, it relates to the need to balance individual rights with the wider public interest. This is a delicate issue. Too broad a qualification could significantly reduce the protection offered by a Bill of Rights and hence the justification for having one. Too narrow a qualification could result in injustices and invite judicial invention of implications considered necessary or desirable.

(ii) Most Bills of Rights permit such qualifications applicable in limited circumstances. Thus the ICCPR has express exceptions in particular Articles.[118] Some of these have already been mentioned in this Paper. Some of the national instruments in the Appendices contain a general qualification, such as in section 1 of the Canadian *Charter of Rights and Freedoms*, which guarantees the rights and freedoms therein, "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[119]

(iii) Arguably, there are some rights which are so basic that they should never be subject to qualification - for example, the right not to be subjected to torture.[120]

(iv) Ultimately it is a matter for the judiciary to interpret and apply any such qualifications, no matter how carefully expressed. Some guidance could be given in undertaking this task by requiring the judiciary to have regard to specific factors such as public safety, public order, public health and the protection of the rights and freedoms of others. In addition, the judiciary would be assisted by a provision directing it to have regard to authoritative judgments, findings and opinions of international and national courts, tribunals and other bodies concerning comparable human rights, and any other relevant information.

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117 see the Canadian Charter of Rights and Freedoms, section 15(2), New Zealand Bill of Rights Act, section 19(2), Papua New Guinea Constitution, section 55(2) Constitution of the Republic of South Africa, section 8(3) and the Racial Discrimination Convention, Article 1.4, scheduled to the Racial Discrimination Act 1975 of the Commonwealth. It has been held to be implied in the USA Constitution.

118 see Appendix 2 - International Covenant on Civil and Political Rights - Articles 8, 10, 12, 13, 14, 15 18, 19, 21, 22 and 25.

119 see also New Zealand Bill of Rights Act, section 5, Papua New Guinea Constitution section 38 (as to qualified rights only), Constitution of the Republic of South Africa, section 33.

120 see item F3, p.31.

(e) Should there be power to suspend a Bill of Rights?

(i) Another issue for consideration is whether there should be any power to suspend the operation of all or any parts of any Northern Territory Bill of Rights in an emergency. Such a provision is contained in *Article 4* of the ICCPR in fairly limited circumstances. It must be a public emergency which threatens the life of the nation and its existence, the measures may be taken only to the extent strictly required by the exigencies of the situation, the measures must not be inconsistent with the nation's obligations under international law and must not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin. No derogation is permitted from the rights concerning life, torture and other unacceptable punishments, slavery, imprisonment for debts, retrospective criminal offences, recognition as a person before the law, and freedom of religion. There is an obligation to inform other state parties of the measures and their termination.[121]

(ii) These are clear dangers in any power to suspend a Bill of Rights. Similar provisions in the constitutions of some other countries have sometimes been abused. If there is to be such a provision in any Northern Territory Bill of Rights, it seems clear that it should be strictly limited and that these limits should be judicially enforceable.

(iii) There is also a question whether the fixed maximum term of the Parliament should be capable of extension by government or the Parliament in a genuine emergency. This is a matter not discussed in the Committee's first Discussion Paper. By way of comparison, the Canadian *Charter of Rights and Freedoms* provides for such a power in section 4.[122] The same question arises in respect of the maximum time between Parliamentary sittings.

(f) Other Matters

(i) There may be other provisions that should be considered for inclusion in a Northern Territory Bill of Rights. For example, that the rights expressed in that Bill are without limitation to any other rights, and that the Bill is to be interpreted such that no person or organisation is to be entitled to do anything aimed at the destruction or limitation of the rights of others. It might also be considered that a provision should be inserted requiring the Bill of Rights to be interpreted in a manner consistent with the preservation and enhancement of the multicultural nature of the Northern Territory community, based on freedom and equality, so as to promote harmony, tolerance and unity.[123]

(ii) The Committee invites comment on all of these matters.

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121 see also Papua New Guinea Constitution, section 40, European Convention on Human Rights, Article 15, Constitution of the Republic of South Africa, section 34; or note that the Canadian Charter of Rights and Freedoms allows a general legislative power of express derogation from section 2 and sections 7-15, but it is only operative for 5 years.

122 see Appendix 5 - Canadian Charter of Rights and Freedoms.

123 see Appendix 5 - Canadian Charter of Rights and Freedoms, section 27.

G. ENFORCEMENT AND ENTRENCHMENT OF A NORTHERN TERRITORY BILL OF RIGHTS

1. Enforcement and Entrenchment generally

(a) The effectiveness of any Bill of Rights largely depends upon the extent to which it is capable of being enforced against the person or body in breach. However, the desirability of effective enforcement mechanisms has to be balanced against the desirability of the democratically elected legislature having the maximum capacity to enact laws which it considers to be in the best interests of the community, and for government to be able to administer those laws and to be able to govern effectively and efficiently with the minimum of restrictions.

(b) The issue of enforceability and entrenchment can be directly related. The greater the degree of entrenchment of a Bill of Rights in a constitution, that is, the more difficult it is to later change that Bill of Rights, the more likely it is to be capable of effective enforcement. The greater the degree of entrenchment, the more difficult it will be for government to secure a change to the Bill of Rights where it is found to be operating in a manner that is disadvantageous to effective and efficient government or to the wider public interest generally.

(c) Most national Bills of Rights are constitutionally entrenched to some degree. The *Bill of Rights Act* in New Zealand is more an exception in this regard, being in the form of an ordinary statute of the Parliament, capable of being amended or repealed by a later statute.[124] On the other hand, it is still an Act capable of being enforced through the courts against government.

(d) Most national Bills of Rights are enforceable through the courts. However, the effectiveness of this depends on the extent to which the principle of the independence of the judiciary is established in the particular jurisdiction. This is a matter discussed in the Committee's *Discussion Paper*.[125]

2. Options

Assuming a Bill of Rights is to be adopted in the Northern Territory as part of its further constitutional development, the possible options for its adoption are as follows:

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[124] see Appendix 3.

[125] 1987. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Discussion Paper on A Proposed New Constitution for the Northern Territory*, Legislative Assembly of the Northern Territory, Darwin.

(a) Ordinary Statute

There may be some advantages to including the Bill of Rights in an ordinary statute, such as has been done in New Zealand, and was first done in Canada. This would enable the Bill to be given a "phasing-in" trial period, when its operation could be assessed and analysed and any deficiencies corrected where necessary. The Bill could be given constitutional status after that initial period had expired and the judiciary and others had adjusted to the changes introduced by it. The Bill could also be enacted by the Northern Territory Legislative Assembly before the commencement of the new constitution if thought appropriate. This may be an option that would appeal to those who favour some legal statement of rights as part of further Northern Territory constitutional development, but who might be concerned about the wide ramifications of an enforceable Bill of Rights that was firmly entrenched in the constitution from its inception and which might have unforeseen consequences in the particular circumstances of the Northern Territory.

(b) Organic Law

The option of a Bill of Rights in an organic law may also have some attractions, in that while the Bill of Rights would remain as a statute and could be changed later if found necessary. Any such change would have to comply with the specified amendment procedures for organic laws, involving a special majority of the Parliament and associated safeguards against hasty amendment. The difficulty in practice with this suggestion is that the Northern Territory presently has no power to make organic laws, so the option could not be implemented until after the new constitution came into effect.

(c) Preamble to the new Northern Territory constitution

The inclusion of the Bill of Rights in a preamble to the new Territory constitution, presumably in a form that was not directly enforceable in the courts at the suit of a person claiming an infringement of rights, is another option deserving consideration. Whilst not directly enforceable, the Bill could have some meaningful operation, in that the provisions of the Bill may impact upon matters of legal interpretation of other laws in appropriate cases, and may also affect the manner of administration of those laws by government by way of introducing a further relevant matter for consideration by administrators.

(d) Non-enforceable constitutional provision

A variation of the option discussed in paragraph (c) above would be to include the Bill of Rights in the body of the new constitution itself, but to expressly provide that that part was not to be directly enforceable at the suit of any person in the courts, nor was it to provide a defence in any court action against that person. Its operation could be limited to matters of interpretation and administration, discussed above.

(e) Parliamentary Scrutiny

The options discussed in paragraphs (c) or (d) above could also be combined with a constitutional provision for the establishment of a standing Parliamentary Committee, the duty of which would include that of considering all legislation (including subordinate legislation) and reporting on whether it complied with the Bill of Rights. Such a provision along these lines was recommended in the Report by the Legal and Constitutional Committee of the Victorian Parliament.[126]

(f) Ombudsman

The option in paragraph (e) above could also be supplemented by a constitutional provision conferring on the Northern Territory Ombudsman the duty of considering all administrative actions the subject of a complaint and reporting on whether they complied with the Bill of Rights, together with any recommendations for changes in matters of administration in order to conform to the Bill.

(g) Enforceable constitutional provision

If it is considered that all of these options are too weak, and do not effectively secure a minimum standard of fundamental rights, the only option is a constitutionally entrenched Bill of Rights, directly enforceable in the courts. There would still be a question of the degree of entrenchment of that Bill of Rights in that constitution. One possibility would be to provide for a simpler method of amendment then a referendum for an initial trial period, perhaps by a special majority of the Parliament only. Another possibility would be to give the Parliament the power of later amendment of the Bill of Rights by way of an express overriding statute, but to provide that any such amendment only operates for a limited period of years — as in Canada.[127]

(h) Status quo

If none of these options are considered to be acceptable, then the status quo will remain, that is, there will be no comprehensive Bill of Rights as part of further Northern Territory constitutional development. However, there may well be selected constitutional provisions of a human rights nature on particular topics, for example, against any compulsory acquisition of property without fair compensation, and there would still be scope for introducing a statutory Bill of Rights or possibly an organic law at a later time. The advantage of framing a Bill of Rights at the same time as the adoption of a new Northern Territory constitution as a part of further Northern Territory constitutional development would, however, be lost.

(i) The Committee repeats that it has as yet made no firm decision of the question of whether there should be a Bill of Rights for the Northern Territory, and if so, what rights it should contain, the extent to which it should be entrenched and how it should be enforceable. These are matters upon which it invites public comment.

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126 1989. *Report on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights*, Legal and Constitutional Committee, Parliament of Victoria, Melbourne.

127 see Appendix 5.

APPENDICES

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H. APPENDIX 1

I. List of Persons and Organisations who have commented on the human rights aspects of the Committee's first Discussion Paper.

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List of Persons and Organisations who commented on the Human Rights Aspects of the Committee's first Discussion Paper.

Persons

Bennett, Steve
Bromley, Toni Vine
Brown, George
Campbell, H M
Draffin, Chris
Fletcher, Kevin F
Forrester, Vince
Forscutt, Jim
Gilmour, Susan
Hockey, Phillip R
James, Earl
Johannsen, Dave
Joshua,
Keunen, Sheila
Kimber, R G
Malcolm, David (Chief Justice)
McNab, Peter
O'Donoghue, Lois
Perceval, Francis
Pfeifer, Horst
Reyburn,
Ross, Bruce
Shannon, David
Smith-Vaughan, P
Thomson, Jim (Professor)
Thorn, Peter (Dr)
Yuell, Ian
Whiley, W

Organisations

Constitutional Heritage Protection Society
Council of Government Schools Organisations (NT) (R Creswick)
Federal Miscellaneous Workers Union (Peter Tullgren)
Jabiru Town Council (Don Ditchburn)
Local Government Association (NT)
National Spiritual Assembly of the Baha'is of Australia Inc
Office of Equal Opportunity (NT)
Tangentyere Council
Trades and Labour Council (NT) (Mark Crossin, Rod Ellis and Joan Wilkinson)
Uniting Church in Australia
Women's Advisory Council (Myrna Bull, Sue Schmolke, Ida Williams)
Yirrkala Dhanbul Community Association Inc

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J. APPENDIX 2

K. The International Covenant on Civil and Political Rights and Optional Protocol, 1996

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[A] International covenant on civil and political rights, 1966

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

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

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from Articles 6, 7, 8 (paragraphs l and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized therein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that recognizes them to a lesser extent.

PART III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this Article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this Article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3. (a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term 'forced or compulsory labour' shall not include:

(i) Any work or service, not referred to in sub-paragraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;.

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reason for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise for execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order *(ordre public),* public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully, in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order *(ordre public)* or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardian-ship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows exclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs limitations as may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others,

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order *(ordre public),* the protection of public health or morals or the protection of the freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order *(ordre public),* the protection of public health or morals or the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

1. Every child shall have, without any discrimination as to race, colour, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

Article 25

Every citizen shall have the right and the opportunity without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

PART IV

Article 28

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.

2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights,

consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

Article 29

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in Article 28 and nominated for the purpose by the States Parties to the present Covenant.

2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.

3. A person shall be eligible for renomination.

Article 30

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.

2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with Article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.

3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.

4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary-General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

Article 31

1. The Committee may not include more than one national of the same State.

2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

Article 32

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in Article 30, paragraph 4.

2. Elections at the expiry of office shall be held in accordance with preceding Articles of this part of the present Covenant.

Article 33

1. If in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.

2 In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

Article 34

1. When a vacancy is declared in accordance with Article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with Article 29 for the purpose of fulfilling the vacancy.

2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.

3. A member of the Committee elected to fill a vacancy declared in accordance with Article 33 shall hold office for the remainder of the term of the member who vacated the seat of the Committee under the provisions of that Article.

Article 35

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

Article 36

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

Article 37

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.

2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

Article 38

Every member of the Committee shall, before taking up his duties make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

Article 39

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, *inter alia* that:

(a) Twelve members shall constitute a quorum;

(b) Decisions of the Committee shall be made by a majority vote of the members present.

Article 40

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:

(a) Within one year of the entry into force of the present Covenant for the States Parties concerned;

(b) Thereafter whenever the Committee so requests.

2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this Article.

Article 41

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this Article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication, the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter.

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State.

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.

(d) The Committee shall hold closed meetings when examining communications under this article.

(e) Subject to the provisions of sub-paragraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant.

(f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in sub-paragraph (b), to supply any relevant information.

(g) The States Parties concerned, referred to in sub-paragraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing.

(h) The Committee shall, within twelve months after the date of receipt of notice under sub-paragraph (b), submit a report:

(i) If a solution within the terms of sub-paragraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of sub-paragraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this Article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph 1 of this Article. Such declarations shall be deposited by the States Parties to the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this Article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 42

1. (a) If a matter referred to the Committee in accordance with Article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an *ad hoc* Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;

(b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not party to the present Covenant, or of a State Party which has not made, the declaration under Article 41.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at the Head quarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.

5. The secretariat provided in accordance with Article 36 shall also service, the commissions appointed under this article.

6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the State Parties concerned to supply any other relevant information.

7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned.

(a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter.

(b) If an amicable solution to the matter on the basis of respect for human rights as recognized in the present Covenant is reached the Commission shall confine its report to a brief statement of the fact and of the solution reached.

(c) If a solution within the terms of sub-paragraph (b) is not reached. the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned.

(d) If the Commission's report is submitted under sub-paragraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.

8. The provisions of this Article are without prejudice to the responsibilities of the Committee under Article 41.

9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this Article.

Article 43

The members of the Committee, and of the *ad hoc* conciliation commissions which may be appointed under Article 42, shall be entitled to the facilities, privileges and immunes of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 44

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

Article 45

The Committee shall submit to the General Assembly of the United Nations through the Economic and Social Council, an annual report on its activities.

PART V

Article 46

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 47

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

Article 48

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 49

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 50

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 51

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 52

Irrespective of the notifications made under Article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph 1 of the same Article of the following particulars:

(a) Signatures, ratifications and accessions under Article 48;

(b) The date of the entry into force of the present Covenant under Article 49 and the date of the entry into force of any amendments under Article 51.

Article 53

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in Article 48.

[B] Optional protocol to the international covenant on civil and political rights, 1966

The States Parties to the present Protocol,

Considering that in order further to achieve the purposes of the Covenant on Civil and Political Rights (hereinafter referred to as the Covenant) and the implementation of its provisions it would be appropriate to enable the Human Rights Committee set up in Part IV of the Covenant (hereinafter referred to as the Committee) to receive and consider, as provided in the present Protocol, communications from individuals claiming to be victim of violations of any of the rights set forth in the Covenant,

Have agreed as follows:

Article 1

A State Party to the Covenant that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a party to the present Protocol.

Article 2

Subject to the provisions of Article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

Article 3

The Committee shall consider inadmissible any communication under the present Protocol which is anonymous, or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the Covenant.

Article 4

1. Subject to the provisions of Article 3, the Committee shall bring any communications submitted to it under the present Protocol to the attention of the State Party to the present Protocol alleged to be violating any provision of the Covenant.

2. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

Article 5

1. The Committee shall consider communications received under the present Protocol in the light of all written information made available to it by the individual and by the State Party concerned.

2. The Committee shall not consider any communication from an individual unless it has ascertained that:

(a) The same matter is not examined under another procedure of international investigation or settlement;

(b) The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.

3. The Committee shall hold closed meetings when examining communications under the present Protocol.

4. The Committee shall forward its views to the State Party concerned and to the individual.

Article 6

The Committee shall include in its annual report under Article 45 of the Covenant a summary of its activities under the present Protocol.

Article 7

Pending the achievement of the objectives of resolution 1514 (XV) adopted by the General Assembly of the United Nations on 14 December 1960 concerning the Declaration on the Granting of Independence to Colonial Countries and Peoples, the provisions of the present Protocol shall in no way limit the right of petition granted to these peoples by the Charter of the United Nations and other international conventions and instruments under the United Nations and its specialized agencies.

A*rticle* 8

1. The present Protocol is open for signature by any State which has signed the Covenant.

2. The present Protocol is subject to ratification by any State which has ratified or acceded to the Covenant. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Protocol shall be open to accession by any State which has ratified or acceded to the Covenant.

4. Accession shall be effected by the deposit of an instrument of accessories with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 9

1. Subject to the entry into force of the Covenant, the present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or instrument of accession.

2. For each State ratifying the present Protocol or acceding to it after the deposit of the tenth instrument of ratification or instrument of accession, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 10

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

Article 11

1. Any State Party to the present Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to the present Protocol with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that at least one-third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-third majority of the States Parties to the present Protocol in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendment which they have accepted.

Article 12

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect three months after the date of receipt of the notification by the Secretary-General.

2. Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under Article 2 before the effective date of denunciation.

Article 13

Irrespective of the notifications made under Article 8, paragraph 5, of the present Protocol, the Secretary-General of the United Nations shall inform all States referred to in Article 48, paragraph l, of the Covenant of the following particulars:

(a) Signatures, ratifications and accessions under Article 8;

(b) The date of the entry into force of the present Protocol under Article 9 and the date of the entry into force of any amendments under Article 11;

(c) Denunciations under Article 12.

Article 14

1. The present Protocol, of which the Chinese, English, French Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in Article 48 of the Covenant.

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L. APPENDIX 3

M. New Zealand Bill of Rights Act 1990

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New Zealand Bill of Rights Act 1990

1. Short Title and commencement — (1) This Act may be cited as the New Zealand Bill of Rights Act 1990.

(2) This Act shall come into force on the 28th day after the date on which it receives the Royal assent.

PART I

GENERAL PROVISIONS

2. Rights affirmed — The rights and freedoms contained in this Bill Rights are affirmed.

3. Application — This Bill of Rights applies only to acts done —

(a) By the legislative, executive, or judicial branches of the government of New Zealand; or

(b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

4. Other enactments not affected — No court shall, in relation to any enactment (whether passed or made before or after the commencement this Bill of Rights), —

(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or

(b) Decline to apply any provision of the enactment—by reason only that the provision is inconsistent with any provision of this Bill of Rights.

5. Justified limitations — Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

6. Interpretation consistent with Bill of Rights to be preferred — Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

7. Attorney-General to report to Parliament where Bill appears to be consistent with Bill of Rights — Where any Bill is introduced into the House of Representatives, the Attorney-General shall, —

(a) In the case of a Government Bill, on the introduction of that Bill; or

(b) In any other case, as soon as practicable after the introduction of the Bill,— bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights

PART II

CIVIL AND POLITICAL RIGHTS

Life and Security of the Person

8. Right not to be deprived of life — No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

9. Right not to be subjected to torture or cruel treatment — Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

10. Right not to be subjected to medical or scientific experimentation — Every person has the right not to be subjected to medical or scientific experimentation without that person's consent.

11. Right to refuse to undergo medical treatment — Everyone has the right to refuse to undergo any medical treatment.

Democratic and Civil Rights

12. Electoral rights — Every New Zealand citizen who is of or over the age of 18 years —

(a) Has the right to vote in genuine periodic elections of members, of the House of Representatives, which elections shall be by equal suffrage and by secret ballot; and

(b) Is qualified for membership of the House of Representatives.

13. Freedom of thought, conscience, and religion — Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.

14. Freedom of expression — Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

15. Manifestation of religion and belief — Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

16. Freedom of peaceful assembly — Everyone has the right to freedom of peaceful assembly.

17. Freedom of association — Everyone has the right to freedom of association.

18. Freedom of movement — (1) Everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand.

(2) Every New Zealand citizen has the right to enter New Zealand.

(3) Everyone has the right to leave New Zealand.

(4) No one who is not a New Zealand citizen and who is lawfully in New Zealand shall be required to leave New Zealand except under decision taken on grounds prescribed by law.

Non-Discrimination and Minority Rights

19. Freedom from discrimination — (1) Everyone has the right to freedom from discrimination on the ground of colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief.

(2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief do not constitute discrimination.

20. Rights of minorities — A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, and to profess and practise the religion, or to use the language, of that minority.

Search, Arrest, and Detention

21. Unreasonable search and seizure — Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

22. Liberty of the person — Everyone has the right not to be arbitrarily arrested or detained.

23. Rights of persons arrested or detained — (1) Everyone who is arrested or who is detained under any enactment —

(a) Shall be informed at the time of the arrest or detention of the reason for it; and

(b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and

(c) Shall have the right to have the validity of the arrest or detention determined without delay by way of *habeas corpus* and to be released if the arrest or detention is not lawful.

(2) Everyone who is arrested for an offence has the right to be charged promptly or to be released.

(3) Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal.

(4) Everyone who is —

(a) Arrested; or

(b) Detained under any enactment —

or any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.

(5) Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

24. Rights of persons charged — Everyone who is charged with an offence —

(a) Shall be informed promptly and in detail of the nature and cause of the charge; and

(b) Shall be released on reasonable terms and conditions unless there is just cause for continued detention; and

(c) Shall have the right to consult and instruct a lawyer; and

(d) Shall have the right to adequate time and facilities to prepare defence; and

(e) Shall have the right, except in the case of an offence under military law tried before a military tribunal to the benefit of a trial jury when the penalty for the offence is or includes imprisonment for more than 3 months; and

(f) Shall have the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance; and

(g) Shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court.

25. Minimum standards of criminal procedure — Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

(a) The right to a fair and public hearing by an independent and impartial court:

(b) The right to be tried without undue delay:

(c) The right to be presumed innocent until proved guilty according to law:

(d) The right not to be compelled to be a witness or to confess guilt:

(e) The right to be present at the trial and to present a defence:

(f) The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution:

(g) The right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty:

(h) The right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both:

(i) The right, in the case of a child, to be dealt with in a manner that takes account of the child's age.

26. Retroactive penalties and double jeopardy — (1) No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.

(2) No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

27. Right to justice — (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

(2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

(3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

PART III

MISCELLANEOUS PROVISIONS

28. Other rights and freedoms not affected — An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part.

29. Application to legal persons — Except where the provisions of this Bill of Rights otherwise provide, the provisions of this Bill of Rights apply, so far as practicable, for the benefit of all legal persons as well as for the benefit of all natural persons.

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N. APPENDIX 4

O. USA Bill of Rights

Relevant excerpts of Amendments to the Constitution of the United States of America

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ARTICLES IN ADDITION TO, AND IN AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION

ARTICLE [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE [II]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

ARTICLE [III]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE [IV]

The right of the people to be secure in their persons, house papers, and effects, against unreasonable searches and seizure shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE [VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of counsel for his defence.

ARTICLE [VII]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

ARTICLE [VIII]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE [IX]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE [XIII]

Section 1. Neither slavery nor involuntary servitude, except, as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE [XIV]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal promotion of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of presentation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.˙

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or

obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE [XV]

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

ARTICLE [XIX]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

ARTICLE [XXIV]

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice-President, for electors for President or Vice-President, or for Senator or Representative in Congress, shall not be denied or abridged by United States or any State by reason of failure to pay any poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

ARTICLE [XXVI]

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

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P. APPENDIX 5

Q. Canadian Charter of Rights and Freedoms

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CONSTITUTION ACT, 1982

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

Democratic Rights

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members.

(2) In time of real or apprehended war, invasion of insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

5. There shall be a sitting of Parliament and of each legislature sitting at least once every twelve months.

Mobility Rights

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(a) to move to and take up residence in any province; and

(b) to pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Legal Rights

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search or seizure.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

10. Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right; and

(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

11. Any person charged with an offence has the right,

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(e) not to be denied reasonable bail without just cause;

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury

where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations:

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of com-mission and the time of sentencing. to the benefit of the lesser punishment.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion. sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Official Languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

16.1 (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and

privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed. [*New*, Constitution Amendment 1993 (New Brunswick)]

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

19. (1) Either English or French may be used in courts by any person in, or in any pleading in or process issuing from, any court established by Parliament.

(2) Either English or French may be used by any person in, or in any pleadings in or process issuing from. any court of New Brunswick.

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(a) there is a significant demand for communications with and services from that office in such language; or

(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Minority Language Educational Rights

23. (1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Enforcement

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any affected by aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired. [*Amended*, Constitution Amendment Proclamation, 1983.]

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

30. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

31. Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter

32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Citation

34. This Part may be cited as the *Canadian Charter of Rights and Freedoms*.

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R. APPENDIX 6

S. Relevant excerpts from the

T. Papua New Guinea Constitution:

[A.] Preamble (part thereof) and

[B.] Part III - Basic Principles of Government (part thereof):

Division 3 - Basic Rights,

Division 4 - Principles of Natural Justice and

Division 5 - Basic Social Obligations

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RELEVANT EXCERPTS FROM THE CONSTITUTION OF THE

INDEPENDENT STATE OF PAPUA NEW GUINEA

*[A] **PREAMBLE** (part thereof)*

National Goals and Directive Principles.

WE HEREBY PROCLAIM the following aims as our National Goals, and direct all persons and bodies, corporate and unincorporate, to be guided by these our declared Directives in pursuing and achieving our aims :-

1. - INTEGRAL HUMAN DEVELOPMENT.

We declare our first goal to be for every person to be dynamically involved in the process of freeing himself or herself from every form of domination or oppression that each man or woman will have the opportunity to develop as a whole person in relationship with others.

WE ACCORDINGLY CALL FOR -

(1) everyone to be involved in our endeavours to achieve integral human development of the whole person for every person and to seek fulfilment through his or her contribution to the common good; and

(2) education to be based on mutual respect and dialogue, and to promote awareness of our human potential and motivation to achieve our National Goals through self-reliant effort; and

(3) all forms of beneficial creativity, including sciences and cultures, to be actively encouraged; and

(4) improvement in the level of nutrition and the standard of public health to enable our people to attain self fulfilment; and

(5) the family unit to be recognized as the fundamental basis of our society, and for every step to be taken to promote the moral, cultural, economic and social standing of the Melanesian family; and

(6) development to take place primarily through the use of Papua New Guinean forms of social and political organization.

2. - EQUALITY AND PARTICIPATION.

We declare our second goal to be for all citizens to have an equal opportunity to participate in, and benefit from the development of our country.

WE ACCORDINGLY CALL FOR -

(1) an equal opportunity for every citizen to take part in the political, economic, social, religious and cultural life of the country; and

(2) the creation of political structures that will enable effective, meaningful participation by our people in that life, and in view of the rich cultural and ethnic diversity of our people for those structures to provide for "substantial decentralization of all forms of government activity; and

(3) every effort to be made to achieve an equitable distribution of incomes and other benefits of development among individuals and throughout the various parts of the country; and

(4) equalization of services in all parts of the country, and for every citizen to have equal access to legal processes and all services, governmental and otherwise, that are required for the fulfilment of his or her real needs and aspirations; and

(5) equal participation by women citizens in all political, economic, social and religious activities; and

(6) the maximization of the number of citizens participating in every aspect of development; and

(7) active steps to be taken to facilitate the organization and legal recognition of all groups engaging in development activities; and

(8) means to be provided to ensure that any citizen can exercise his personal creativity and enterprise in pursuit of fulfilment that is consistent with the common good, and for no citizen to be deprived of this opportunity because of the predominant position of another; and

(9) every citizen to be able to participate, either directly or through a representative, in the consideration of any matter affecting his interests or the interests of his community; and

(10) all persons and governmental bodies of Papua New Guinea to ensure that, as far as possible, political and official bodies are so composed as to be broadly representative of citizens from the various areas of the country; and

(11) all persons and governmental bodies to endeavour to achieve universal literacy in *Pisin, Hiri Motu*, or English, and in "*tok ples*" *or* "*ita eda tano gado*"; and

(12) recognition of the principles that a complete relationship in marriage rests on equality of rights and duties of the partners, and that responsible parenthood is based on that equality.

3. - NATIONAL SOVEREIGNTY AND SELF-RELIANCE

We declare our third goal to be for Papua New Guinea to be politically and economically independent, and our economy basically self-reliant.

WE ACCORDINGLY CALL FOR -

(1) our leaders to be committed to these National Goals and Directive Principles, to ensure that their freedom to make decisions is not restricted by obligations to or relationship with others, and to make all of their decisions in the national interest; and

(2) all governmental bodies to base their planning for political, economic and social development on these Goals and Principles; and

(3) internal interdependence and solidarity among citizens, and between provinces, to be actively promoted; and

(4) citizens and governmental bodies to have control of the bulk of economic enterprise and production; and

(5) strict control of foreign investment capital and wise assessment of foreign ideas and values so that these will be subordinate to goal of national sovereignty and self-reliance

and *in particular* for the entry of foreign capital to be geared to internal social and economic policies and to the integrity of the Nation and the People; and

(6) the State to take effective measures to control and actively participate in the national economy, and *in particular* to control major enterprises engaged in the exploitation of natural resources; and

(7) economic development to take place primarily by the use of skills and resources available in the country either from citizens or the State and not in dependence on imported skills and resources; and

(8) the constant recognition of our sovereignty, which must not be undermined by dependence on foreign assistance of any sort, and *in particular* for no investment, military or foreign aid agreement or understanding to be entered into that imperils our self-reliance and self-respect, or our commitment to these National Goals and Directive Principles, or that may lead to substantial dependence upon or influence by any country, investor, lender or donor.

4. - NATURAL RESOURCES AND ENVIRONMENT.

We declare our fourth goal to be for Papua New Guinea's natural resources and environment to be conserved and used for the collective benefit of us all, and be replenished for the benefit of future generations.

WE ACCORDINGLY CALL FOR -

(1) wise use to be made of our natural resources and the environment in and on the land or seabed, in the sea, under the land, and in the air, in the interests of our development and in trust for future generations; and

(2) the conservation and replenishment, for the benefit of ourselves and posterity, of the environment and its sacred, scenic and historical qualities; and

(3) all necessary steps to be taken to give adequate protection to our valued birds, animals, fish, insects, plants and trees.

5. - PAPUA NEW GUINEAN WAYS.

We declare our fifth goal to be to achieve development primarily through the use of Papua New Guinean forms of socials political and economic organization.

WE ACCORDINGLY CALL FOR -

(1) a fundamental re-orientation of our attitudes and the institutions of government, commerce, education and religion towards Papua New Guinean forms of participation, consultation and consensus, and a continuous renewal of the responsiveness of these institutions to the needs and attitudes of the People; and

(2) particular emphasis in our economic developments be placed on small-scale artisan, service business activity; and

(3) recognition that the cultural, commercial and ethnic diversity of our people is a positive strength, and for the fostering of a respect for, and appreciation of, traditional ways of life and culture, including language, in all their richness and variety, as well as for a willingness to apply these ways dynamically and creatively for the tasks of development; and

(4) traditional villages and communities to remain as viable units of Papua New Guinean society, and for active steps to be taken to improve their cultural, social, economic and ethical quality

Basic Rights.

WE HEREBY ACKNOWLEDGE that, subject to any restrictions imposed by law on non-citizens, all persons in our country are entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever their race, tribe, places of origin, political opinion, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the legitimate public interest, to each of the following :-

(a) life, liberty, security of the person and the protection of the law; and

(b) the right to take part in political activities; and

(c) freedom from inhuman treatment and forced labour; and

(d) freedom of conscience, of expression, of information and of assembly and association; and

(e) freedom of employment and freedom of movement; and

(f) protection for the privacy of their homes and other property and from unjust deprivation of property,

and have accordingly included in this Constitution provisions designed to afford protection to those rights and freedoms, subject to such limitations on that protection as are contained in those provisions, being limitations primarily designed to ensure that the enjoyment of the acknowledged rights and freedoms by an individual does not prejudice the rights and freedoms of others or the legitimate public interest**.**

Basic Social Obligations.

WE HEREBY DECLARE that all persons in our country have the following basic obligations to themselves and their descendants, to each other, and to the Nation *:-*

(a) to respect, and to act in the spirit of, this Constitution; and

(b) to recognize that they can fully develop their capabilities and advance their true interests only by active participation in the development of the national community as a whole; and

(c) to exercise the rights guaranteed or conferred by this Constitution, and to use the opportunities made available to them under it to Participate fully in the government of the Nation; and

(d) to protect Papua New Guinea and to safeguard the national wealth, resources and environment in the interests not only of the present generation but also of future generations*;* and

(e) to work according to their talents in socially useful employment, and if necessary to create for themselves legitimate opportunities for such employment; and

(f) to respect the rights and freedoms of others, and to co-operate fully with others in the interests of interdependence and solidarity; and

(g) to contribute, as required by law, according to their means to the revenues required for the advancement of the Nation and the purposes of Papua New Guinea; and

(h) in the case of parents, to support, assist and educate their children (whether born in or out of wedlock), and in particular to give them a true understanding of their basic rights and obligations and of the National Goals and Directive Principles; and

(i) in the case of the children, to respect their parents.

IN ADDITION, WE HEREBY DECLARE that all citizens have an obligation to themselves and their descendants, to each other and to the Nation to use profits from economic activities in the advancement of our country and our people, and that the law may impose a similar obligation on non-citizens carrying on economic activities in or from our country.

[B] PART 111 - BASIC PRINCIPLES OF GOVERNMENT (part thereof)

Division 3. - Basic Rights

Subdivision A. - Introductory.

32. - RIGHT TO FREEDOM

(1) Freedom based on law consists in the least amount of restriction on the activities of individuals that is consistent with the maintenance and development of Papua New Guinea and of society in accordance with this Constitution and, in particular, with the National Goals and Directive Principles and the Basic Social Obligations.

(2) Every person has the right to freedom based on law, and accordingly has a legal right to do anything that -

(a) does not injure or interfere with the rights and freedoms of others; and

(b) is not prohibited by law,

and no person -

(c) is obliged to do anything that is not required by law; and

(d) may be prevented from doing anything that complies with the provisions of paragraphs (a) and (b)

(3) This section is not intended to reflect on the extra-legal existence, nature, or effect of social, civic, family or religious obligations, or other obligations of an extra-legal nature, or to prevent such obligations being given effect to by law.

33. - OTHER RIGHTS AND FREEDOMS, ETC.

Nothing in this Division derogates the rights and freedoms of the individual under any other law and, in particular, an Organic Law or an Act of the Parliament may provide further guarantees of rights and freedoms and may further restrict the limitations that may be placed on, or on the exercise of, any right or freedom (including the limitations that may be imposed under Section 38 (*general qualifications on qualified rights*)).

34. - APPLICATION OF DIVISION 3.

Subject to this Constitution, each provision of this Division applies, as far as may be -

(a) as between individuals as well as between governmental bodies and individuals; and

(b) to and in relation to corporations and associations (other than governmental bodies) in the same way as it applies to and in relation to individuals,

except where, or to the extent that the contrary intention appears in this Constitution.

Subdivision B. - Fundamental Rights.

35. - RIGHT TO LIFE.

(1) No person shall be deprived of his life intentionally except -

(a) in execution of a sentence of a court following his conviction of an offence for which the penalty of death is prescribed by law; or

(b) as the result of the use of force to such an extent is reasonable in the circumstances of the case and is permitted by any other law -

(i) for the defence of any person from violence; or

(ii) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or

(iii) for the purpose of suppressing riot, an insurrection or a mutiny; or

(iv) in order to prevent him from committing an offence; or

(v) for the purpose of suppressing piracy or terrorism or similar acts; or

(c) as the result of a lawful act of war.

(2) Nothing in Subsection (1)(b) relieves any person from any liability at law in respect of the killing of another.

36. - FREEDOM FROM INHUMAN TREATMENT.

(1) No person shall be submitted to torture (whether physical or mental), or to treatment or punishment that is cruel or otherwise inhuman, or is inconsistent with respect for the inherent dignity of the human person.

(2) The killing of a person in circumstances in which Section 35(1)(a) (*right to life*) does not, of itself contravene Subsection (1), although the manner or the circumstances of the killing may contravene it.

37. - PROTECTION OF THE LAW.

(1) Every person has the right to the full protection of the law and the succeeding provisions of this section are intended to ensure that that right is fully available, especially to persons in custody or charged with offences.

(2) Except, subject to any Act of the Parliament the contrary, in the case of the offence commonly known as contempt of court, nobody may be convicted of an offence that is not defined by, and the penalty for which is not prescribed by, a written law.

(3) A person charged with an offence shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time, by an independent and impartial court.

(4) A person charged with an offence -

(a) shall be presumed innocent until proved guilty according to law, but a law may place upon a person charged with an offence the burden of proving particular facts which are, or would with the exercise of reasonable care be, peculiarly within his knowledge; and

(b) shall be informed promptly in a language which the offence with which he is charged; and

(c) shall be given adequate time and facilities for the preparation of his defence; and

(d) shall be permitted to have without payment the assistance of an interpreter if he cannot under-stand or speak the language used at the trial of the charge; and

(e) shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice, or if he is a person entitled to legal aid, by the Public Solicitor or another legal representative assign to him in accordance with law; and

(f) shall be afforded facilities to examine in person or by his legal representative the witnesses called before the court by the prosecution, and to obtain the attendance and carry out the examination of witnesses and to testify before the court on his own behalf, on the same conditions as those applying to witnesses called by the prosecution.

(5) Except with his own consent, the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable, and the court orders him to be removed and the trial to proceed in his absence, but provision may be made by law for a charge that a person has committed an offence the maximum penalty for which does not include imprisonment, (except in default of payment of a fine), to be heard summarily in his absence if it is established that he has been duly served with a summons in respect of the alleged offence.

(6) Nothing in Subsection (4)(f) invalidates a law which imposes reasonable conditions that must be satisfied if witness called to testify on behalf of a person charged with an offence are to be paid their expenses out of public funds.

(7) No person shall be convicted of an offence on account of any act that did not, at the time when it took place, constitute an offence, and no penalty shall be imposed for an offence that is more severe in degree or description than the maximum penalty that might have been imposed for the offence at the time when it was committed

(8) No person who shows that he has been tried by a competent court for an offence and has been convicted or acquitted shall again be tried for that offence or for any other offence of which he could have been convicted at the trial for that offence, except upon the order of a superior court made in the course of appeal or review proceedings relating to the conviction or acquittal.

(9) No person shall be tried for an offence for which he has been pardoned.

(10) No person shall be compelled in the trial of an offence to be witness against himself.

(11) A determination of the existence or extent of a civil right or obligation shall not be made except by an independent and impartial court or other authority prescribed by law or agreed upon by the parties, and proceedings for such a determination shall be fairly heard within a reasonable time.

(12) Except with the agreement of the parties, or by order of the court in the interests of national security, proceedings in any jurisdiction of a court and proceedings for the determination of the existence or extent of any civil right or obligation before any other authority, including the announcement of the decision of the court or other authority, shall be held in public.

(13) Nothing in Subsection (12) prevents a court or other authority from excluding from the hearing of the proceedings before it persons, other than the parties and their legal representatives, to such an extent as the court or other authority -

(a) is by law empowered to do and considers necessary or expedient in the interests of public welfare or in circumstances where publicity would prejudice the interests of justice, the welfare of persons under voting age or the protection of the private lives of persons concerned in the proceedings; or

(b) is by law empowered or required to do in the interests of defence, public safety or public order.

(14) In the event that the trial of a person is not commenced within four months of the date on which he was committed for trial, a detailed report concerning the case shall be made by the Chief Justice to the Minister responsible for the National Legal Administration.

(15) Every person convicted of an offence is entitled to have his conviction and sentence reviewed by a higher court or tribunal according to law.

(16) No person shall be deprived by law of a right of appeal against his conviction or sentence by any court that existed at the time of the conviction or sentence, as the case may be.

(17) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

(18) Accused persons shall be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.

(19) Persons under voting age who are in custody in connexion with an offence or alleged offence shall be separated from other persons in custody and be accorded treatment appropriate to their age.

(20) An offender shall not be transferred to an area away from that in which his relatives reside except for reasons of security or other good cause and, if such a transfer is made, the reason for so doing shall be endorsed on the file of the offender.

(21) Nothing in this section -

(a) derogates Division III.4 *(principles of natural justice)* or

(b) affects the powers and procedures of village courts.

(22) Notwithstanding Subsection 21(b) powers and procedures of village courts shall be exercised in accordance with the principles of natural justice.

Subdivision C. - Qualified Rights.

General.

38. - GENERAL QUALIFICATIONS ON QUALIFIED RIGHTS.

(1) For the purposes of this Subdivision, a law that complies with the requirements of this section is a law that is made and certified in accordance with Subsection (2), and that -

(a) regulates or restricts the exercise of a right or freedom referred to in this Subdivision to the extent that the regulation or restriction is necessary -

(i) taking account of the National Goals and Directive Principles and the Basic Social Obligations, for the purpose of giving effect to the public interest in -

(A) defence; or

(B) public safety; or

(C) public order; or

(D) public welfare; or

(E) public health (including animal and plant health);or

(F) the protection of children and persons under his disability (whether legal or practical); or

(G) the development of under-privileged or less advanced groups or areas; or

(ii) in order to protect the exercise of the rights and freedoms of others; or

(b) makes reasonable provision for cases where the exercise of one such right may conflict with the exercise of another,

to the extent that the law is reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind.

(2) For the purposes of Subsection (1), a law must -

(a) be expressed to be a law that is made for that purpose; and

(b) specify the right or freedom that it regulates or restricts; and

(c) be made, and certified by the Speaker in his certificate under Section 110 (*certification as to making of laws)* to have been made, by an absolute majority.

(3) The burden of showing that a law is a law that complies with the requirements of Subsection (1) is on the party relying on its validity.

39. - "REASONABLY JUSTIFIABLE IN A DEMOCRATIC SOCIETY", ETC.

(1) The question, whether a law or act is reasonably justifiable in a democratic society having a proper regard for the rights and dignity of mankind, is to be determined in the light of the circumstances obtaining at the time when the decision on the question is made.

(2) A law shall not be declared not to be reasonably justifiable in a society having a proper regard for the rights and dignity of mankind except by the Supreme Court or the National Court, or any other court prescribed for the purpose by or under an Act of the Parliament, and unless the court is satisfied that the law was never so justifiable such a declaration operates as a repeal of the law as at the date of the declaration.

(3) For the purposes of determining whether or not any law, matter or thing is reasonably justified in a democratic society that has a proper regard for the rights and dignity of mankind, a court may have regard to -

(a) the provisions of this Constitution generally and especially the National Goals and Directive Principles and the Basic Social Obligations; and

(b) the Charter of the United Nations: and

(c) the Universal Declaration of Human Rights and any other declaration, recommendation or decision of the General Assembly of the United Nations concerning human rights and fundamental freedoms; and

(d) the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto, and any other international conventions, agreements or declaration. concerning human rights and fundamental freedoms; and

(e) judgements, reports and opinions of the International Court of Justice, the European Commission of Human Rights, the European Court of Human Rights and other international courts and tribunals dealing with human rights and fundamental freedoms; and

(f) previous laws, practices and Judicial decisions and opinions in the country; and

(g) laws, practices and judicial decisions and opinions in other countries; and

(h) the Final Report of the Pre-Independence Constitutional Planning Committee dated 13 August 1974 and presented to the pre-Independence House of Assembly on 16 August 1974, as affected by decisions of that House on the report and by decisions of the Constituent Assembly on the draft of this Constitution; and

(i) declarations by the International Commission of Jurists and other similar organizations;

(j) any other material that the court considers relevant.

40. - VALIDITY OF EMERGENCY LAWS.

Nothing in this Part invalidates an emergency law as defined in Part *X.(emergency powers)*. but nevertheless so far as is consistent with their purposes and terms all such laws shall be interpreted and applied so as not to affect or derogate a right or freedom referred to in this Division to an extent that is more than is reasonably necessary to deal with the emergency concerned and matters arising out of it, but only so far as is reasonably justifiable in a democratic society having a proper regard for the rights and dignity of mankind.

41. - PROSCRIBED ACTS.

(1) Notwithstanding anything to the contrary in any other provision of any law, any act that is done under a valid law but in the particular case -

(a) is harsh or oppressive; or

(b) is not warranted by, or is disproportionate to, the requirements of the particular circumstances or of the particular case; or

(c) is otherwise not, in the particular circumstances, reasonably justifiable in a democratic society having a proper regard for the rights and dignity of mankind,

is an unlawful act.

(2) The burden of showing that Subsection (1)(a), (b) or (c) applies in respect of an act is on the party alleging it, and may be discharged on the balance of probabilities.

(3) Nothing in this section affects the operation of any other law under which an act may be held to be lawful or invalid.

*Rights **of** All Persons.*

42. - LIBERTY OF THE PERSON.

(1) No person shall be deprived of his personal liberty except -

(a) in consequence of his unfitness to plead to a criminal charge; or

(b) in the execution of the sentence or order of a court in respect of an offence of which he has been found guilty, or in the execution of the order of a court of record punishing him for contempt of itself or another court or tribunal; or

(c) by reason of his failure to comply with the order of a court made to secure the fulfilment of an obligation (other than a contractual obligation) imposed upon him by law; or

(d) upon reasonable suspicion of his having committed, or being about to commit, an offence; or

(e) for the purpose of bringing him before a court in execution of the order of a court; or

(f) for the purpose of preventing the introduction or spread of a disease or suspected disease, whether of humans, animals or plants, or for normal purposes of quarantine; or

(g) for the purpose of preventing the unlawful entry of a person into Papua New Guinea, or for the purpose of effecting the expulsion, extradition or other lawful removal of a person from Papua New Guinea, or the taking of proceedings for any of those purposes; or

(h) in the, case of a person who is, or is reasonably suspected of being of unsound mind -

(i) or addicted to drugs or alcohol, for the purpose of his care or treatment or the protection of the community, under an order of a court;

or

(ii) for the purpose of taking prompt legal proceedings to obtain an order of a court of a type referred to in Subparagraph (i).

(2) A person who is arrested or detained -

(a) shall be informed promptly, in a language that he understands, of the reasons for his arrest or detention and of any charge against him; and

(b) shall be permitted whenever practicable to communicate without delay and in private with a member of his family or a personal friend, and with a lawyer of his choice (including the Public Solicitor if he is entitled to legal aid); and

(c) shall be given adequate opportunity to give instructions to a lawyer of his choice in the place in which he is detained,

and shall be informed immediately on his arrest of his rights under this subsection.

(3) A person who is arrested or detained -

(a) for the purpose of being brought before a court in the execution of an order of a court; or

(b) upon reasonable suspicion of his having committed, or being about to commit, an offence,

shall, unless he is released, be brought without delay before a court or a judicial officer and, in a case referred to in paragraph (b) shall not be further held in custody in connexion with the offence except by order of a court or judicial officer.

(4) The necessity or desirability of interrogating the person concerned or other persons, or any administrative requirement or convenience, is not a good ground for failing to comply with Subsection (3), but exigencies of travel which in the circumstances are reasonable may, without derogating any other protection available to the person concerned, be such a ground.

(5) Where a complaint is made to the National Court or a Judge that a person is unlawfully or unreasonably detained -

(a) the National Court or Judge shall inquire into the complaint and order the person concerned to be brought before it or him; and

(b) unless the court or Judge is satisfied that the detention is lawful, and in the case of a person being detained on remand pending his trial does not constitute an unreasonable detention having regard, in particular, to its length, the Court or a Judge shall order his release either unconditionally or subject to such conditions as the Court or Judge thinks fit.

(6) A person arrested or detained for an offence (other than treason or wilful murder as defined by an Act of the Parliament) is entitled to bail at all times from arrest or detention to acquittal or conviction unless the interests of justice otherwise require.

(7) Where a person to whom Subsection (6) applies is refused bail -

(a) the court or person refusing bail shall, on request by the person concerned or his representative, state in writing the reason for the refusal; and

(b) the person or his representative may apply to the Supreme Court or the National Court in a summary manner for his release.

(8) Subject to any other law, nothing in this section applies in respect of any reasonable act of the parent or guardian of a child, or a person into whose care a child has been committed, in the course of the education, discipline or upbringing of the child.

(9) Subject to any Constitutional Law or Act of the Parliament, nothing in this section applies in respect of a person who is in custody under the law of another country -

(a) while in transit through the country; or

(b) permitted by or under an Act of the Parliament made for the purposes of Section 206 (*visiting forces*).

43. - FREEDOM FROM FORCED LABOUR.

(1) No person shall be required to perform forced labour.

(2) In Subsection (1), "forced labour" does not include -

(a) labour required by the sentence or order of a court; or

(b) labour required of a person while in lawful custody, being labour that, although not required by the sentence or order of a court, is necessary for the hygiene of, or for the maintenance of, the place in which he is in custody; or

(c) in the case of a person in custody for the purpose of his care, treatment, rehabilitation or welfare, labour reasonably required for that purpose; or

(d) labour required of a member of a disciplined force in pursuance of his duties as such a member; or

(e) subject to the approval of any local government body for the area in which he is required to work, labour reasonably required as part of reasonable and normal communal or other civic duties; or

(f) labour of a reasonable amount and kind (including, in the case of compulsory military service, labour required as an alternative to such service in the case of a person who has conscientious objections to military service) that is required in the national interest by an Organic Law that complies with Section 38 *(general qualifications on qualified rights).*

44. - FREEDOM FROM ARBITRARY SEARCH AND ENTRY.

No person shall be subjected to the search of his person or property or to entry of his premises, except to the extent that the exercise of that right is regulated or restricted by a law -

(a) that makes reasonable provision for a search or entry -

(i) under an order made by a court; or

(ii) under a warrant for a search issued by a court or judicial officer on reasonable grounds, supported by oath or affirmation, Particularly describing the purpose of the search; or

(iii) that authorizes a public officer or government agent of Papua New Guinea or an officer of a body corporate established by law for a public purpose to enter, where necessary on the premises of a person in order to inspect those premises or anything in or on them in relation to any rate or tax or in order to carry out work connected with any property that is lawfully in or on those premises and belongs to the Government or any such body corporate; or

(iv) that authorizes the inspection of goods, premises, vehicles, ships or aircraft to ensure compliance with lawful requirements as to the entry of persons or importation of goods into Papua New Guinea or departure of persons or exportation of goods from Papua New Guinea or as to standards of safe construction, public safety, public health, permitted use or similar matters, or to secure compliance with the terms of a licence to engage in manufacture or trade; or

(v) for the purpose of inspecting or taking copies of documents relating to -

(A) the conduct of a business, trade, profession or industry in accordance with a law regulating the conduct of that business, trade, profession or industry; or

(B) the affairs of a company in accordance with a law relating to companies; or

(vi) for the purpose of inspecting goods or inspecting or taking copies of documents, in connexion with the collection, or the enforcement of payment of taxes or under a law prohibiting or restricting the importation of goods into Papua New Guinea or the exportation of goods from Papua New Guinea; or

(b) that complies with Section 38 (*general qualifications on qualified rights)*

45. - FREEDOM OF CONSCIENCE, THOUGHT AND RELIGION.

(1) Every person has the right to freedom of conscience, thought and religion and the practice of his religion and beliefs, including freedom to manifest and propagate his religion and beliefs in such a way as not to interfere with the freedom of others, except to the extent that the exercise of that right is regulated or restricted by a law that complies with Section 38 *(general qualifications on qualified rights).*

(2) No person shall be compelled to receive religious instruction or to take part in a religious ceremony or observance, but this does not apply to the giving of religious instruction to a child with the consent of his parent or guardian or to the inclusion in a course of study of secular instruction concerning any religion or belief.

(3) No person is entitled, to intervene unsolicited into the religious affairs of a person of different belief, or to attempt to force his or any religion (or irreligion) on another, by harassment or otherwise.

(4) No person may be compelled to take an oath that is contrary to his religion or belief, or to take an oath in a manner or form that is contrary to his religion or belief.

(5) A reference in this section to religion includes reference to the traditional religious beliefs and customs of the peoples of Papua New Guinea.

46. - FREEDOM OF EXPRESSION.

(1) Every person has the right to freedom of expression and publication, except to the extent that the exercise of that right is regulated or restricted by law -

(a) that imposes reasonable restrictions on public office-holders; or

(b) that imposes restrictions on non-citizens; or

(c) that complies with Section 38 *(general qualifications on qualified rights).*

(2) In Subsection (1), "freedom of expression and publication" includes -

(a) freedom to hold opinions, to receive ideas and information and to communicate ideas and information, whether to the public generally or to a person or class of persons;

(b) freedom of the press and other mass communications media.

(3) Notwithstanding anything in this section, an Act of the Parliament may make reasonable provision for securing reasonable access to mass communications media for interested persons and associations -

(a) for the communication of ideas and information; and

(b) to allow rebuttal of false or misleading statements concerning their acts, ideas or beliefs, and generally for enabling and encouraging freedom of expression.

47. - FREEDOM OF ASSEMBLY AND ASSOCIATION.

(1) Every person has the right peacefully to assemble and associate and to form or belong to, or not to belong to, political parties, industrial organizations or other associations, except to the extent that the exercise of that right is regulated or restricted by a law -

(a) that takes reasonable provision in respect of the registration of all or any associations; or

(b) that imposes reasonable restrictions on public office-holders; or

(c) that imposes restrictions on non-citizens; or

(d) that complies with Section 38 (*general qualifications on qualified rights)*.

48. - FREEDOM OF EMPLOYMENT

(1) Every person has the right to freedom of choice of employment in any calling for which he has the qualifications (if any) lawfully required, except to the extent that that freedom is related or restricted voluntarily or by a law that complies with Section 38 (*general qualifications on qualified rights*) or a law that imposes restrictions on non-citizens.

(2) Subsection (1) does not prohibit reasonable action or provision for the encouragement of persons to join industrial organizations or for requiring membership of an industrial organization for any purpose.

49. - RIGHT TO PRIVACY.

Every person has the right to reasonable privacy in respect of his private and family life, his communications with other persons and his personal papers and effects, except to the extent that the exercise of that right is regulated or restricted by a law that complies with Section 38 (*general qualifications on qualified rights)*.

Special Rights of Citizens.

50. - RIGHT TO VOTE AND STAND FOR PUBLIC OFFICE.

(1) Subject to the express limitations imposed by this Constitution, every citizen who is of full capacity and has reached voting age, other than a person who -

(a) is under sentence of death or imprisonment for a period of more than nine months; or

(b) has been convicted, within the period of three years next preceding the first day of the polling period for the election concerned, of an offence relating to elections that is prescribed by an Organic Law or an Act of the Parliament for the purposes of this paragraph,

has the right, and shall be given a reasonable opportunity -

(c) to take part in the conduct of public affairs, either directly or through freely chosen representatives; and

(d) to vote for, and to be elected to, elective public office at genuine, periodic, free elections; and

(e) to hold public office and to exercise public functions.

(2) The exercise of those rights may be regulated by a law that is reasonably justifiable for the purpose in a democratic society that has a proper regard for the rights and dignity of mankind.

51. - RIGHT TO FREEDOM OF INFORMATION.

(1) Every citizen has the right of reasonable access to official documents, subject only to the need for such secrecy as is reasonably, justifiable in a democratic society in respect of -

(a) matters relating to national security, defence or international relations of Papua New Guinea (including Papua New Guinea's relations with the Government of any other country or with any international organization); or

(b) records of meetings and decisions of the National Executive Council and of such executive bodies and elected governmental authorities as are prescribed by Organic Law or Act of the Parliament; or

(c) trade secrets, and privileged or confidential commercial or financial information obtained from a person or body; or

(d) parliamentary papers the subject of parliamentary privilege; or

(e) reports, official registers and memoranda prepared by governmental authorities or authorities established by government, prior to completion; or

(f) papers relating to lawful official activities for investigation and prosecution of crime; or

(g) the prevention, investigation and prosecution of crime; or

(h) the maintenance of personal privacy and security of the person; or

(i) matters contained in or related to reports prepared by, on behalf of or for the use of a governmental authority responsible for the regulation or supervision of financial institutions; or

(j) geological or geophysical information and data concerning wells and ore bodies.

(2) A law that complies with Section 38 (*general qualifications on qualified rights)* may regulate or restrict the right guaranteed by this section.

(3) Provision shall be made by law to establish procedures by which citizens may obtain ready access to official information.

(4) This section does not authorize -

(a) withholding information or limiting the availability of records to the public except in accordance with its provisions; or

(b) withholding information from the Parliament.

52. - RIGHT TO FREEDOM OF MOVEMENT.

(1) Subject to Subsection (3), no citizen may be deprived of the right to move freely throughout the country, to reside in any part of the country and to enter and leave the country, except in consequence of a law that provides for deprivation of personal liberty in accordance with Section 42 (*liberty of the person*).

(2) No citizen shall be expelled or deported from the country except by virtue of an order of a court made under a law in respect of the extradition of offenders, or alleged offenders, against the law of some other place.

(3) A law that complies with Section 38 (*general qualifications on qualified rights*) may regulate or restrict the exercise of the right referred to in Subsection (1), and in particular may regulate or restrict the freedom of movement of persons convicted of offences and of members of a disciplined force.

53. - PROTECTION FROM UNJUST DEPRIVATION OF PROPERTY.

(1) Subject to Subsection 54 *(special provision in relation to certain lands*) and except as permitted by this section, possession may not be compulsorily taken of any property, and no interest in or right over property may be compulsorily acquired, except in accordance with Organic Law or an Act of the Parliament, and unless -

(a) the property is required for -

(i) a public purpose; or

(ii) a reason that is reasonably justified in a democratic society that has a proper regard for the rights and dignity of mankind,

that is so declared and so described, for the purposes of this section, in an Organic Law or an Act of the Parliament; and

(b) the necessity for the taking of possession or acquisition for the attainment of that purpose or for that reason is such as to afford reasonable justification for the causing of any resultant hardship to any person affected.

(2) Subject to this section, just compensation must be made on just terms by the expropriating authority, giving full weight to the National Goals and Directive Principles and having due regard to the national interest and to the expression of that interest by the Parliament, as well as to the person affected.

(3) For the purposes of Subsection (2), compensation shall not be deemed not to be just and on just terms solely by reason of a fair provision fer deferred payment, payment by instalments or compensation otherwise than in cash.

(4) In this section, a reference to the taking of possession of property, or the acquisition of an interest in or right over property includes reference to -

(a) the forfeiture; or

(b) the extinction or determination (otherwise than by way of a reasonable provision for the limitation of actions or reasonable law in the nature of prescription or adverse possession),

of any right or interest in property.

(5) Nothing in the preceding provisions of this section prevents -

(a) the taking of possession of property, or the acquisition of an interest in or right over property, that is authorized by any other provision of this Constitution; or

(b) any taking of possession or acquisition -

(i) in consequence of an offence or attempted offence against, or breach or attempted breach of, or other failure to comply with a law or

(ii) in satisfaction of a debt or civil obligation or

(iii) subject to Subsection (6), where the property is or may be required as evidence in proceedings or possible proceedings before court or tribunal,

in accordance with a law that is reasonably justifiable in a democratic society that has a proper regard for the rights and dignity of mankind; or

(c) any taking of possession or acquisition that was an incident of the grant or acceptance of, or of any interest in or right over, that property or any other property by the holder or any of his predecessors in title; or

(d) any taking of possession or acquisition that is in accordance with custom; or

(e) any taking of possession or acquisition of ownerless or abandoned property (other than customary land); or

(f) any restriction on the use of or on dealing with property or any interest in or right over any property that is reasonably necessary for the preservation of the environment or of the national cultural inheritance.

(6) Subsection (5)(b)(iii) does not authorize the retention of any property after the end of the period for which its retention is reasonably required for the purpose referred to in that paragraph.

(7) Nothing in the preceding provisions of this section applies to or in relation to the property of any person who is not a citizen and the power to compulsorily take possession of, or to acquire an interest in, or right over, the property of any such person shall be as provided for by an Act of the Parliament.

54. - SPECIAL PROVISION IN RELATION TO CERTAIN LANDS.

Nothing in Section 37 *(protection of the law) or* 53 *(protection from unjust deprivation of property)* invalidates a law that is reasonably justifiable in a democratic society that has a proper regard for human rights and that provides -

(a) for the recognition of the claimed title of Papua New Guinea to land where -

(i) there is a genuine dispute as to whether the land was acquired validly or at all from the customary owners before Independence Day; and

(ii) if the land were acquired compulsorily the acquisition would comply with Section 53(1) (*protection from unjust deprivation of property);* or

(b) for the settlement by extra-judicial means of disputes as to the ownership of customary land that appear not to be capable of being reasonably settled in practice by judicial means; or

(c) for the prohibition or regulation of the holding of certain interests in, or in relation to, some or all land by non-citizens.

55. - EQUALITY OF CITIZENS.

(1) Subject to this Constitution, all citizens have the same rights, privileges, obligations and duties irrespective of race, tribe, place of origin, political opinion, colour, creed, religion or sex.

(2) Subsection (1) does not prevent the making of laws for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged or less advanced groups or residents of less advanced areas.

(3) Subsection (1) does not affect the operation of a pre-Independence law.

56. - OTHER RIGHTS AND PRIVILEGES OF CITIZENS.

(1) Only citizens may -

(a) vote in elections for, or hold, elective public offices; or

(b) acquire freehold land.

(2) An Act of the Parliament may -

(a) define the offices that are to be regarded as elective public offices; and

(b) define the forms of ownership that are to be regarded as freehold; and

(c) define the corporations that are to be regarded as citizens,

for the purposes of Subsection (1).

(3) An Act of the Parliament may make further provision for rights and privileges to be reserved for citizens.

Subdivision D. - Enforcement.

57. - ENFORCEMENT OF GUARANTEED RIGHTS AND FREEDOMS.

(1) A right or freedom referred to in this Division shall be protected by, and is enforceable in, the Supreme Court or the National Court or any other court prescribed for the purpose by an Act of the Parliament, either on its own initiative or on application by any person who has an interest in its protection and enforcement, or in the case of a person who is, in the opinion of the court, unable fully and freely to exercise his rights under this section by a person acting on his behalf, whether or not by his authority.

(2) For the purposes of this section -

(a) the Law Officers of Papua New Guinea; and

(b) any other persons prescribed for the purpose by an Act of the Parliament; and

(c) any other persons with an interest (whether personal or not) in the maintenance of the principles commonly known as the Rule of Law such that, in the opinion of the court concerned, they ought to be allowed to appear and be heard on the matter in question,

have an interest in the protection and enforcement of the rights and freedoms referred to in this Division, but this subsection does not limit the persons or classes of persons who have such an interest.

(3) A court that has jurisdiction under Subsection (1) may make all such orders and declarations as are necessary or appropriate for the purposes of this section, and may make an order or declaration in relation to a statute at any time after it is made (whether or not it is in force).

(4) Any court, tribunal or authority may, on its own initiative or at the request of a person referred to in, Subsection (1), adjourn, or otherwise delay a decision, in any proceedings before it in order to allow a question concerning the effect or application of this Division to be determined in accordance with Subsection (1).

(5) Relief under this section is not limited to cases of actual or imminent infringement of the guaranteed rights and freedoms, but may, if the court thinks it proper to do so, be given in cases in which there is a reasonable probability of infringement, or in which an action that a person reasonably desires to take is inhibited by the likelihood of, or a reasonable fear of, an infringement.

(6) The jurisdiction and powers of the courts under this section are in addition to, and not in derogation of, their jurisdiction and powers under any other provision of this Constitution.

58. - COMPENSATION.

(1) This section is in addition to, and not in derogation of, Section 57 (*enforcement of guaranteed rights and freedoms).*

(2) A person whose rights or freedoms declared or protected by, this Division are infringed including any infringement caused by a derogation of the restrictions specified in Part X.5 (*internment*) on the use of emergency powers in relation to internment is entitled to reasonable damages and, if the court thinks it proper, exemplary damages in respect of the infringement responsible for, the infringement.

(3) Subject to Subsections (4) and (5), damages may be awarded against any person who committed, or was responsible for, the infringement.

(4) Where the infringement was committed by a governmental body, damages may be awarded either -

(a) subject to Subsection (5), against a person referred to in Subsection (3); or

(b) against the governmental body to which any such person was responsible,

or against both, in which last case the court may apportion the damages between them.

(5) Damages shall not be awarded against a person who was responsible to a governmental body in respect of the action giving rise to the infringement if -

(a) the action was an action made unlawful only by Section 41(1) *(Proscribed acts);* and

(b) the action taken was genuinely believed by that person to be required by law,

but the burden of proof of the belief referred to in paragraph (b) is on the party alleging it.

Division 4. - Principles of Natural Justice.

59. - PRINCIPLES OF NATURAL JUSTICE.

(1) Subject to this Constitution and to any statute, the principles of natural justice are the rules of the underlying law known by that name developed for control of judicial and administrative proceedings.

(2) The minimum requirement of natural justice is the duty to act fairly and, in principle, to be seen to act fairly.

60. - DEVELOPMENT OF PRINCIPLES.

In the development of the rules of the underlying law in accordance with Sch. 2 *(Adoption, etc., of certain laws)* particular attention shall be given to the development of a system of principles of natural justice and of administrative law specifically designed for Papua New Guinea, taking special account of the National Goals and Directive Principles and of the Basic Social Obligations, and also of typically Papua New Guinean procedures and forms of organization.

61 - BASIC RIGHTS AND FREEDOMS.

For the avoidance of doubt, it is hereby declared that nothing in the preceding provisions of this Division derogates any of the rights and freedoms provided for by Division 3 *(basic rights)*.

62. - DECISIONS IN "DELIBERATE JUDGEMENT".

(1) Where a law provides or allows for an act to be done in the "deliberate judgement" of a person, body or authority, the principles of natural justice apply only to the extent that the exercise of judgement must not be biased, arbitrary or capricious.

(2) Except -

(a) to the extent provided for by Subsection (1);and

(b) in accordance with Section 155(5) *(the National Judicial System);*and

(c) provided by a Constitutional Law or an Act of the Parliament,

an act to which Subsection (1) applies is, to the extent to which it is done in the deliberate judgement of the person concerned non-justiciable.

Division 5. - Basic Social Obligations.

63. - ENFORCEMENT OF THE BASIC SOCIAL OBLIGATIONS.

(1) Except to the extent provided in Subsections (3) and (4), the Basic Social Obligations are non-justiciable.

(2) Nevertheless, it is the duty of all governmental bodies to encourage compliance with them as far as lies within their respective powers.

(3) Where any law, or any power conferred or duty **i**mposed by any law (whether the power or duty be of legislative, judicial, executive, administrative or other kind), can reasonably be understood, applied, exercised, complied with or enforced, without failing to give effect to the intention

of the Parliament or to this Constitution, in such a way as to enforce or encourage compliance with the Basic Social Obligations, or at least not to derogate them, it is to be understood, applied, exercised, complied with or enforced in that way.

(4) Subsection (1) does not apply in the exercise of the jurisdiction of the Ombudsman Commission or other body prescribed for the purposes of Division III.2 (*leadership code),* which shall take the Basic Social Obligations fully into account in all cases as appropriate.

U. APPENDIX 7

V. Universal Declaration of Human Rights of 1948

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UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948.

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge.

Now, Therefore,

The General Assembly

proclaims

This universal declaration of human rights as a common standard of achievement for all peoples and all nations, to the end that every individual and organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and security of person.

Article 4

No one shall be held in slavery or servitude: slavery and the slave trade shall be prohibited in all their forms.

Article 5

No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the offence was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13

1. Everyone has the right to freedom of movement and residence within the borders of each state.

2. Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15

1. Everyone has the right to a nationality.

2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and its dissolution.

2. Marriage shall be entered into only with the free and full consent of intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17

1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property.

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

1. Everyone has the right to freedom of peaceful assembly and association.

2. No one may be compelled to belong to an association.

Article 2l

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

2. Everyone has the right of equal access to public service in his country.

3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22

Everyone, as a member of society, has the right to social security and entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

2. Everyone without any discrimination, has the right to equal pay for equal work.

3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

4. Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

1. Everyone has the right to education. Education shall be free at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

3. Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

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W. APPENDIX 8

X. European Convention on Human Rights and its Protocols

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THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS PROTOCOLS

The Governments signatory hereto, being Members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948.

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its Members and that one of the methods by which the aim is to be pursued is the maintenance and further realization of Human Rights and Fundamental Freedoms;

Reaffirming their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by understanding and observance of the Human Rights upon which they depend;

Being resolved, as the Governments or European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration;

Have agreed as follows:

Article 1

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.

Section I

Article 2

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3

No one shall subjected to torture or to inhuman or degrading treatment or punishment.

Article 4

1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this Article the term 'forced or compulsory labour' shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

(b) any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service;

(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

(d) any work or service which forms part of normal civic obligations.

Article 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law;

(a) the lawful detention of a person after conviction by a court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language in which he understands, of the reasons for his arrest and any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 12

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 13

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 15

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Article 16

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Article 17

Nothing in this Convention may be interpreted as implying for any State group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Article 18

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

Section II

Article 19

To ensure the observance of the engagements undertaken by the Contracting Parties in the present Convention, there shall be set up:

1. A European Commission of Human Rights hereinafter referred to as 'the Commission';

2. A European Court of Human Rights, hereinafter referred to as 'the Court'.

Section III

Article 20

The Commission shall consist of a number of members equal to that of the High Contracting Parties. No two members of the Commission may be nationals of the same State.

Article 21

1. The members of the Commission shall be elected by the Committee of Ministers by an absolute majority of votes, from a list of names drawn up by the Bureau of the Consultative Assembly; each group of the Representatives of the High Contracting Parties in the Consultative Assembly shall put forward three candidates, of whom two at least shall be its nationals.

2. As far as applicable, the same procedure shall be followed to complete the Commission in the event of other States subsequently becoming Parties to this Convention, and in filling casual vacancies.

Article 22

1. The members of the Commission shall be elected for a period of six years. They may be re-elected. However, of the members elected at the first election, the terms of seven members shall expire at the end of three years.

2. The members whose terms are to expire at the end of the initial period of three years shall be chosen by lot by the Secretary-General of the Council of Europe immediately after the first election has been completed.

3. A member of the Commission elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

4. The members of the Commission shall hold office until replaced. After having been replaced, they shall continue to deal with such cases as they already have under consideration.

Article 23

The members of the Commission shall sit on the Commission in their individual capacity.

Article 24

Any High Contracting Party may refer to the Commission, through the Secretary-General of the Council of Europe, any alleged breach of the provisions of the Convention by another High Contracting Party.

Article 25

1. The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognizes the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.

2. Such declarations may be made for a specific period.

3. The declarations shall be deposited with the Secretary-General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties and publish them.

4. The Commission shall only exercise the powers provided for in this Article when at least six High Contracting Parties are bound by declarations made in accordance with the preceding paragraphs.

Article 26

The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken.

Article 27

1. The Commission shall not deal with any petition submitted under Article 25 which

   (a) is anonymous, or

   (b) is substantially the same as a matter which has already been examined by the Commission or has already been submitted to another procedure or international investigation or settlement and if it contains no relevant new information.

2. The Commission shall consider inadmissible any petition submitted under Article 25 which it considers incompatible with the provisions of the present Convention, manifestly ill-founded, or an abuse of the petition.

3. The Commission shall reject any petition referred to it which it considers inadmissible under Article 26.

Article 28

In the event of the Commission accepting a petition referred to it:

   (a) it shall, with a view to ascertaining the facts undertake together with the representatives of the parties an examination of the petition and, if need be, an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities, after an exchange of views with the Commission:

   (b) it shall place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for Human Rights as defined in this Convention.

Article 29

1. The Commission shall perform the functions set out in Article 28 by means of a Sub-Commission consisting of seven members of the Commission.

2. Each of the parties concerned may appoint as members of this Sub-Commission a person of its choice.

3. The remaining members shall be chosen by lot in accordance with arrangements prescribed in the Rules of Procedure of the Commission.

Article 30

If the Sub-Commission succeeds in effecting a friendly settlement in accordance with Article 28, it shall draw up a Report which shall be sent to the States concerned, to the Committee of Ministers and to the Secretary-General of the Council of Europe for publication. This Report shall be confined to a brief statement of the facts and of the solution reached.

Article 31

1. If a solution is not reached, the Commission shall draw up a Report on the facts and state its opinion as to whether the facts found disclose a breach the State concerned of its obligations under the Convention. The opinions of all the members of the Commission on this point may be stated in the Report.

2. The Report shall be transmitted to the Committee of Ministers. It shall also be transmitted to the States concerned, who shall not be at liberty to publish it.

3. In transmitting the Report to the Committee of Ministers the Commission may make such proposals as it thinks fit.

Article 32

1. If the question is not referred to the Court in accordance with Article 48 of this Convention within a period of three months from the date of the transmission of the Report to the Committee of Ministers, the Committee of Ministers shall decide by a majority of two-thirds of the members entitled to sit on the Committee whether there has been a violation of the Convention.

2. In the affirmative case the Committee of Ministers shall prescribe a period during which the Contracting Party concerned must take the measures required by the decision of the Committee of Ministers.

3. If the High Contracting Party concerned has not taken satisfactory measures within the prescribed period, the Committee of Ministers shall decide by the majority provided for in paragraph 1 above what effect shall be given to its original decision and shall publish the Report.

4. The Contracting Parties undertake to regard as binding on them any decision which the Committee of Ministers may take in application of the preceding paragraphs.

Article 33

The Commission shall meet *in camera*.

Article 34

The Commission shall take its decision by a majority of the Members present and voting; the Sub-Commission shall take its decisions by a majority of its members.

Article 35

The Commission shall meet as the circumstances require. The meetings shall be convened by the Secretary-General of the Council of Europe.

Article 36

The Commission shall draw up its own rules of procedure.

Article 37

The secretariat of the Commission shall be provided by the Secretary-General of the Council of Europe.

Section IV

Article 38

The European Court of Human Rights shall consist of a number of judges equal to that of the Members of the Council of Europe. No two judges may be nationals of the same State.

Article 39

1. The members of the Court shall be elected by the Consultative Assembly by a majority of the votes cast from a list of persons nominated by the Members of the Council of Europe; each Member shall nominate three candidates, of whom two at least shall be its nationals.

2. As far as applicable, the same procedure shall be followed to complete the Court in the event of the admission of new members of the Council of Europe, and in filling casual vacancies.

3. The candidates shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence.

Article 40

1. The members of the Court shall be elected for a period of nine years. They may be re-elected. However, of the members elected at the first election the terms of four members shall expire at the end of three years and the terms of four more members shall expire at the end of six years.

2. The members whose terms are to expire at the end of the initial periods of three and six years shall be chosen by lot by the Secretary-General immediately after the first election has been completed.

3. A member of the Court elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

4. The members of the Court shall hold office until replaced. After having been replaced, they shall continue to deal with such cases as they already have under consideration.

Article 41

The Court shall elect its President and Vice-President for a period of three years. They may be re-elected.

Article 42

The members of the Court shall receive for each day of duty a compensation to be determined by the Committee of Ministers.

Article 43

For the consideration of each case brought before it the Court shall consist of a Chamber composed of seven judges. There shall sit as an *ex officio* member of the Chamber the judge who is a national of any State party, or, if there is none, a person of its choice who shall sit in the capacity of judge; the names of the other judges shall be chosen by lot by the President before the opening of the case.

Article 44

Only the High Contracting Parties and the Commission shall have the right to bring a case before the Court.

Article 45

The jurisdiction of the Court shall extend to all cases concerning the interpretation and application of the present Convention which the High Contracting Parties or the Commission shall refer to it in accordance with Article 48.

Article 46

1. Any of the High Contracting Parties may at any time declare that it recognizes as compulsory *ipso facto* and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention.

2. The declarations referred to above may be made unconditionally or on condition of reciprocity, on the part of several or certain other High Contracting Parties or for a specified period.

3. These declarations shall be deposited with the Secretary-General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties.

Article 47

The Court may only deal with a case after the Commission has acknowledged the failure of efforts for a friendly settlement and within the period of three months provided for in Article 32.

Article 48

The following may bring a case before the Court, provided that the High Contracting Party concerned, if there is only one, or the High Contracting Parties concerned, if there is more than one, are subject to the compulsory jurisdiction of the Court or, failing that, with the consent of the High Contracting Party concerned, if there is only one, or of the High Contracting Parties concerned if there is more than one:

(a) the Commission;

(b) a High Contracting Party whose national is alleged to be a victim;

(c) a High Contracting Party which referred the case to the Commission;

(d) a High Contracting Party against which the complaint has been lodged.

Article 49

In the event of dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Article 50

If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party, is completely or partially in conflict with the obligations arising from the present Convention and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

Article 51

1. Reasons shall be given for the judgment of the Court.

2. If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

Article 52

The judgment of the Court shall be final.

Article 53

The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties.

Article 54

The judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution.

Article 55

The Court shall draw up its own rules and shall determine its own procedure.

Article 56

1. The first election of the members of the Court shall take place after the declarations by the High Contracting Parties mentioned in Article 46 have reached a total of eight.

2. No case can be brought before the Court before this election.

Section V

Article 57

On receipt of a request from the Secretary-General of the Council of Europe any Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of this Convention.

Article 58

The expenses of the Commission and the Court shall be borne by the Council of Europe.

Article 59

The members of the Commission and of the Court shall be entitled, during the discharge of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.

Article 60

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.

Article 61

Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.

Article 62

The High Contracting Parties agree that, except by special agreement they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

Article 63

1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary-General of the Council of Europe that the present Convention shall extend to all or any of the territories for whose international relations it is responsible.

2. The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary-General of the Council of Europe.

3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.

4. Any State which has made a declaration in accordance with paragraph 1 of this article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Commission to receive petitions from individuals, non-governmental organizations or groups of individuals in accordance with Article 25 of the present Convention.

Article 64

1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.

2. Any reservation made under this article shall contain a brief statement of the law concerned.

Article 65

1. A High Contracting Party may denounce the present Convention only after the expiry of five years from the date of which it became a Party to it and after six months' notice contained in a notification addressed to the Secretary-General of the Council of Europe, who shall inform the other High Contracting Parties.

2. Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.

3. Any High Contracting Party which shall cease to be a Member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.

4. The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article 63.

Article 66

1. This Convention shall be open to the signature of the Members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary-General of the Council of Europe.

2. The present Convention shall come into force after the deposit of ten instruments of ratification.

3. As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification.

4. The Secretary-General of the Council of Europe shall notify all the Members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.

Done at Rome this 4th day of November, 1950, in English and French, being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary-General shall transmit certified copies to each of the signatories.

Protocols

1. *Enforcement of certain Rights and Freedoms not included in Section I of the Convention.*

The Governments signatory hereto, being Members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November, 1950 (hereinafter referred to as 'the Convention'),

Have agreed as follows:

Article 1

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 2

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Article 3

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Article 4

Any High Contracting Party may at the time of signature or ratification or at any time thereafter communicate to the Secretary-General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of the present Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.

Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may from time to time communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.

A declaration made in accordance with this article shall be deemed to have been made in accordance with paragraph 1 of Article 63 of the Convention.

Article 5

As between the High Contracting Parties the provisions of Articles 1, 2, 3 and 4 of this Protocol shall be regarded as additional articles to the Convention and all the provisions of the Convention shall apply accordingly.

Article 6

This ProtocoI shall be open for signature by the Members of the Council of Europe, who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of ten instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.

The instruments of ratification shall be deposited with the Secretary-General of the Council of Europe, who will notify all Members of the names of those who have ratified.

Done at Paris on the 20th day of March 1952, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary-General shall transmit certified copies to each of the signatory Governments.

2. Conferring upon the European Court of Human Rights competence to give Advisory Opinions

The member States of the Council of Europe signatory hereto:

Having regard to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as 'the Convention'), and in particular Article 19 instituting, among other bodies, a European Court of Human Rights (hereinafter referred to as 'the Court');

Considering that it is expedient to confer upon the Court competence to give advisory opinions subject to certain conditions;

Have agreed as follows:

Article 1

1. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto.

2. Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and in the Protocols thereto, or with any other question which the Commission, the Court, or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

3. Decisions of the Committee of Ministers to request an advisory opinion shall require a two-thirds majority vote of the representatives entitled to sit on the Committee.

Article 2

The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its consultative competence as defined in Article 1 of this Protocol.

Article 3

1. For the consideration of requests for an advisory opinion, the Court shall sit in plenary session.

2. Reasons shall be given for advisory opinions of the Court.

3. If the advisory opinion does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

4. Advisory opinions of the Court shall be communicated to the Committee of Ministers.

Article 4

The powers of the Court under Article 55 of the Convention shall extend to the drawing up of such rules and the determination of such procedure as the Court may think necessary for the purposes of this Protocol.

Article 5

1. This Protocol shall be open to signature by Member States of the Council of Europe, signatories to the Convention, who may become Parties to it by:

(a) signature without reservation in respect of ratification or acceptance;

(b) signature with reservation in respect of ratification or acceptance followed by ratification or acceptance. Instruments of ratification or acceptance shall be deposited with the Secretary-General of the Council of Europe.

2. This Protocol shall enter into force as soon as all the States Parties Convention shall have become Parties to the Protocol in accordance with the provisions of paragraph 1 of this Article.

3. From the date of the entry into force of this Protocol, Articles 1 to 4 shall be considered an integral part of the Convention.

4. The Secretary-General of the Council of Europe shall notify the Member States of the Council of:

(a) any signature without reservation in respect of ratification of acceptance;

(b) any signature with reservation in respect of ratification or acceptance;

(c) the deposit of any instrument of ratification or acceptance;

(d) the date of entry into force of this Protocol in accordance with paragraph 2 of this Article.

In witness whereof the undersigned, being duly authorized thereto have signed this Protocol.

Done at Strasbourg, this 6th day of May 1963, in English and in French both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary-General shall transmit certified copies to each of the signatory States.

3. Amending Articles 29, 30, and 94 of the Convention

The member States of the Council of Europe, signatories to this Protocol,

Considering that it is advisable to amend certain provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1960 (hereinafter referred to as 'the Convention') concerning the procedure of the European Commission of Human Rights

Have agreed as follows:

Article 1

1. Article 29 of the Convention is deleted.

2. The following provision shall be inserted in the Convention:

'Article 29

After it has accepted a petition submitted under Article 25, the Commission may nevertheless decide unanimously to reject the petition if, in the course of its examination, it finds that the existence of one of the grounds for non-acceptance provided for in Article 27 has been established.

In such a case, the decision shall be communicated to the parties.'

Article 2

In Article 30 of the Convention, the word 'Sub-Commission' shall be replaced by the word 'Commission'.

Article 3

1. At the beginning of Article 34 of the Convention, the following shall be inserted:

'Subject to the provisions of Article 29....'

2. At the end of the same article, the sentence 'the Sub-Commission shall take its decisions by a majority of its members' shall be deleted.

Article 4

1. The Protocol shall be open to signature by the member States of the Council of Europe, who may become Parties to it either by:

(a) signature without reservation in respect of ratification or acceptance,: or

(b) signature with reservation in respect of ratification or acceptance, followed by ratification or acceptance. Instruments of ratification or acceptance shall be deposited with the Secretary-General of the Council of Europe.

2. This Protocol shall enter into force as soon as all States Parties to the Convention shall have become Parties to the Protocol, in accordance with the provisions of paragraph 1 of this Article.

3. The Secretary-General of the Council of Europe shall notify the Member States of the Council of:

(a) any signature without reservation in respect of ratification or acceptance;

(b) any signature with reservation in respect of ratification or acceptance;

(c) the deposit of any instrument of ratification or acceptance;

(d) the date of entry into force of this Protocol in accordance with paragraph 2 of this Article.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 6th day of May 1963, in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary shall transmit certified copies to each of the signatory States.

4. Securing certain Rights and Freedoms other than those included in the Convention and in Protocol No.1

The Governments signatory hereto, being Members of the Council of Europe.

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as 'the Convention') and in Articles 1 to 3 of the First Protocol to the Convention, signed at Paris on 20 March 1952,

Have agreed as follows:

Article 1

No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.

Article 2

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of 'ordre public', for the prevention of crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the interest in a democratic society.

Article 3

1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.

2. No one shall be deprived of the right to enter the territory of the State of which he is a national.

Article 4

Collective expulsion of aliens is prohibited.

Article 5

1. Any High Contracting Party may, at the time of signature or ratification of this Protocol, or at any time thereafter, communicate to the Secretary-General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of this Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.

2. Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may, from time to time, communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.

3. A declaration made in accordance with this article shall be deemed to have been made in accordance with paragraph 1 of Article 63 of the Convention.

4. The territory of any State to which this Protocol applies by virtue of ratification or acceptance by that State, and each territory to which this applied by virtue of a declaration by that State under this article, shall be treated as separate territories for the purpose of the references in Articles 2 and 3 to the territory of a State.

Article 6

1. As between the High Contracting Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.

2. Nevertheless, the right of individual recourse recognized by a declaration made under Article 25 of the Convention, or the acceptance of the compulsory jurisdiction of the Court by a declaration made under Article 46 of the Convention, shall not be effective in relation to this Protocol unless the High Contracting Party concerned has made a statement recognizing such right, or accepting such jurisdiction, in respect of all or any of Articles 1 to 4 of the Protocol.

Article 7

1. This Protocol shall be open for signature by the members of the Council of Europe who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of five instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.

2. The instruments of ratification shall be deposited with the Secretary-General of the Council of Europe, who will notify all members of the names of those who have ratified.

In witness thereof the undersigned, being duly authorized thereto, have signed this Protocol.

Done at Strasbourg, this 16th day of September 1963, in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary-General shall transmit certified copies to each of the signatory States.

5. Amending Articles 22 and 40 of the Convention

The Governments signatory hereto, being Members of the Council of Europe.

Considering that certain inconveniences have arisen in the application of the provisions of Articles 22 and 40 of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November 1950 (hereinafter referred to as 'the Convention') relating to the length of the terms of office of the members of the European Commission of Human Rights (hereinafter referred to as 'the Commission') and of the European Court of Human Rights (hereinafter referred to as the Court'):

Considering that it is desirable to ensure as far as possible an election every three years of one half of the members of the Commission and of one-third of the members of the Court;

Considering therefore that it is desirable to amend certain provisions of the Convention,

Have agreed as follows:

Article 1

In Article 22 of the Convention, the following two paragraphs shall be inserted after paragraph (2):

'(3) In order to ensure that, as far as possible, one half of the membership of the Commission shall be renewed every three years, the Committee of Ministers may decide, before proceeding to any subsequent election, that the term or terms of office of one or more members to be elected shall be for a period other than six years but not more than nine and not less than three years.

(4) In cases where more than one term of office is involved and the Committee of Ministers applies the preceding paragraph, the allocation of the terms of office shall be effected by the drawing of lots by the Secretary-General, immediately after the election.'

Article 2

In Article 22 of the Convention, the former paragraphs (3) and (4) shall become respectively paragraphs (5) and (6).

Article 3

In Article 40 of the Convention, the following two paragraphs shall be inserted after paragraph (2):

'(3) In order to ensure that, as far as possible, one third of the membership of the Court shall be renewed every three years, the Consultative Assembly may decide, before proceeding to any subsequent election, that the term or terms of office of one or more members to be elected shall be for a period other than nine years but not more than twelve and not less than six years.

(4) In cases where more than one term of office is involved and the Consultative Assembly applies the preceding paragraph, the allocation of the terms of office shall be effected by the drawing of lots by the Secretary-General immediately after the election.'

Article 4

In Article 40 of the Convention, the former paragraphs (3) and (4) shall become respectively paragraphs (5) and (6).

Article 5

1. This Protocol shall be open to signature by Members of the Council of Europe, signatories to the Convention, who may become Parties to it by:

(a) signature without reservation in respect of ratification or acceptance;

(b) signature with reservation in respect of ratification or acceptance, followed by ratification or acceptance.

Instruments of ratification or acceptance shall be deposited with the Secretary-General of the Council of Europe.

2. This Protocol shall enter into force as soon as all Contracting Parties to the Convention shall have become Parties to the Protocol, in accordance with the provisions of paragraph 1 of this Article.

3. The Secretary-General of the Council of Europe shall notify the Members of the Council of:

(a) any signature without reservation in respect of ratification or acceptance;

(b) any signature with reservation in respect of ratification or acceptance;

(c) the deposit of any instrument of ratification or acceptance;

(d) the date of entry into force of this Protocol in accordance of paragraph 2 of this Article.

In witness whereof the undersigned, being duly authorized thereto, have signed this Protocol.

Done at Strasbourg, this 20th day of January 1966, in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary-General shall transmit certified copies to each of the signatory Governments.

6. Concerning the Abolition of the Death Penalty

The member States of the Council of Europe, signatory to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as 'the Convention'),

Considering that the evolution that has occurred in several member States of the Council of Europe expresses a general tendency in favour of abolition of the death penalty;

Have agreed as follows:

Article 1

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Article 2

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary-General of the Council of Europe the relevant provisions of that law.

Article 3

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

Article 4

No reservation may be made under Article 64 of the Convention in respect of the provisions of this Protocol.

Article 5

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.

2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the date of receipt of such declaration by the Secretary General.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the date of receipt of such notification by the Secretary General.

Article 6

As between the States Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional articles to the Convention and all provisions of the Convention shall apply accordingly.

Article 7

This Protocol shall be open for signature by the member States of the Council of Europe, signatories to the Convention. It shall be subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol unless it has, simultaneously or previously, ratified the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 8

1. This Protocol shall enter into force on the first day of the month following the date on which five member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 7.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the date of the deposit of the instrument of ratification, acceptance or approval.

Article 9

The Secretary General of the Council of Europe shall notify the member States of the Council of:

(a) any signature;

(b) the deposit of any instrument of ratification, acceptance or approval;

(c) any date of entry into force of this Protocol in accordance with articles 5 and 8;

(d) any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 28th day of April 1983, in English and French both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

7. Concerning Various Matters

The member States of the Council of Europe signatory hereto,

Being resolved to take further steps to ensure the collective enforcement of certain rights and freedoms by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as 'the Convention'),

Have agreed as follows:

Article 1

1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

(a) to submit reasons against his expulsion,

(b) to have his case reviewed, and

(c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.

2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

Article 2

1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised shall be governed by law.

2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

Article 3

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the nondisclosure of the unknown fact in time is wholly or partly attributable to him.

Article 4

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the re-opening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention.

Article 5

Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.

Article 6

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply and state the extent to which it undertakes that the provisions of this Protocol shall apply to such territory or territories.

2. Any State may at any later day, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date of receipt by the Secretary General of such declaration.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of two months after the date of such notification by the Secretary General.

4. A declaration made in accordance with this Article shall be deemed to have been made in accordance with paragraph 1 of Article 63 of the Convention.

5. The territory of any State to which this Protocol applies by virtue of ratification, acceptance or approval by that State, and each territory to which this Protocol is applied by virtue of a declaration by that State under this Article, may be treated as separate territories for the purpose of the reference in Article 1 to the territory of a State.

Article 7

1. As between the States Parties, the provisions of Articles 1 to 6 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

2. Nevertheless, the right of individual recourse recognised by a declaration made under Article 25 of the Convention, or the acceptance of the compulsory jurisdiction of the Court by a declaration made under Article 46 of the Convention, shall not be effective in relation to this Protocol unless the State concerned has made a statement recognising such right, or accepting such jurisdiction in respect of Articles 1 to 5 of this Protocol.

Article 8

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 9

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date on which seven member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 8.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date of the deposit of the instrument of ratification, acceptance or approval.

Article 10

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

(a) any signature;

(b) the deposit of any instrument of ratification, acceptance or approval;

(c) any date of entry into force of this Protocol in accordance with Articles 6 and 9;

(d) any other act, notification or declaration relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 22nd day of November 1984, in English and French both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

8. Concerning Various Matters.

The member States of the Council of Europe, signatories to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as 'the Convention'),

Considering that it is desirable to amend certain provisions of the Convention with a view to improving and in particular to expediting the procedure of the European Commission of Human Rights,

Considering that it is also advisable to amend certain provisions of the Convention concerning the procedure of the European Court of Human Rights.

Have agreed as follows:

Article 1

1. The existing text of Article 20 of the Convention shall become paragraph 1 of that Article and shall be supplemented by the following four paragraphs:

'2. The Commission shall sit in plenary session. It may, however, set up Chambers, each composed of at least seven members. The Chambers may examine petitions submitted under Article 25 of this Convention which can be dealt with on the basis of established case law or which raise no serious question affecting the interpretation or application of the Convention. Subject to this restriction and to the provisions of paragraph 5 of this Article, the Chambers shall exercise all the powers conferred on the Commission by the Convention.

The member of the Commission elected in respect of a High Contracting Party against which a petition has been lodged shall have the right to sit on a Chamber to which that petition has been referred.

3. The Commission may set up committees, each composed of at least three members, with the power, exercisable by a unanimous vote to declare inadmissible or strike from its list of cases a petition submitted under Article 25, when such a decision can be taken without further examination.

4. A Chamber or committee may at any time relinquish jurisdiction in favour of the plenary Commission, which may also order the transfer to it of any petition referred to a Chamber or committee.

5. Only the plenary Commission can exercise the following powers:

(a) the examination of applications submitted under Article 24;

(b) the bringing of a case before the Court in accordance with Article 48a;

(c) the drawing up of rules of procedure in accordance with Article 36.'

Article 2

Article 21 of the Convention shall be supplemented by the following third paragraph:

'3. The candidates shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be persons of recognised competence in national or international law.'

Article 3

Article 23 of the Convention shall be supplemented by the following sentence:

'During their term of office they shall not hold any position which is incompatible with their independence and impartiality as members of the Commission or the demands of this office.'

Article 4

The text, with modifications, of Article 28 of the Convention shall become paragraph 1 of that Article and the text, with modifications, of Article 30 shall become paragraph 2. The new text of Article 28 shall read as

'Article 28

1. In the event of the Commission accepting a petition referred to it:

(a) it shall, with a view to ascertaining the facts, undertake together with the representatives of the parties an examination of the petition if need be, an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities, after an exchange of views with the Commission;

(b) it shall at the same time place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for Human Rights as defined in this Convention.

2. If the Commission succeeds in effecting a friendly settlement, it 'shall draw up a Report which shall be sent to the States concerned, to the Committee of Ministers and to the Secretary General of the Council of Europe for publication. This Report shall be confined to a brief statement of the facts and of the solution reached.'

Article 5

In the first paragraph of Article 29 of the Convention, the word 'unanimously' shall be replaced by the words 'by a majority of two-thirds of its members'.

Article 6

The following provision shall be inserted in the Convention:

'Article 30

1. The Commission may at any stage of the proceedings decide to strike a petition out of its list of cases where the circumstances lead to the conclusion that:

(a) the applicant does not intend to pursue his petition, or

(b) the matter has been resolved, or

(c) for any other reason established by the Commission, it is no longer justified to continue the examination of the petition.

However, the Commission shall continue the examination of a petition if respect for Human Rights as defined in this Convention so requires.

2. If the Commission decides to strike a petition out of its list after having accepted it, it shall draw up a Report which shall contain a statement of the facts and the decision striking out the petition together with the reasons therefor. The Report shall be transmitted to the parties, as well as to the Committee of Ministers for information. The Commission may publish it.

3. The Commission may decide to restore a petition to its list of cases if it considers that the circumstances justify such a course.'

Article 7

In Article 31 of the Convention, paragraph 1 shall read as follows:

'1. If the examination of a petition has not been completed in accordance with Article 28 (paragraph 2), 29 or 30, the Commission shall draw up a Report on the facts and state its opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention. The individual opinions of members of the Commission on this point may be stated in the Report.'

Article 8

Article 34 of the Convention shall read as follows:

'Subject to the provisions of Articles 20 (paragraph 3) and 29, the Commission shall take its decisions by a majority of the members present and voting.'

Article 9

Article 40 of the Convention shall be supplemented by the following seventh paragraph:

'7. The members of the Court shall sit on the Court in their individual capacity. During their term of office they shall not hold any position which is incompatible with their independence and impartiality as members of the Court or the demands of this office.'

Article 10

Article 41 of the Convention shall read as follows:

'The Court shall elect its President and one or two Vice-Presidents for a period of three years. They may be re-elected.'

Article 11

In the first sentence of Article 43 of the Convention, the word 'seven' shall be replaced by the word 'nine'.

Article 12

1. This Protocol shall be open for signature by member States of the Council of Europe signatories to the Convention, which may express their consent to be bound by:

(a) signature without reservation as to ratification acceptance or approval, or

(b) signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.

2. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 13

This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which all Parties to the Convention have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 12.

Article 14

The Secretary General of the Council of Europe shall notify the member States of the Council of:

(a) any signature:

(b) the deposit of any instrument of ratification, acceptance or approval;

(c) the date of entry into force of this Protocol in accordance with Article 13;

(d) any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Vienna, this 19th day of March 1985, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

9. Concerning access to the Court by Individuals

The member States of the Council of Europe, signatories to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as 'the Convention'),

Being resolved to make further improvements to the procedure under the Convention,

Have agreed as follows:

Article 1

For parties to the Convention which are bound by this Protocol, the Convention shall be amended as provided in Articles 2 to 5.

Article 2

Article 31, paragraph 2, of the Convention, shall read as follows:

'2. The Report shall be transmitted to the Committee of Ministers. The Report shall also be transmitted to the States concerned, and, if it deals with a petition submitted under Article 25, the applicant. The States concerned and the applicant shall not be at liberty to publish it.'

Article 3

Article 44 of the Convention shall read as follows:

'Only the High Contracting Parties, the Commission, and persons, non-governmental organisations or groups of individuals having submitted a petition under Article 25 shall have the right to bring a case before the Court.'

Article 4

Article 45 of the Convention shall read as follows:

'The jurisdiction of the Court shall extend to all cases concerning the interpretation and application of the present Convention which are referred to it in accordance with Article 48.'

Article 5

Article 48 of the Convention shall read as follows:

'1. The following may refer a case to the Court, provided that the High Contracting Party concerned, if there is only one, or the High Contracting Parties concerned, if there is more than one, are subject to the compulsory jurisdiction of the Court or, failing that, with the consent of the High Contracting Party concerned, if there is only one, or, of the High Contracting Parties concerned if there is more than one:

(a) the Commission;

(b) a High Contracting Party whose national is alleged to be a victim;

(c) a High Contracting Party which referred the case to the Commission;

(d) a High Contracting Party against which the complaint has been lodged;

(e) the person, non-governmental organisation or group of individuals having lodged the complaint with the Commission.'

2. If a case is referred to the Court only in accordance with paragraph i.e, it shall first be submitted to a panel composed of three members of the Court. There shall sit as an *ex-officio* member of the panel the judge who is elected in respect of the High Contracting Party against which the complaint has been lodged, or, it there is none, a person of its choice who shall sit in

the capacity of judge. If the complaint has been lodged against more than one High Contracting Party, the size of the panel shall be increased accordingly.

If the case does not raise a serious question affecting the interpretation or application of the Convention and does not for any other reason warrant consideration by the Court, the panel may, by a unanimous vote, decide that it shall not be considered by the Court. In that event the Committee of Ministers shall decide, in accordance with the provisions of Article 32, whether there has been a violation of the Convention.'

Article 6

1. This Protocol shall be open for signature by member States of the Council of Europe signatories to the Convention, which may express their consent to be bound by:

(a) signature without reservation as to ratification, acceptance or approval; or

(b) signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.

2. The instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 7

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which ten member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 6.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of signature or of the deposit of the instrument of ratification, acceptance or approval.

Article 8

1. The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

(a) any signature;

(b) the deposit of any instrument of ratification, acceptance or approval;

(c) any date of entry into force of this Protocol in accordance with Article 7;

(d) any other act, notification or declaration relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Rome, this 6th day of November 1990, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

10. *Concerning Various Matters (Provisional text)*

The member States of the Council of Europe, signatories to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4November 1950 (hereinafter referred to as 'the Convention').

Considering that it is advisable to amend Article 32 of the Convention with a view to the reduction of the two-thirds majority provided therein,

Have agreed as follows:

Article 1

The words 'of two-thirds' shall be deleted from paragraph 1 of Article 32 of the Convention.

Article 2.

1. This Protocol shall be open for signature by member States of the Council of Europe signatories to the Convention, which may express their consent to be bound by:

(a) signature without reservation as to ratification, acceptance or approval; or

(b) signature subject to ratification, acceptance or approval followed by ratification, acceptance or approval.

2. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 3

This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which all Parties to the Convention have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 2.

Article 4

The Secretary General of the Council of Europe shall notify the member States of the Council of:

(a) any signature;

(b) the deposit of any instrument of ratification, acceptance or approval;

(c) the date of entry into force of this Protocol in accordance with Article 3;

(d) any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at ... this ... day of....., in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

Y. APPENDIX 9

Z. Relevant excerpts of the Constitution of the Republic of South Africa, 1993:

[A.] Chapter 3 - Fundamental Rights and

[B.] Schedule 4 - Constitutional Principles

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[A] CHAPTER 3 Fundamental Rights

Application

7. (1) This Chapter shall bind all legislative and executive organs of state at all levels of government.

(2) This Chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution.

(3) Juristic persons shall be entitled to the rights contained in this Chapter where, and to the extent that, the nature of the rights permits.

(4) (a) When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph *(b)* shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.

(b) The relief referred to in paragraph (a) may be sought by—

(i) a person acting in his or her own interest;

(ii) an association acting in the interest of its members;

(iii) a person acting on behalf of another person who is not in a position to seek such relief in his or her own name:

(iv) a person acting as a member of or in the interest of a group or class of persons; or

(v) a person acting in the public interest.

Equality

8. (1) Every person shall have the right to equality before the law and to equal protection of the law.

(2) No person shall be unfairly discriminated against, directly or indirectly and without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

(3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.

(b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.

(4) *Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.

Life

9. Every person shall have the right to life.

Human dignity

10. Every person shall have the right to respect for and protection of his or her dignity.

Freedom and security of the person

11. (l) Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.

(2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.

Servitude and forced labour

12. No person shall be subject to servitude or forced labour.

Privacy

13. Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.

Religion belief and opinion

14. (1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.

(2) Without derogating from the generality of subsection (1), religious observances may be conducted at state or state-aided institutions under rules established by an appropriate authority for that purpose, provided that such religious observances are conducted on an equitable basis and attendance at them is free and voluntary.

(3) Nothing in this Chapter shall preclude legislation recognising—

(a) a system of personal and family law adhered to by persons professing a particular religion; and

(b) the validity of marriages concluded under a system of religious law subject to specified procedures.

Freedom of expression

15. (1) Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research.

(2) All media financed by or under the control of the state shall be regulated in a manner which ensures impartiality and the expression of a diversity of opinion.

Assembly, demonstration and petition

16. Every person shall have the right to assemble and demonstrate with others peacefully and unarmed, and to present petitions.

Freedom of association

17. Every person shall have the right to freedom of association.

Freedom or movement

18. Every person shall have the right to freedom of movement anywhere within the national territory.

Residence

19. Every person shall have the right freely to choose his or her place of residence anywhere in the national territory.

Citizens' rights

20. Every citizen shall have the right to enter, remain in and leave the Republic, and no citizen shall without justification be deprived of his or her citizenship.

Political rights

21. (1) Every citizen shall have the right—

(a) to form, to participate in the activities of and to recruit members for a political party;

(b) to campaign for a political party or cause; and

(c) freely to make political choices.

(2) Every citizen shall have the right to vote, to do so in secret and to stand for election to public office.

Access to court

22. Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum.

Access to information

23. Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights.

Administrative justice

24. Every person shall have the right to—

(a) lawful administrative action where any of his or her rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.

Detained arrested and accused persons

25. (1) Every person who is detained, including every sentenced prisoner shall have the right—

(a) to be informed promptly in a language which he or she understands of the reason for his or her detention;

(b) to be detained under conditions consonant with human dignity, which shall include at least the provision of adequate nutrition, reading material and medical treatment at state expense;

(c) to consult with a legal practitioner of his or her choice, to be informed of this right promptly and where substantial injustice would otherwise result, to be provided with the services of a legal practitioner by the state;

(d) to be given the opportunity to communicate with, and to be visited by his or her spouse or partner next-of-kin. religious counsellor and a medical practitioner of his or her choice; and

(e) to challenge the lawfulness of his or her detention in person before a court of law and to be released if such detention is unlawful.

(2) Every person arrested for the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right—

(a) promptly to be informed, in a language which he or she understands that he or she has the right to remain silent and to be warned of the consequences of making any statement;

(b) as soon as it is reasonably possible, but not later than 48 hours after the arrest or, if the said period of 48 hours expires outside ordinary court hours or on a day which is not a court day, the first court day after such expiry, to be brought before an ordinary court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be entitled to be released;

(c) not to be compelled to make a confession or admission which could be used in evidence against him or her; and

(d) to be released from detention with or without bail, unless the interests of justice require otherwise.

(3) Every accused person shall have the right to a fair trial which shall include the right—

(a) to a public trial before an ordinary court of law within a reasonable time after having been charged;

(b) to be informed with sufficient particularity of the charge;

(c) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;

(d) to adduce and challenge evidence and not to be a compellable witness against himself or herself;

(e) to be represented by a legal practitioner of his or her choice or, where substantial injustice would otherwise result, to be provided with legal representation at state expense, and to be informed of these rights;

(f) not to be convicted of an offence in respect of any act or omission which was not an offence at the time it was committed, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed;

(g) not to be tried again for any offence of which he or she has previously been convicted or acquitted;

(h) to have recourse by way of appeal or review to a higher court than the court of first instance;

(i) to be tried in a language which he or she understands or failing this to have the proceedings interpreted to him or her; and

(j) to be sentenced within a reasonable time after conviction.

Economic activity

26. (1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory.

(2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality.

Labour relations

27. (1) Every person shall have the right to fair labour practices.

(2) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations.

(3) Workers and employers shall have the right to organise and bargain collectively.

(4) Workers shall have the right to strike for the purpose of collective bargaining.

(5) Employers' recourse to the lock-out for the purpose of collective bargaining shall not be impaired, subject to section 33(1).

Property

28. (1) Every person shall have the right to acquire and hold rights in property and to the extent that the nature of the rights permits, to dispose of such rights.

(2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.

(3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.

Environment

29. Every person shall have the right to an environment which is not detrimental to his or her health or well-being.

Children

30. (1) Every child shall have the right—

(a) to a name and nationality as from birth;

(b) to parental care;

(c) to security, basic nutrition and basic health and social services;

(d) not to be subject to neglect or abuse; and

(e) not to be subject to exploitative labour practices nor to be required or permitted to perform work which is hazardous or harmful to his or her education, health or well-being.

(2) Every child who is in detention shall, in addition to the rights which he or she has in terms of section 25, have the right to be detained under conditions and to be treated in a manner that takes account of his or her age.

(3) For the purpose of this section a child shall mean a person under the age of 18 years and in all matters concerning such child his or her best interest shall be paramount

Language and culture

31. Every person shall have the right to use the language and to participate in the cultural life of his or her choice.

Education

32. Every person shall have the right—

(a) to basic education and to equal access to educational institution;

(b) to instruction in the language of his or her choice where this is reasonably practicable; and

(c) to establish where practicable educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race.

Limitation

33. (1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation—

(a) shall be permissible only to the extent that it is—

(i) reasonable; and

(ii) justifiable in an open and democratic society based on freedom and equality; and

(b) shall not negate the essential content of the right in question.

and provided further that any limitation to—

(aa) a right entrenched section 10, 11, 12, 14(1), 21, 25 or 30(1)(d) or (e) or (2); or

(bb) a right entrenched in section 15, 16, 17, 18, 23 or 24, in so far as such right relates to free and fair political activity,

shall, in addition to being reasonable as required in paragraph (a)(i), also be necessary.

(2) Save as provided for in subsection (1) or any other provision of this Constitution, no law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this Chapter.

(3) The entrenchment of the rights in terms of this Chapter shall not be construed as denying the existence of any other rights of freedoms recognised or conferred by common law, customary law or legislation to the extent that they are not inconsistent with this Chapter.

(4) This Chapter shall not preclude measures designed to prohibit unfair discrimination by bodies other than those bound in terms of section 7(1).

(5) (a) The provision of a law in force at the commencement of this Constitution promoting fair employment practices, orderly and equitable collective bargaining and the regulation of industrial action shall remain of full force and effect until repealed or amended by the legislature.

(b) If a proposed enactment amending or repealing a law referred to in paragraph (a) deals with a matter in respect of which the National Manpower Commission referred to in section 2A of the Labour Relations Act, 1956 (Act No.28 of 1956) or any other similar body which may replace the Commission, is competent in terms of a law then in force to consider and make recommendations, such proposed enactment shall not be introduced in Parliament unless the said Commission or such other body has been given an opportunity to consider the proposed enactment and to make recommendations with regard thereto.

State of emergency and suspension

34. (1) A state of emergency shall be proclaimed prospectively under an Act of Parliament, and shall be declared only where the security of the Republic is threatened by war, invasion, general insurrection or disorder or at a time of national disaster, and if the declaration of a state of emergency is necessary, to restore peace or order.

(2) The declaration of a state of emergency and any action taken, including any regulation enacted, in consequence thereof, shall be of force for a period of not more than 21 days, unless it is extended for a period of not longer than three months, or consecutive periods of not longer than three months at a time, by resolution of the National Assembly adopted by a majority of at least two-thirds of all its members.

(3) Any superior court shall be competent to enquire into the validity of a declaration of a state of emergency, any extension thereof, and any action taken, including any regulation enacted, under such declaration.

(4) The rights entrenched in this Chapter may be suspended only inconsequence of the declaration of a state of emergency, and only to the extent necessary to restore peace or order.

(5) Neither any law which provides for the declaration of a state of emergency, nor any action taken, including any regulation enacted, in consequence thereof, shall permit or authorise—

(a) the creation of retrospective crimes;

(b) the indemnification of the state or of persons acting under its authority for unlawful actions during the state of emergency; or

(c) the suspension of this section, and sections 7,8(2), 9,10, 11(2), 12,14, 27(1) and (2), 30(1)(d) and (e) and (2) and 33(1) and (2).

(6) Where a person is detained under a state of emergency the detention shall be subject to the following conditions:

(a) An adult family member or friend of the detainee shall be notified of the detention as soon as is reasonably possible;

(b) the names of all detainees and a reference to the measures in terms of which they are being detained shall be published in the *Gazette* within five days of their detention;

(c) when rights entrenched in section 11 or 25 have been suspended—

(i) the detention of a detainee shall as soon as it is reasonably possible but not later than 10 days after his or her detention, be reviewed by a court of law, and the court shall order the release of the detainee if it is satisfied that the detention is not necessary to restore peace or order;

(ii) a detainee shall at any stage after the expiry of a period of 10 days after a review in terms of subparagraph (i) be entitled to apply to a court of law for a further review of his or her detention, and the court shall order the release of the detainee if it is satisfied that the detention is no longer necessary to restore peace or order;

(d) the detainee shall be entitled to appear before the court in person, to be represented by legal counsel, and to make representations against his or her continued detention;

(e) the detainee shall be entitled at all reasonable times to have access to a legal representative of his or her choice;

(f) the detainee shall be entitled at all times to have access to a medical practitioner of his or her choice; and

(g) the state shall for the purpose of a review referred to in paragraph (c) (i)or (ii) submit written reasons to justify the detention or further detention of the detainee to the court, and shall furnish the detainee, with such reasons not later than two days before the review.

(7) If a court of law, having found the grounds for a detainee's detention unjustified orders his or her release, such a person shall not be detained again on the same grounds unless the state shows good cause to a court of law prior to such re-detention.

Interpretation

35. (1) In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.

(2) No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation.

(3) In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter.

[B] SCHEDULE 4 Constitutional Principles

I

The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.

II

Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to *inter alia,* the fundamental rights contained in Chapter 3 of the Constitution.

III

The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.

IV

The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government.

V

The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour, or gender.

IV

There shall be a separation of powers between the legislature, executive and judiciary, with appropriate, checks and balances to ensure accountability, responsiveness and openness.

VII

The judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.

VIII

There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll, and, in general, proportional representation.

IX

Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.

X

Formal legislative procedure shall be adhered to by legislative organs at all levels of government.

X1

The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.

XII

Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected.

XIII

The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specially therewith.

XIV

Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.

XV

Amendments to the Constitution shall require special procedures involving special majorities.

XVI

Government shall be structured at national, provincial and local levels.

XVII

At each level of government there shall be democratic representation. This principle shall not derogate from the provisions of Principle XIII.

XVIII

The powers, boundaries and functions of the national, governments and provincial governments shall be defined in the Constitution. Amendments to the Constitution which alter the powers, boundaries, functions or institutions of provinces shall in addition to any other procedures specified in the Constitution for constitutional amendments, require the approval of a special majority of the legislatures of the provinces, alternatively, if there is such a chamber, a two-thirds majority of a chamber of Parliament composed of provincial representatives, and if the amendment concerns specific provinces only, the approval, of the legislatures of such provinces will also be needed. Provision shall be made for obtaining the views of a provincial legislature concerning all constitutional amendments regarding its powers, boundaries and functions.

XIX

The powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis.

XX

Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between

different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which recognises the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural diversity.

XXI

The following criteria shall be applied in the allocation of powers to the national government and the provincial governments:

1. The level at which decisions can be taken most effectively in respect of the quality rendering of services, shall be the level responsible and accountable for the quality and the rendering of the services, and such level shall accordingly be empowered by the Constitution to do so.

2. Where it is necessary for the maintenance of essential national standards for the establishment of minimum standards required for the rendering of services, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one province which is prejudicial to the interests of another province, or the country as a whole, the Constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the Constitution.

3. Where there is necessity for South Africa to speak with one voice, or to act as a single entity—in particular in relation to other states—powers should be allocated to the national government.

4. Where uniformity across the nation is required for a particular function, the legislative power over that function should be allocated predominantly, if not wholly, to the national government.

5. The determination of national economic policies, and the power to promote interprovincial commerce and to protect the common market in respect of the mobility of goods, services, capital and labour should be allocated to the national government.

6. Provincial governments shall have powers, either exclusively or concurrently with the national government, *inter alia*—

(a) for the purposes of provincial planning and development and the rendering of services; and

(b) in respect of aspects of government dealing with specific socio-economic and cultural needs and the general well-being of the inhabitants of province.

7. Where mutual co-operation is essential or desirable or where it is required to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the provincial governments.

8. The Constitution shall specify how powers which are not specifically allocated in the Constitution to the national government or to a provincial government, shall be dealt with as necessary ancillary powers pertaining to the powers and functions allocated either to the national government or provincial governments.

XXII

The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces.

XXIII

In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national government and provincial governments which cannot be resolved by a court on a construction of the Constitution, precedence shall be given to the legislative powers of the national government.

XXIV

A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes or in provincial legislation or in both.

XXV

The national government and provincial governments shall have fiscal powers and functions which will be defined in the Constitution. The framework for local government referred to in Principle XXIV shall make provision for appropriate fiscal powers and functions for different categories of local government.

XXVI

Each level of government shall have a constitutional right to as equitable share of revenue collected nationally so as to ensure that provinces and local governments are able to provide basic services and execute the functions allocated to them.

XXVII

A Financial and Fiscal Commission, in which each province shall be represented, shall recommend equitable fiscal and financial allocations to the provincial and local governments from revenue collected nationally, after taking into account the national interest, economic disparities between the provinces as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each of the provinces.

XXVII

Notwithstanding the provisions of Principle XII, the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognised and protected. Provision shall be made that every person shall have the right to last labour practices.

XXIX

The independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor-General and a Public Protector shall be provided for and safe guarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.

XXX

1. There shall be an efficient, non-partisan, career-oriented public service broadly representative of the South African community, functioning on a basis of fairness and which shall serve all members or the public in an unbiased and impartial manner, and shall, in the exercise of its powers and in compliance with its duties, loyally execute the law policies of the government of the day in the

performance of its administrative functions. The structures and functioning of the public service, as well as the terms and conditions of service of its members shall be regulated by law.

2. Every member of the public service shall be entitled to a fair pension.

XXXI

Every member of the security forces (police, military and intelligence), and the security forces as a whole shall be required to perform their functions and exercise their power in the national interest and shall be prohibited from furthering or prejudicing party political interest.

XXXII

The Constitution shall provide that until 30 April 1999 the national executive shall be composed and shall function substantially in the manner provided for in Chapter 6 of this Constitution.

XXXIII

The Constitution shall provide that unless Parliament is dissolved on account of its passing a vote of no-confidence in the Cabinet, no national election shall be held before 30 April 1999.

Chapter2.

Discussion Paper No. 9

Constitutional Recognition of Local Government

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

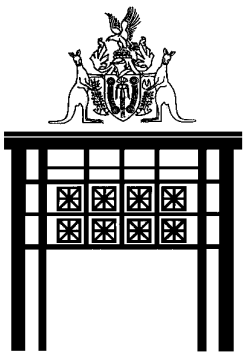
Sessional Committee on Constitutional Development

Discussion Paper No. 9

Constitutional Recognition of Local Government

JUNE 1995

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



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Sessional Committee on Constitutional Development

Discussion Paper No. 9

Constitutional Recognition of Local Government

JUNE 1995

CONTENTS **Page No.**

A . EXECUTIVE SUMMARY

1. This Paper looks at the question whether local government in the Northern Territory should be entrenched in a new Northern Territory constitution, and if so, the options for such entrenchment and the extent to which it should be entrenched, if at all.

2. The Paper raises a number of matters that could be considered for constitutional entrenchment in a new constitution for the Northern Territory. Although not an exhaustive list these matters could include the following:

   - the status of local government as the third sphere of government;
   - the protection of local government councils against arbitrary dismissal;
   - the guaranteeing of a central core of powers and functions to local government or at least a requirement of consultation before any change to those powers and functions;
   - the guarantee of direct franchise for local government elections; and
   - the protection of local government boundaries.

3. The paper highlights recent comparative developments in the other States of Australia that extend to recognition of local government under normal legislative parameters to constitutionally entrenched provisions and whether the Northern Territory could use those examples in framing local government provisions in a new Northern Territory constitution.

4. The Committee stresses that this is still an options paper and the views expressed herein do not necessarily represent the final views of the Committee. The paper is issued to invite further comment before the Committee makes its report to the Legislative Assembly.

B . INTRODUCTION

1. 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, and again on 27 June 1994, it was 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 Northern 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 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 and Australian populations."

2. Discussion and Information papers

The Committee has prepared and issued a number of papers arising from its 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, *Citizens' Initiated Referendums.*

- Discussion Paper No 4, *Recognition of Aboriginal Customary Law*.

- Discussion Paper No 5, *The Merits or Otherwise of Bringing an NT Constitution into Force Before Statehood*.

- Discussion Paper No 6, *Aboriginal Rights and Issues Options For Entrenchment*.

- Discussion Paper No 7, *An Australian Republic? Implications for the Northern Territory.*

- Discussion Paper No 8, *A Northern Territory Bill of Rights?*

- Information Paper No 1, *Options for a Grant of Statehood*.

- Information Paper No 2, *Entrenchment of a New State Constitution.*

- Interim Report No 1, *A Northern Territory Constitutional Convention*.

3. Purpose of this Paper

(a) This Paper looks at the question whether local government in the Northern Territory should be entrenched in a new State constitution, and if so, the options for such entrenchment and the extent to which it should be entrenched, if at all.

(b) In this paper, the term "local government", as applied to the Northern Territory, refers to both municipal and community government under the *Local Government Act*. The term "municipal government" encompasses cities, towns, and shires.

(c) The Committee stresses that this is still an options paper and the views expressed herein do not necessarily represent the final views of the Committee. The paper is issued to invite further comment before the Committee makes its report to the Legislative Assembly.

4. Background to this Paper and Previous Submissions

(a) The subject of this paper was considered briefly in the Committee's Discussion Paper on *A Proposed New State Constitution for the Northern Territory*[1] of October 1987, for ease of reference called the *Discussion Paper*. It will be observed that the Committee on that occasion was conscious of the fact that vast areas of the Northern Territory were not within any local government area. Other areas were covered by community government schemes, a particular form of local government in the Northern Territory. Any decision to extend local government was, it said, appropriately a matter for the new State in consultation with the local residents. Any constitutional recognition of local government must take into account the special situation of the Northern Territory and the associated difficulties of administration. [2]

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[1] 1987. Northern Territory Legislative Assembly Select Committee on Constitutional Development, Legislative Assembly of the Northern Territory, Darwin.

[2] 1987. Northern Territory Legislative Assembly Select Committee on Constitutional Development. *Discussion Paper on A Proposed New Constitution for the Northern* Territory, Lesiglative Assembly of the Northern Territory, Darwin: 90-92

"1. Arguments have been advanced in the Northern Territory proposing the constitutional entrenchment of the position of local government. At present, local government derives its existence, powers and status from the Local Government Act of the Territory and has no such entrenched position. The self-governing Northern Territory has both legislative power (through the Legislative Assembly) and executive authority (through Ministers of the Territory Government) in relation to all aspects of local government in the Territory.

2. Previous attempts to have local government recognised in the Commonwealth Constitution through the Constitutional Convention have so far brought no results, although the matter is presently under consideration by the Constitutional Commission. However four States have proceeded to recognise local government in their own constitutions - New South Wales, Victoria, South Australia and Western Australia.

3. Of these States, only the Victorian provision goes further than merely providing for formal recognition. The constitution of Victoria requires the existence of a general system of local government throughout the State (with some exceptions). Local government bodies are to be elected and are protected from dismissal except by Act of Parliament. Limitations are placed on suspension of local government bodies. The constitutional provisions have a limited degree of entrenchment (see discussion above) but subject thereto, ultimate control remains with the Victorian Parliament and Government.

4. The Northern Territory Local Government Association has previously indicated that any provision for constitutional recognition should be in accordance with the following principles:

(a) general competence and autonomy for each local government body to act for the peace, order and good government of its area;

(b) secure financial basis;

(c) proper recognition of the elected member role;

(d) protection from dismissal of individual local government bodies without public inquiry; and

(e) due consultation prior to any changes to powers, functions, duties, responsibilities and financial resources.

These principles have been adopted from the policy of the Local Government Association and Shires Association Executives, endorsed by the Australian Council of Local Government Associations. They were considered in the 1984 Local Government Report of the Structure of Government Sub-Committee to the Australian Constitutional Convention.

5. The Select Committee notes the special situation of the Northern Territory, where vast areas are not within any local government area. Other areas are covered by community government schemes. Any decision to extend local government or community government is appropriately a matter for the new State in consultation with the local residents. Constitutional recognition of local government must take into account the special situation of the Territory and the associated difficulties of administration.

(b) Subject to those considerations, the Committee favoured in that *Discussion Paper* some constitutional provisions for the recognition of local government in the new State, but it did not specify what form they should or could take. It invited public comment on the nature of those provisions.

(c) As a result of that invitation, a number of submissions were received by the Committee, including from municipal and community government bodies and associations in the Northern Territory, some Northern Territory organisations and a number of individuals. Of these, all favoured at least some minimal recognition of local government in a new State constitution. A few thought that the new constitution should say no more than this, the detail being left to ordinary legislation. Several sought more detailed protections.

(d) The Northern Territory Local Government Association, with the broad support of the Northern Territory Community Government Association (but extending to community government), together with similar comments by several other commentators, maintained its position for a more detailed form of constitutional recognition as indicated in the *Discussion Paper*.

One commentator thought that a local government body should not be able to be dismissed until after an enquiry and then a referendum with at least a twothirds majority. The Tangentyere Council Inc. maintained its view that constitutional recognition should extend to Aboriginal local government bodies, which should be able to coexist with and within the boundaries of other local government bodies, and that the structure of the Aboriginal local government provisions should accord with Aboriginal tradition.

(e) A list of those who made submissions on this aspect of the *Discussion Paper* is in Appendix 1.

(f) In the Committee's Discussion Paper No. 6,[3] under the heading of *Self-Determination,* the Committee had cause to consider the existing position as to local government in so far as it was relevant to Aboriginal Territorians. It noted that while a number of Aboriginal communities had opted for community government,

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6. Subject to these considerations, the Select Committee favours some constitutional provisions for the recognition of local government in the new State. It invites public comment on the nature of those provisions."

[3] 1993. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development,. Discussion Paper No. 6 - *Aboriginal Rights and Issues Options for Entrenchment*., Legislative Assembly of the Northern Territory, Darwin: 23-26

many others had chosen other mechanisms for the legal organisation of their community under both Northern Territory law and Commonwealth law.[4]

(g) Only a few of the commentators on Discussion Paper No 6 specifically referred to local and community government. One felt that Aboriginal people could best be served by keeping relevant municipal powers with the Federal Government. However this will be the case in any event, in that existing Commonwealth legislation

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[4] 1993. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. Discussion Paper No. 6 - *Aboriginal Rights and Issues Options for Entrenchment*, Legislative Assembly of the Northern Territory, Darwin: 26-27

"(f) At a wider Territory level, various arrangements exist for encouraging Aboriginal participation in the community as a whole and for ameliorating their existing disadvantages. This includes a variety of programs and services designed for Aboriginal people and aimed at addressing any inequality. Many of the latter are federally sponsored but others are Territory Government initiatives.

(g) It is theoretically open to particular Aboriginal communities in the Territory to seek greater local control through the formation of a local government municipality under the Local Government Act. So far, this has not occurred. It is doubtful that this existing form of local government in the Territory is an appropriate structure to implement Aboriginal self-determination.

(h) The Local Government Act was amended in 1978 to introduce the concept of community government (see Part VIII of that Act). This form of government is not directed specifically at Aboriginal communities, although it has most commonly been utilised by those communities. It requires a minimum of 10 residents of an area outside an ordinary local government municipality to apply to the relevant Territory Minister for the establishment of a community government. A draft scheme is then prepared and advertised, and the Minister is obliged to consult with the residents of the area. The Minister may then approve the draft, with or without amendments.

(i) The community government scheme operates as a simplified form of local government under an elected council. The functions of a community government are expressed in the scheme and can cover a wide range of matters (see section 270). A community government can also make by-laws on a wide range of matters and can by those by-laws provide for the imposition of fines for breach (see section 292). By-laws are subject to tabling and disallowance action in the Legislative Assembly (Interpretation Act, section 63).

(j) A list of those communities in the Territory that have adopted this form of government, and the functions covered by each community government scheme, are set out in Appendix 4 to this Paper.

(k) There has been some debate and difference of views about the extent to which community government has been successful in achieving a degree of autonomy in Aboriginal communities under that scheme.

(l) In the Committee's first Discussion Paper on a 'Proposed new State Constitution for the Northern Territory" (October 1987), the Committee noted the special situation of the Northern Territory, with vast areas not within any local government area. Some areas were covered by community government schemes but most areas were not subject to either. The Committee raised the question of the constitutional entrenchment of local government, but did not consider it in detail.

(m) A number of Aboriginal communities have chosen to use other mechanisms for the legal organisation of their community. In some cases they have used the mechanism of an incorporated association or trading association under Territory law (see the Associations Incorporation Act). In other cases, they have sought incorporation as an Aboriginal Council or Association under Commonwealth law (Aboriginal Councils and Associations Act 1976). A list of the various communities in the Territory established under Commonwealth legislation, and the manner in which those communities are established, is set out in Appendix 5 to this paper. A comparable list of those Aboriginal bodies incorporated under Northern Territory law is not available, but it is understood the number is significant.

(n) Some of these communities are located on Aboriginal land or community living areas, while others are not. In the case of some Aboriginal organisations (other than community government), their area of operation can overlap with that of an ordinary local government municipality (for example, the Tangentyere Council Inc. of Alice Springs)."

will presumably continue to operate, whatever may be included in the new Northern Territory Constitution. The Tangentyere Council Inc. advocated that Aboriginal traditions as applied to local government should override democratic requirements as to local government.

(h) The Committee in Discussion Paper No. 6 looked at the community government option as one possible form of securing a measure of autonomy to Aboriginal communities. It felt that a more secure constitutional position for community government would not of itself necessarily guarantee a much greater degree of local autonomy for those communities, but that it did provide one framework upon which such greater autonomy could be constructed by other means. It invited submissions — see Appendix 2.

C . EXISTING POSITION IN AUSTRALIA

1. Australia generally

(a) The constitutional status of local government in Australia has traditionally been determined by the States. This was a carry over from pre-federation days, when this was a matter within the province of the former Australian colonies and their governments. The Commonwealth has no constitutional power with respect to local government except by indirect means; eg, by the use of financial grants to the States for the purpose of local government. An attempt to alter the Australian Constitution by national referendum in 1988 to recognise local government as the third sphere of government in this country failed.

(b) However local government as the third sphere of government is now recognised in all of the Constitutions of the States (see below), although the extent of such recognition and the protection thereby offered, varies from State to State.

2. Northern Territory

(a) At present in the Northern Territory, there is no constitutional recognition of local government. The legal capacity to establish local government in the Northern Territory and the powers, responsibilities and other legal incidents of that local government are dependant upon an ordinary Act of the Northern Territory Legislative Assembly, the *Local Government Act*. That Act provides for the establishment of two forms of local government municipal and community government.

(b) The subject of local government gets no mention in the *Northern Territory (Self Government) Act* 1978, the main Commonwealth Act giving rise to Self-Government. The subject of "local government" is mentioned in Regulation 4(1) of the Northern Territory (Self-Government) Regulations, but this only has effect to ensure that Ministers of the Northern Territory, being the Ministers that form the Northern Territory Government and are chosen from among the members of the Legislative Assembly, have executive authority with respect to the subject of local government. There is no right to a grant of local government except in so far as ordinary Northern Territory legislation confers it. Nor is there any guarantee that local government, once granted, will be continued except in so far as ordinary Northern Territory legislation or the common law so provides. There is similarly no constitutional guarantee that the powers of any existing local government body in the Northern Territory will continue into the future.

(c) The absence of any constitutional protections means that local government does not have as secure a legal position in the Northern Territory as does the Commonwealth

Government as the first sphere of government and to a lesser extent the Northern Territory Government as the second sphere.

(d) It is to be noted, however, that the grant of Northern Territory Self-Government itself, by which the Northern Territory Government is established and operates separately from the Commonwealth, does not have any greater legal protection beyond that of an ordinary Commonwealth Act. This is different from the States, the continued existence of which are guaranteed by the Australian Constitution.

(e) Local government, as the third sphere of government in the Northern Territory, has had a history almost as long as European settlement. It began with the proclamation in 1874 of the District of Palmerston under a *South Australian District Councils Act* as then operating in the Northern Territory (the Northern Territory then being part of South Australia).

(f) Following the surrender of the Northern Territory by South Australia and its acceptance by the Commonwealth as a Territory of the Commonwealth in 1911, new Territory legislation, the Darwin Town Council Ordinance, was enacted in 1915, providing for the continuance of local government in Darwin. The Darwin Council continued as the only local governing body in the Territory until it was abolished in 1937. It was not re-established as a municipality until 1957.

(g) Since that time, a number of other local government bodies have been established in the Northern Territory under Northern Territory legislation. There are currently 6 municipalities in the Northern Territory. There are also 2 special purpose mining towns with a particular form of municipal arrangements.

(h) In addition, under amendments to the *Local Government Act* in 1979, a new form of local government was introduced, being described as "community government". It was designed to meet the needs of smaller Northern Territory communities, both Aboriginal and non-Aboriginal. The provisions introduced a measure of flexibility in the design of community government schemes to meet the particular needs of the community in question. Such schemes, once approved, have effect as subordinate Northern Territory law, subject to disallowance by the Legislative Assembly. The first community government scheme became operational in 1980. Since that time, a number of communities have also adopted this model. There are currently 29 community governments in the Northern Territory, with another 18 currently under consideration.

(i) Most of the Northern Territory remains outside of any local government arrangements because of the sparse population.

(j) As pointed out in the Committee's Discussion Paper No 6, and as already mentioned above, a number of Aboriginal communities in the Northern Territory have chosen not to use local government under Northern Territory law as the mechanism for the legal organisation of their community. In some cases they have

used an incorporated association or trading association under Northern Territory law[5] or have sought incorporation under Commonwealth law.[6] For present purpose, this is of limited relevance, as this Paper is only concerned with the possible constitutional entrenchment of local government and not with constitutional recognition of other forms of community organisation. However it should be noted that there are currently 30 incorporated associations in the Northern Territory established under either Commonwealth law (4 Associations) or Northern Territory law (26 Associations) which are treated as local government bodies for the purposes of local government funding arrangements.

(k) In some quarters it has been suggested that there could be some legal doubt as to whether local government under a Territory law is capable of operating on Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act* 1976. The Committee notes that the Northern Territory Government has taken the view that local government is capable of operating on Aboriginal land and has acted accordingly. The Committee is of the view that this is one area where there should be no doubt. This may be able to be resolved in any arrangements for the patriation of the *Aboriginal Land Rights (Northern Territory) Act* 1976 to the new State as a new State law.

3. New South Wales

(a) Part 8 of the NSW Constitution recognises the system of local government in that State, but the detail is left to State legislation. Thus while local government generally has constitutional status as the third sphere of government, the existence, continuance and powers of particular Councils are dependant on State legislation.

(b) A copy of Part 8 is in Appendix 3.

4. Victoria

(a) The *Victorian Constitution Act* 1975 was amended by the Constitution *(Local Government) Act* 1988 to insert a new Part IIA to give constitutional status to Local Government. It gives a somewhat greater measure of protection than NSW to an existing local government Council, providing that it cannot be dismissed except by an Act of Parliament relating to that Council.

(b) Part IIA can only be changed by an Act of Parliament by an absolute majority of members in both houses of that Parliament.

(c) A copy of Part IIA is at Appendix 4.

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5 see the *Associations Incorporation Act.*

6 see the *Aboriginal Councils and Associations Act 1976.*

5. Queensland

(a) The *Constitution Act* of Queensland was amended by the *Constitution Act Amendment Act* 1989, to insert sections 54—56. These give a measure of constitutional protection to existing Councils, requiring any dissolution of a Council to be confirmed by motion in the State Parliament. It also requires notice of any bill in the Parliament which will affect local government to be given to the Local Government Association.

(b) These new provisions are entrenched, in the sense that a bill for the abolition of local government in the State must be passed at a State referendum.

(c) A copy of these sections is at Appendix 5.

6. South Australia

(a) The *Constitution Act of South Australia* was amended by the *Constitution Act Amendment Act*, 1980, to insert a new Part IIA in the Constitution on Local Government. It is in similar terms to that of NSW. It is also entrenched in the sense that an amendment to Part IIA requires an absolute majority of all members of both houses of Parliament.

(b) A copy of Part IIA is at Appendix 6.

7. Western Australia

(a) The *Constitution Act* of WA was amended in 1979 to insert a new Part IIIB in the Constitution in terms somewhat similar to that of NSW.

(b) A copy of Part IIIB is at Appendix 7.

8. Tasmania

(a) The *Constitution Act of Tasmania* was amended by *the Constitution Amendment (Recognition of Local Government) Act* 1988 to insert a new Part IVA in the Constitution on Local Government. It entrenches the division of the State into municipal areas such that this division cannot be altered unless the Local Government Advisory Board under the *Local Government Act* so recommends.

(b) A copy of Part IVA is at Appendix 8.

D . OPTIONS

1. General

(a) Local government has had a long and proud history in Australia. In earlier times, it exercised a wide range of local functions and powers at a time when central government was not so all encompassing as it is today. Many of its essential functions were gradually taken over by the States in the interests of uniformity and efficiency. But local government survived in Australia and remains strong in most places. It continues to exhibit four main characteristics of democratic government, namely:

* it is multi-functionary;

* it exercises autonomy in its legal decision making;

* it imposes and collects its own taxes or rates;

* it is comprised of elected representatives.

(b) However because of local government's subordinate constitutional position, there was and still largely is potential for having its position as the third sphere of government eroded, reducing its powers and limiting its discretions.

(c) There are clear arguments for retaining local government in Australia as an independent sphere of government. It is that level of government that is closest to the citizen and hence is usually more accessible to the citizen. There are strong arguments that purely local issues requiring a decision are best resolved at the local level. Its existence accommodates the view that says that it is desirable to have the greatest possible degree of decentralisation in the business of government.

(d) If anything, local government has increased in importance since federation in Australia. This has been assisted by the allocation by the Commonwealth through the States and the Northern Territory to local government of a portion of Commonwealth financial grants. Much of the Australian landmass is subject to local government, although this applies to only a small proportion of the area of the Northern Territory.

(e) Constitutional entrenchment offers one way of securing a measure of protection to local government. However the value of such a method of protection depends upon the nature and scope of the constitutional provisions and the degree to which they are entrenched in a constitution.

(f) Matters that could be considered for constitutional entrenchment in a new constitution for the Northern Territory include the status of local government as the

third sphere of government, the protection of local government councils against arbitrary dismissal, the guaranteeing of a central core of powers and functions to local government or at least a requirement of consultation before any change to those powers and functions, the guarantee of direct franchise for local government elections and the protection of local government boundaries.

(g) As to the issue of the degree of entrenchment, the Committee has already expressed the view that the new constitution for the Northern Territory should be entrenched, in that it should only be able to be changed by a successful referendum of Northern Territory voters. It follows that if a decision is taken that local government is to be given constitutional status in a new Northern Territory constitution, it will acquire a real measure of protection which will be difficult to alter later.

(h) On one view, this might be considered to have disadvantages. The rigid nature of any such constitutional entrenchment would prevent later changes by Parliament by ordinary legislation where thought necessary or desirable. On one view, such flexibility is desirable to ensure an adequate level of supervision by the State concerned. The opposite view is that such rigid provisions are necessary to protect the constitutional status and autonomy of local government and to prevent changes by ordinary State legislation which may be perceived as being detrimental to local government.

(i) It is noticed that any such perceived disadvantages have not dissuaded the States from taking action to constitutionalise local government in their own State constitutions, although the extent of the protections thereby conferred varies from State to State, as discussed above.

(j) There may in fact be good arguments from a State perspective for entrenching local government in a State constitution. By doing so, local government is confirmed as being within the overall State structure, even if with a degree of autonomy. This should indicate to the Commonwealth that it is not a matter for which the Commonwealth has any direct constitutional responsibility. Given the protection of State constitutions contained in section 106 of the Australian Constitution, this tends to confirm local government as a State responsibility. The fact that local government is protected by all State constitutions also provides a reason as to why there may be no need for a change to the Australian Constitution on this subject.

2. Particular Northern Territory Considerations

(a) As indicated in the Committee's Discussion Paper,[7] the fact that local government has not yet been extended to most of the area of the Northern Territory, and the

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[7] 1987. Northern Territory Legislative Assembly Select Committee on Constitutional Development, *Discussion Paper on A Proposed New Constitution for the Northern Territory* - Legislative Assembly of the Northern Territory, Darwin: Part R; and see also Appendix 2.

sparse population of much of the Northern Territory, are factors that must be taken into account in any proposal to constitutionalise local government in a new Northern Territory constitution. It might be thought as a result that there should be no right to a grant of local government. Rather, a decision should be taken by the Northern Territory Government in each case where a new grant of local government is sought as to whether that grant is justified in the particular circumstances of that case. This is the current position under the *Local Government Act*.

(b) On the other hand, once local government is established in a locality in the Northern Territory, there is then a question whether it should receive a measure of constitutional protection in any new Northern Territory constitution.

(c) There may be a view that the desirability of such constitutional protection may not be as great in the Northern Territory as elsewhere in Australia. This may in part be indicated by the relatively small population of the Northern Territory, and as a consequence, the small number of electors for each seat of the Northern Territory legislature (presently the Legislative Assembly). This means that, by and large, the members of that legislature are more accessible to the electors they represent and arguably those members are more able to remain in touch with local issues. Whether as a result this diminishes the importance of, or the need for, local government as an autonomous third sphere of government in the Northern Territory, is a matter for consideration.

(d) If local government is seen as one avenue for granting a greater measure of autonomy for Aboriginal communities and as a suitable vehicle (but not necessarily the sole vehicle) for implementing a form of self-determination within the overall framework of the Northern Territory, then the arguments for constitutional entrenchment of local government may acquire more force. Depending on the extent of entrenchment, this should ensure that the Aboriginal autonomy thereby conferred cannot be altered by an ordinary Act of the Northern Territory Parliament.

(e) The Committee wishes to assess the strength of feeling in support of local government in the Northern Territory as part of assessing whether there is a need for any such constitutional protections.

3. Constitutional Options

(a) The simplest form of any constitutional entrenchment would be to merely recognise local government in the Northern Territory in its new constitution as the third sphere of government, but to leave the detail to ordinary Northern Territory legislation. This is the position in the States of NSW and WA. This would in effect create a non justiciable form of recognition, in that there would be no right to a grant of local government in a particular case, and once granted, there would be no constitutional guarantee of its continuance or powers.

(b) This position could be supplemented by a constitutional provision that there must continue to be a system of local government in the Northern Territory, and that there can be no change to this position without a constitutional amendment. This is basically the position in South Australia, in that case requiring an absolute majority of both houses of State Parliament for there to cease to be a system of local government in that State. A similar provision in Queensland requires a State referendum to abolish the system of local government in that State.

(c) A further provision in the Queensland Constitution could also be considered; that is, that any Bill in the State Parliament which affects local government is to be referred to the Local Government Association first for consultation before passage.

(d) None of these provisions would, if incorporated in a new Northern Territory constitution, offer specific guarantees to a particular local government body in the Northern Territory.

(e) The Committee has already indicated the difficulties in the Northern Territory with any conferral of a right to a grant of local government where none presently exists. The Committee notes that no State constitution confers such a right.

(f) However once such a grant has been made, there are a range of possibilities for entrenching guarantees in respect of the particular body. These include

(i) A statement of general competence for any local government body to act for the peace, order and good government of its area in relation to the powers, functions, duties and responsibilities conferred upon it, providing presumably that it does not act inconsistently with any Northern Territory law. Any change in this respect by a later Northern Territory law could be required to be subject to prior consultation with local government in some way.

There is a related question whether there is a need to give the existing local government provisions some additional constitutional status, such that they cannot be unilaterally altered later by an ordinary Act of Parliament to change the powers, functions, duties or responsibilities of local government. This is discussed below in relation to organic laws.

(ii) A statement that the Northern Territory law on local government shall provide for members of local government to be directly elected. This in turn raises the question whether this should be mandatory for Aboriginal community organisations that desire a method of selection of their representatives more in line with their customs.

(iii) A provision limiting the power of the State to dismiss the members of an existing local government body and to appoint an administrator. Such a provision is contained in the Victorian Constitution, requiring an Act of Parliament for any dismissal. In Queensland, the State Constitution requires

a motion in State Parliament to confirm the dissolution of a council. It would be possible to go further and require a public inquiry before any dismissal, as advocated by the Northern Territory Local Government Association, and possibly also a local referendum, presumably with a power of suspension in urgent cases of misconduct in the interim.

(iv) A provision protecting the boundaries of a local government body from change. In the Tasmanian Constitution, this requires a prior recommendation of the Local Government Advisory Board.

(g) A further option for consideration is whether the whole or part of the existing *Local Government Act* should become an organic law under the new Northern Territory constitution, such that it could not thereafter be changed by an ordinary Act of Parliament. Instead it would require a special majority of the Parliament for any change to that Act, in accordance with the general provisions for organic laws. This would have the value of entrenching the status of local government generally in the Northern Territory, possibly as an alternative to incorporation of local government in the new Northern Territory constitution. It would not of itself, however, provide guarantees to particular local government bodies beyond the provisions of the Act.

(h) A further option again, calculated to protect particular local government bodies and to ensure their autonomy, would be to give that particular grant of local government some constitutional status as part of any wider grant of self-determination under an agreement entered into between the Northern Territory Government and the relevant Aboriginal body.[8] This could be seen as of particular value to Aboriginal communities contemplating this form of local organisation as part of any wider local or regional agreement.

(i) There may be other options for constitutional recognition. The Committee would welcome comments and suggestions.

(j) The alternative is no constitutional recognition at all, leaving local government to be dealt with by ordinary Northern Territory legislation.

(k) The Committee stresses that it has not yet decided to favour any of these options, and invites comments and submissions.

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[8] 1993. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. Discussion Paper No. 6 - *Aboriginal Rights and Issues Options for Entrenchment*, Legislative Assembly of the Northern Territory, Darwin: 33.

E . APPENDIX 1

F . LIST OF PERSONS AND ORGANISATIONS WHO HAVE COMMENTED ON THE DISCUSSION PAPER ON A PROPOSED NEW CONSTITUTION FOR THE NORTHERN TERRITORY

LIST OF PERSONS AND ORGANISATIONS WHO HAVE COMMENTED ON THE DISCUSSION PAPER ON A PROPOSED NEW CONSTITUTION FOR THE NORTHERN TERRITORY

	Tennant Creek Town Council
	Alice Springs Town Council
	Women's Advisory Council
	NT Local Government Association
	Tangentyere Council Inc.
	Tangentyere Council Inc.
Kevin ANDERSON	NT Community Government Association
Susan ANDRUSZKO	Darwin City Council
John ANTELLA	NT Local Government Association
John ANTELLA	Darwin City Council
Kevin FLETCHER	
Jim FORSCUTT	
Phillip HOCKEY	
Earl JAMES	
Sheila KEUNEN	
R G KIMBER	
Noel LYNAGH	NT Local Government Association
Mick MARTIN	Jabiru Town Councils
Francis PERCEVAL	
Ken PORTER	
Sue SCHMOLKE	Women's Advisory Council
Jim THOMSON	
Wendy WHILEY	Women's Advisory Council, Groote Eylandt

G . APPENDIX 2

H . COMMUNITY GOVERNMENT - OPTIONS

EXTRACT FROM: 1993. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. Discussion Paper No. 6 - *Aboriginal Rights and Issues Options for Entrenchment*, Legislative Assembly of the Northern Territory, Darwin: 34-37.

"5. Community Government - Options

(a) The Committee, in its first Discussion Paper on a "Proposed New State Constitution for the Northern Territory" (October 1987) made the point that because of the special situation of the Northern Territory, there should be no obligation to have a form of local government (including community government) for all parts of the Territory. Any decision to extend local government was appropriately a matter for the new State in consultation with the local residents.

(b) On the other hand, arguably there should be a right to apply for a grant of local government (including community government) and to have the application fairly considered. Such a right could be constitutionally entrenched.

(c) Once local government (including community government) is established in any area, the question arises of whether that form of government should be constitutionally entrenched in some way, such that it cannot be arbitrarily abolished or its powers reduced. The Committee in its first Discussion Paper raised the question of constitutional entrenchment, but pointed out that this must take into account the special situation of the Territory and the associated difficulties of administration. Subject to these considerations, the Committee said it favoured some constitutional provisions for the recognition of local government in the new State.

(d) An alternative to entrenchment of the position of local government (including community government) in a new constitution, or perhaps as a supplement to it, would be to provide for an Organic Law - as described in Item D.2.2.1, (f) above - on local and community government, to be made by the new State Parliament after negotiations with Aboriginal and other communities directly involved. Such a law could be made subject to special amendment requirements.

(e) There may also be grounds for reviewing the present provisions of the Local Government Act as to community government, to minimise Territory or new State governmental controls and oversight and to maximise the powers of community government within its agreed charter and functions. This has been discussed above. Whether such amendments would make community government a more acceptable option for Aboriginal self-determination is a matter for consideration.

(f) Public comments have already been received by the Committee on the matter of community government and its constitutional entrenchment. Mr Kevin Anderson of the former Northern Territory Community Government Association stated:

"I would say that the introduction of local government into remote communities in the Northern Territory has been one of the greatest initiatives taken by the government of the day in the Northern Territory, supported by the opposition. We believe that it has given people in remote communities an unprecedented opportunity

to manage their own affairs and, obviously, our concern with any constitution of a future Northern Territory state is that it should protect the powers which have been devolved through legislation which incorporates remote communities as legitimate partners in the third tier of government. For that reason, our submission states that we would like to see any future constitution enshrine protection clauses of local government generally in the Territory. We do not wish to see any discrimination in terms of the way the community government is treated, as opposed to municipal government. We see them both as legitimate types of local government and do not subscribe to any distinction which sees municipal government as a superior form of 'traditional' local government. We believe that all local governing bodies in the Territory, whether in remote locations or in major municipalities,, are equal under the law. We would like to see that guaranteed in the constitution.

Our submission argues for constitutional recognition in accordance with 5 principles, these being:

- *general competence and autonomy for each local government body to act for peace, order and good government in its area;*
- *a secure financial basis;*
- *a proper recognition of the elected member's role;*
- *protection from dismissal of individual local government bodies without public inquiry; and*
- *due consultation prior to any changes to powers, functions, duties, responsibilities and financial resources."*

(g) On the other hand, Tangentyere Council Inc. expressed the view that it was not happy with the community government option, as the powers retained by the Territory Government were considered to be unacceptable. In its submission to the Committee, the Council raised concerns about the physical overlap of Aboriginal forms of local government with ordinary forms of municipal local government. It concluded:

- *Therefore it is submitted that if the Committee wishes to proceed with formulating a constitutional recognition of local government it should include specific reference to the situation of Aboriginal Town Campers by:*
- *ensuring that an Aboriginal local governing body can exist within another local governing body's boundary;*
- *to overcome any doubt about the limitations of the Racial Discrimination Act, specifically allow the Aboriginal local governing bodies to limit membership to Aborigines;*
- *specifically allow aspects of the constitutions of Aboriginal local governing bodies which are drafted according to Aboriginal tradition to override requirements on other local governing bodies for democratic elections where there is a conflict."*

(h) It would not be possible, by a Territory or new State constitution or by a Territory or new State law, to exclude the operation of the Aboriginal Councils and Associations Act 1976 of the Commonwealth in the Territory. Even if community government was to be given a

more secure constitutional position in the Territory, some Aboriginal communities may still prefer to establish or continue their legal organisation under that Act.

(i) A more secure constitutional position for community government will not of itself necessarily guarantee a much greater degree of local autonomy for Aboriginal communities. However it does provide one framework upon which such greater autonomy can be constructed by other means.

(j) The Committee would welcome comments on the nature and extent of any constitutional guarantees of local government (including community government) and how these may be best designed to facilitate a real measure of autonomy for Aboriginal communities.

(k) Where community government is established over an area of Aboriginal land, issues arise as to how the powers and functions of that community government can be reconciled with the powers and functions of the traditional Aboriginal owners and custodians of that land. The Committee would also welcome comment on this issue.

(l) The Committee also welcome comment on whether there are any alternatives to community government for Aboriginal communities (other than under the Aboriginal Councils and Associations Act). Options include a possible expanded role for the traditional Aboriginal owners and custodians of Aboriginal land, as well as possible new forms of government on a local or regional basis. The latter was recently advocated in the Final Report of the Legislation Review Committee of Queensland relating to the "Management of Aboriginal and Torres Strait Islander Communities" (November 1991)."

I . APPENDIX 3

J . NEW SOUTH WALES

NEW SOUTH WALES

PART 8 - LOCAL GOVERNMENT

Local Government

51. (1) There shall continue to be a system of local government for the State under which duly elected or duly appointed local government bodies are constituted with responsibilities for acting for the better government of those parts of the State that are from time to time subject to that system of local government.

(2) The manner in which local government bodies are constituted and the nature and extent of their powers, authorities, duties and functions shall be as determined by or in accordance with laws of the Legislature.

(3) The reference in subsection (2) to laws of the Legislature shall be read as a reference to laws that have been enacted by the Legislature, whether before or after the commencement of this section, and that are for the time being in force.

(4) For the purposes of this section, the Western Lands Commissioner, the Lord Howe Island Board, and an administrator with all or any of the functions of a local government body, shall be deemed to be local government bodies.

K . APPENDIX 4

L .

M . VICTORIA

VICTORIA

Constitution (Local Government) Act 1988

Purpose of Act.

1. The purpose of this Act is to—

(a) ensure that there continues to be a democratically elected system of local government in Victoria; and
(b) identify the areas in which Parliament can make laws relating to local government; and
(c) provide that a Council cannot be dismissed except by an Act of Parliament.

Commencement.

2. This Act comes into operation on a day to be proclaimed.

Part IIA of *Constitution Act* 1975 substituted.

3. For Part IIA of the *Constitution Act* 1975 substitute:

"PART IIA—LOCAL GOVERNMENT"

Local government.

"74A. (1) There is to continue to be a system of local government for Victoria consisting of democratically elected Councils having the functions and powers that the Parliament considers are necessary to ensure the peace, order and good government of each municipal district.

(2) An elected Council does not have to be constituted in respect of any area in Victoria—

(a) which is not significantly and permanently populated; or

(b) in which the functions of local government are carried out by or under arrangements made by a public statutory body which is carrying on large-scale operations in the area."

Local government laws.

"74B. (1) Parliament may make any laws it considers necessary for or with respect to—

(a) the constitution of Councils; and
(b) the objectives, functions, powers, duties and responsibilities of Councils; and
(c) entitlement to vote and enrolment for elections of Councils; and
(d) the conduct of and voting at elections of Councils; and
(e) the counting of votes at elections of Councils; and

(f) the qualifications to be a Councillor; and
(g) the disqualification of a person from being or continuing to be a Councillor; and
(h) the powers, duties and responsibilities of Councillors and Council staff; and
(i) any other act, matter or thing relating to local administration.

(2) A Council cannot be dismissed except by an Act of Parliament relating to the Council.

(3) Parliament may make taws for or with respect to—

(a) the suspension of a Council; and
(b) the administration of a Council during a period in which the Council is suspended or dismissed; and
(c) the re-instatement of a Council which has been suspended; and
(d) the election of a Council if a suspended Council is-reinstated; and
(e) the election of a Council where a Council has been dismissed."

N . APPENDIX 5

O . QUEENSLAND

QUEENSLAND

LOCAL GOVERNMENT

54. System of local government. (1) There must be and continue to be a system of local government in Queensland under which duly elected local government bodies are constituted each being charged with the good rule and government of that part of Queensland from time to time subject to that system of local government and committed to the jurisdiction of that local government body.

(2) The manner in which local government bodies are constituted and the nature and extent of their powers, authorities, duties and functions are as determined by and in accordance with the laws of the Parliament of Queensland.

(3) Nothing in this section affects the operation of laws of the Parliament of Queensland with respect to the carrying out of the powers, authorities, duties and functions of a local government body by a person or persons appointed where—

(a) the council of the local government body has been dissolved;

or

(b) the council of a local government body is unable to be duly elected,

until such time as the council of a local government body has been duly elected.

(4) The reference in subsections (2) and (3) to the laws of the Parliament of Queensland is a reference to the laws enacted by that Parliament, before or after the passing of the Constitution Act Amendment Act 1989, and for the time being in force.

(5) For the purposes of this section a Joint Local Authority Board and any person or persons appointed to carry out the powers, authorities, duties and functions of a council of a local government body as an Administrator are deemed to be the council of a local government body.

55. Manner of appointing persons to exercise powers authorities, duties and functions of local government (1) A body constituted or deemed to be constituted by one or more persons appointed (but not duly elected) after the commencement of the *Constitution Act Amendment Act 1989* to carry out the powers, authorities, duties and functions of a council of a local government body is not a council of a local government body appointed in accordance with section *54* (3)(a) and, notwithstanding the provisions of any Act, such person or persons is or are not authorized to carry out powers, authorities, duties and functions of a council of a local government body unless the power conferred by law to dissolve the council of a local government body constituted or deemed to be constituted by such person or persons has been exercised in accordance with this section.

(2) The instrument that purports to dissolve the council of a local government body or a copy of the instrument must be tabled in the Legislative Assembly within 14 sitting days after the instrument has been made and, to the extent that it so purports, the instrument takes effect merely a suspension

from office of the duly elected members of the council of the local government body concerned until the Legislative Assembly, or the motion of the member of the Assembly for the time being responsible for local government in the State, within a period of 14 sitting days from such tabling confirms the dissolution of the council of the local government body.

(3) Where the Legislative Assembly confirms the dissolution of the council of a local government body, the instrument takes effect according to its terms as a dissolution of the council of the local government body concerned.

(4) Where the Legislative Assembly—

(a) refuses to affirm the motion referred to in subsection (2);
or

(b) fails, within the period of 14 sitting days, to affirm the motion referred to in subsection (2),

the instrument to dissolve the council of the local government body thereupon ceases to have effect and—

(c) the suspension from office of the duly elected members of the council of the local government body thereupon ceases and they are reinstated in their respective offices; and

(d) the appointment of the person or persons appointed to exercise the powers, authorities, duties and functions of the council of the local government body thereupon terminates.

(5) Any person or persons appointed (but not duly elected) according to law to carry out the powers, authorities, duties and functions of a council of a local government body whose members are, pursuant to this section, suspended from office is or are authorized to carry out those powers authorities, duties and functions during the period of suspension.

(6) In this section, the expression "local government body" means a body constituted by duly elected members and changed with carrying on the functions of local government.

56. Procedure on Bills affecting local government. (1) A member of the Legislative Assembly who is to be in charge of the passage in the Assembly of a Bill that is the responsibility of the member of the Assembly for the time being responsible for local government in the State and that, if enacted by the Parliament, would affect local government bodies generally, or any of them, if he considers compliance with this subsection is practicable in the particular case must cause a summary of the Bill to be given to an association that represents local government bodies in the State a reasonable time before he (or a member on his behalf) moves for leave of the Assembly to bring in the Bill.

(2) A Bill for an Act whereby the whole of the State would cease to have a system of local government that conforms to that prescribed by section 54 (1) must not be presented to Her Majesty or the Governor for assent unless, on a day, appointed by Order in Council, no earlier than six months and no later than one month before the Bill is introduced in the Assembly a proposal that

the State should cease to have such a system of local government has been approved by majority vote of the electors of the State voting on the proposal.

A Bill assented to consequent upon its presentation in contravention of this subsection is of no effect as an Act.

When such proposal is submitted to the electors of the State the vote must be taken in such manner as the Parliament prescribes.

Any of the electors of the State is entitled to bring proceedings in the Supreme Court for a declaration, injunction or other remedy to enforce the provisions of this subsection either before or after a Bill of a kind received to in this subsection is presented for assent.

In this subsection "electors of the State" means the persons qualified to vote at a general election of members of the Assembly according to the provisions of the *Elections Act 1983-1985* or of any Act in substitution therefor.".

P . APPENDIX 6

Q . SOUTH AUSTRALIA

SOUTH AUSTRALIA

Constitutional guarantee of continuance of local government in this State

64A. (1) There shall continue to be a system of local government in this State under which elected local governing bodies are constituted with such powers as the Parliament considers necessary for the better government of those areas of the State that are from time to time subject to that system of local government.

(2) The manner in which local governing bodies are constituted, and the nature and extent of their powers, functions, duties and responsibilities shall be determined by or under Acts of the Parliament from time to time in force.

(3) No Bill by virtue of which this State would cease to have a system of local government that conforms with subsection (1) of this section shall be presented to Her Majesty or the Governor for assent unless the Bill has been passed by an absolute majority of the members of each House of Parliament.

R . APPENDIX 7

S . WESTERN AUSTRALIA

WESTERN AUSTRALIA

Constitution Act 1889

PART IIIB — LOCAL GOVERNMENT

Elected local governing bodies

52. (1) The Legislature shall maintain a system of local governing bodies elected and constituted in such manner as the Legislature may from time to time provide.

(2) Each elected local governing body shall have such powers as the Legislature may from time to time provide being such powers as the Legislature considers necessary for the better government of the area in respect of which the body is constituted.

Certain laws not affected

53. Section 52 does not affect the operation of any law —

(a) prescribing circumstances in which the offices of members of a local governing body shall become and remain vacant; or

(b) providing for the administration of any area of the State —

(i) to which the system maintained under that section does not for the time being extend; or

(ii) when the offices of all the members of the local governing body for that area are vacant; or

(c) limiting or otherwise affecting the operation of a law relating to local government; or

(d) conferring any power relating to local government on a person other than a duly constituted local governing body.

T . APPENDIX 8

U . TASMANIA

TASMANIA

PART IVA

LOCAL GOVERNMENT

45A—(1) There shall be in Tasmania a system of local government with municipal councils elected in such manner as Parliament may from time to time provide.

(2) Each municipality shall have such powers as Parliament may from time to time provide, being such powers as Parliament considers necessary for the welfare and good government of the area in respect of which the municipality is constituted.

45B—Section 45A does not affect the operation of any law—

(a) prescribing circumstances in which the offices of members of a municipal council shall become and remain vacant;

(b) providing for the administration of any area of the State—

(i) to which the system referred to in that section does not for the time being extend; or

(ii) when the offices of all the members of the municipal council for that area are vacant; or

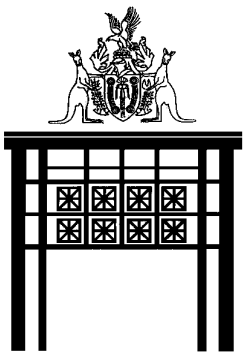
(c) conferring any power relating to local government on a person other than a municipal council.

45C— Any division of Tasmania into municipal areas shall not be altered unless the Local Government Advisory Board established by the *Local Government Act 1962* so recommends.

Chapter 3

Information Paper No. 1

Options for a Grant of Statehood



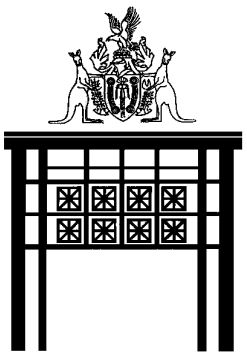
LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Select Committee on Constitutional Development

Information Paper No. 1

Options for a Grant of Statehood

SEPTEMBER 1987



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Select Committtee on Constitutional Development

INFORMATION PAPER NO. 1

Options for a Grant of Statehood

SEPTEMBER 1987

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CONTENTS **Page No.**

INFORMATION PAPER NO. 1

OPTIONS FOR A GRANT OF STATEHOOD

A INTRODUCTION

(1) 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 terms of reference were made when the Committee was reconstituted on April 28, 1987 following the March 1987 election. The main portion of the Committee's current terms of reference is set out in F below. The 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 provision for the Select Committee to inquire into and to report and make recommendations on the issues, conditions and procedures pertinent to the entry of the Northern Territory into the federation as a new State, this being in addition to its main task in relation to a new State constitution.

(2) Discussion and Information Papers

(a) The Select Committee has decide to issue a number of discussion papers for public comment on matters arising from the terms of reference. The discussion papers will deal with the legislature, executive, judiciary of the new State and other matters. The purpose of these papers is to invite public comment with a view to assisting the committee to make recommendations on a new State constitution.

(b) The Select Committee is also desirous of issuing information papers to the public on issues relevant to a grant of Statehood to the Northern Territory by way of background to assist members of the public in formulating their views on the various matters of importance. This information paper is one such paper.

(c) This information paper looks at the methods available for making a grant of Statehood and indicates which is the preferred method. Clearly the method of grant is of considerable importance and will inevitably affect the preparation of the new State constitution. Public comment is invited on this paper.

B OPTIONS FOR GRANT OF STATEHOOD

1. A new State can be created in 2 ways -

   (a) By Act of the Commonwealth Parliament under section 121 of the Commonwealth Constitution, under which Statehood may be granted on terms and conditions, including the extent o£ representation in either House of the Parliament, as it thinks fit.

   OR

   (b) By national referendum to alter the Commonwealth Constitution under section 123 by way of a grant of Statehood.

2. Copies of both sections 121 and 123 are set out in D below.

3. A national referendum! of Australian electors is not mandatory for the section 121 method, but is for the section 12e method. The record of success with national referendums in the past has not been very good. For either method, legislation must be passed by the Commonwealth Parliament.

4. Either method gives rise to some constitutional uncertainties in relation to the representation of the new State in the Commonwealth Parliament in particular, the uncertainties arise from section 24 and the second last paragraph of section l28 of the constitution.

5. In addition, the section l21 method gives rise to doubts as to the scope of the Commonwealth's power to impose terms and conditions on a new State that might place that new State in an inferior constitutional position compared with existing States.

6. It is beyond the scope of this paper to enter upon a detailed consideration of these doubts and uncertainties.

7. There is no mechanism for seeking an advisory opinion of the High Court to clarify the constitutional doubts and uncertainties surrounding either method. However a High Court decision could be sought upon the passage of the relevant Statehood legislation by the Commonwealth Parliament but before its commencement.

8. Advice has been sought from Professor Howard on the question of the most appropriate method for the grant of Statehood. He has advised that the only practical option is to pursue the section 121 method and hope for co-operation in seeking to resolve the serious doubts about its meaning by bringing an action for a declaration in the High Court before any proposed legislation comes into operation.

9. The Select Committee is of the view that the section 121 method is the preferred option. Planning for a grant of Statehood should proceed on this basis.

C BASIC STEPS TO STATEHOOD

1. Given the critical constitutional role of the Commonwealth in effecting any grant of Statehood, it is clearly desirable to obtain in advance a public commitment from the Commonwealth Government to support the proposed grant.

2. Such a commitment is unlikely to be forthcoming unless there is demonstrable support in the Northern Territory for the proposed grant. To this end, the Select Committee concurs with the holding of a Territory referendum within a reasonable time to a.ssess support for the proposal generally. Work already in progress in the Territory on the proposed grant should not be held up pending the holding of this referendum, but the continuance of that programme would be ccnditional ultimately upon a successful referendum result.

3. The Commonwealth should give an early undertaking to broaden the Northern Territory (Self-Government) Regulations to ensure that Ministers and the Legislative Assembly of the Territory have the necessary authority to enable planning to proceed with a view to seeking a grant of Statehood.

4. The Select Committee envisages that, two concurrent courses of action will take place in preparing for grant of Statehood:

   (a) the preparation of a new State constitution; and

   (b) the negotiation and conclusion of a Memorandum of Agreement between the Territory and Commonwealth Governments, incorporating the terms and conditions of the proposed grant.

5. The implementation of (a) above is already proceeding through the Select Committee. Part A of each of the Discussion Papers outlines and endorses the three stages for adopting a new State constitution. These are:

   (i) the Committee will prepare a draft constitution for presentation to the Legislative Assembly. Options, where necessary, will be included.

   (ii) the draft constitution will be put before a Territory Constitutional Convention. The Convention will be established by appropriate action of the Legislative Assembly and will include broad representation from across the Northern Territory community. .It will receive the recommendations of the Legislative Assembly following debate on the Committee's report, will discuss the proposals and ratify a final draft of the constitution.

   (iii) the constitution as ratified by the Convention will be submitted to a referendum of Northern Territory electors for approval. This will be a subsequent referendum to that mentioned in paragraph 2 above.

The ability to legally adopt a new State constitution is dependant upon a specific grant of powers by the Commonwealth.

6. Concurrently with the preparation of the new State constitution, the Select Committee envisages that the Territory and Commonwealth Governments will negotiate and conclude a Memorandum of Agreement, incorporating the terms and conditions of the grant of Statehood; for implementation under section 121 of the Constitution.

This should provide for the new State to be placed in substantially the same constitutional position as existing States. It should not deal with matters more appropriately dealt with in the new State constitution.

7. Consultation with the existing States will also be necessary to seek their support to the proposed grant of Statehood, including in particular the proposals for representation of the new State in the Commonwealth Parliament and as to financial arrangements.

8. Once a new State constitution has been adopted and approved at a referendum, and the Memorandum of Agreement has been concluded, proposed legislation should be placed before the Commonwealth Parliament to give effect to the grant of Statehood. That legislation should accurately reflect the terms and conditions of the Memorandum of Agreement and should refer to, but not set out in full, the new State constitution. That constitution should be part of new State law and not be part of a Commonwealth Act.

9. In the event that the legislation, as finally enacted by the Commonwealth Parliament, contains any significant variations from the terms and conditions contained in the Memorandum of Agreement, the legislation should provide that the grant of Statehood should not take effect until proclaimed, and that the proclamation is conditional upon a further referendum of Territory electors being carried. This would ensure that the Commonwealth Parliament did not impose any terms and conditions on the new State that were not acceptable to Territorians. In the absence of any such significant variations, the legislation should come into operation automatically on a specified date.

10. The Commonwealth Parliament should contemporaneously enact other legislation consequential upon the grant of Statehood to make any necessary changes to other existing legislation. A summary of possible changes to Commonwealth legislation is contained in F below.

11. Amendments to some Territory legislation may also be necessary, with effect from the grant of Statehood.

12. Prior to the grant taking effect, it will be necessary to hold elections for the new State representatives in both Houses of the Commonwealth Parliament (possibly in conjunction with a federal election) and to make any appointments that are to take effect on and from the grant (for example, the appointment of the new State Governor. Savings provisions can deal with the position of those officers and employees whose positions are to be continued on and from the grant (for example, judicial officers, public servants, etc). The question

whether the Legislative Assembly is to be continued as the Parliament of the new State remains to be determined (see Discussion Paper No. l).

D SELECTED PROVISIONS FROM THE COMMONWEALTH CONSTITUTION

"7. The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.

But until the Parliament of the Commonwealth otherwise provides, the Parliament of the State of Queensland, if that State be an Original State, may make laws dividing the State into divisions and determining the number o£ senators to be chosen for each division, and in the absence of such provision the State shall be one electorate.

Until the Parliament otherwise provides there shall be six senators for each Original State. The Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six: senators.

The senators shall be chosen for a term of six years, and the names of the senators chosen for each State shall be certified by the Governor to the Governor-General."

"24. The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.

The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:-

(i) A quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators:

(ii) The number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

But notwithstanding anything in this section, five members at least shall be chosen in each Original State."

"121. The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit."

"128. This Constitution shall not be altered except in the following manner:-

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the house of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State and Territory qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half' the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

In this section, "Territory" means any territory referred to in section one hundred and twenty-two of this Constitution in respect of which there is in force a law allowing its representation in the House of Representatives . "

E POSSIBLE CHANGES TO COMMONWEALTH LEGISLATION

It is clear that a number of items of Commonwealth legislation will require amendment upon a grant of Statehood to the Northern Territory.

It is not possible at this stage to be precise about the nature and extent of these amendments. This is because -

(a) final policy positions have not yet been arrived at and agreed with the Commonwealth in the various key areas affected by Commonwealth legislation and relating to the grant;

(b) Commonwealth legislation may change prior to the grant.

It is, however, possible to identify most of the legislation and to indicate in broad terms the nature of the amendments which may be required. The legislation is listed below.

1. Northern Territory (Self-Government) Act 1978 and Regulations

Probable complete repeal of this Act. Query, whether certain institutions and officers established or appointed under that Act will be continued on and from the grant of Statehood.

2. Northern Territory Acceptance Act 1910

Possible consequential amendments to this Act only, to reflect the change in status from a Commonwealth territory to a new State.

3. Aboriginal Land Rights (Northern Territory) Act 1976

On current proposals contained in the paper "Land Matters upon Statehood", this Act would be patriated to the new State as part of its law.

4. Petermann Aboriginal Land Trust (Boundaries) Act 1985

Possible consequential amendments may be required to this Act as a result of 3 above only.

5. Coastal Waters (Northern Territory Powers) Act 1980 Coastal Waters (Northern Territory Title) Act 1980

Possible repeal of these 2 Acts. Query amendments to the Coastal Waters (State Powers) Act 1980, the Coastal Waters (State Title) Act 1980 and the Seas and Submerged Lands Act 1973.

6. National Parks and Wildlife Conservation Act 1975 and Regulations

On current proposals contained in the paper "Land Matters upon Statehood", this Act would require substantial Amendment to reflect the transfer of National Parks in the Northern Territory from Commonwealth to new State ownership and control and to terminate the special application of this Act to the Northern Territory.

7. Environment Protection (Alligator Rivers Region) Act 1978 and
Environment Protection (Northern Territory Supreme Court) Act 1978

These Acts to be repealed with appropriate savings.

8. Northern Territory (Commonwealth Lands) Act l980

Consequential amendment to this Act may be desirable to reflect the fact that the relevant land is now vested in the new State.

9. Lands Acquisition Act 1955
Lands Acquisition (N.T. Pastoral Leases) Act 198l

Consequential amendments to these Acts are required to treat the Northern Territory in the same way as the States. It may be necessary to amend the latter Act to reflect the fact that the relevant land is now vested in the new State.

10. Atcmic Energy Act 1953

Under this Act, unlike the States, ownership of uranium and other prescribed substances in the Northern Territory remains with the Commonwealth. This Act would need substantial amendment to reflect the current proposals that ownership and control of uranium and other prescribed substances in the Territory are to be transferred to the new State, together with the Ranger licence granted under the Act.

11. Koongarra Project Area Act 1981

Possible consequential amendments may be required to this Act as a result of 10 above.

12. Commonwealth Electoral Act 1918
Representation Act 1983

Substantial amendments will be required to these Acts to facilitate representation of the new State in both Houses of the Commonwealth Parliament and to terminate existing Territorial representation. This includes a consideration as to whether Cocos (Keeling) Islands and Christmas Island Territories, which are presently included with the Northern Territory for federal electoral purposes, are to be incorporated as part of the new State, thus enabling a continuation of these electoral arrangements, or are to be incorporated with the A.C.T. or some other State, or are to be left as separate territories.

13. Referendum (Machinery Provisions) Act 1984

Consequential amendments to this Act to reflect the status of the new State for the purpose of referendums.

14. Ashmore and Cartier Islands Acceptance Act 1933

On current proposals, this Act probably would require repeal with appropriate savings, to enable the Territory to be incorporated in the new State.

15. Judiciary Act 1903

Consequential amendments to this Act to reflect the status of the new State and to delete special provision applicable to the Northern Territory and to the Northern Territory .Supreme Court, and to provide for Appeals from the Supreme Court of the new State to the High Court on the same basis as other State Supreme Courts.

16. Family Law Act l975

Amendment of this Act to ensure that the present jurisdiction of the Supreme Court of the Northern Territory is carried over to the Supreme Court of the new State.

17 Bankruptcy Act 1966

Consequential amendments to this Act as to the jurisdiction of the Courts of the new State.

18. Acts Interpretation Act 1901

Consequential Amendments to this Act to ensure that any reference to a State in Commonwealth laws prima facie includes the new State.

19. Commonwealth Places (Application of Laws) Act 1970

Possible amendment of this Act to make it clear that it extends to the new State.

20. Ombudsman Act 1976
Administrative Appeals Tribunal Act 1975
Administrative Decisions (Judicial Review) Act 1977

Appropriate amendments to these Acts to delete entirely their application to new State laws and actions thereunder.

21. States Grants (General Revenue) Act 1985 (or its successor)
Commonwealth Grants Commission Act 1973

Consequential amendments to these Acts to place the new State in the same position as the existing States, subject to any special financial arrangements negotiated upon Statehood.

22. Financial Agreement Acts

Amendments to this Act or a new Act to facilitate the acceptance of the new State as a party to the Financial Agreement and the Loan Council.

23. Payroll Tax (Territories) Act 19.71
Payroll Tax (Territories~ Assessment Act 1971
Commonwealth Authorities (Northern Territory Pay-roll Tzx) Act 1979

Consequential amendments may be required to these Acts.

24. Superannuation Act 1976 and Regulations

It is assumed that there will still be a number of officers employed by the new State, being officers formerly employed by the Northern Territory; or by Northern Territory authorities, who will continue as "eligible members" in the C.S.S. by arrangement with the Northern Territory, they not having elected to join NTG PASS. This will necessitate the continued operation of the Superannuation Act 1976 and Regulations in respect of these officers in the new State, with appropriate amendments to reflect this continued operation.

25. Public Service Act 1922
Commonwealth Teaching Service Act 1972

Depending on the decisions made as to the continuing status of compulsorily transferred employees as from the grant of Statehood, amendments may be required to the relevant provisions of the above two Acts.

26. Conciliation and Arbitration Act 1904

Depending on the decisions taken as to the industrial powers of the new State, it will probably be necessary to amend this Act in conjunction with the repeal of section 53 of the Northern Territory (Self-Government) Act 1978.

27. Advisory Council for Inter-Governmental Relations Act 1976

Consequential amendments to this Act to reflect the change in status to a new State.

28. Transfer of Prisoners Act 1983

Consequential amendments to this Act to reflect the status of the Northern Territory as a new State.

29. Australian National Airlines Act 1945

Given some of the services of Australian Airlines are provided in reliance upon the territories power in Section 122 of the Constitution, the continued operation or those services may depend on appropriate amendments to this Act or other Commonwealth legislation, or alternatively on legislative support by the new State.

30. Air Navigation Acct 1922 and Regulations

Consequential amendments may be required to this legislation to reflect the status of the new State.

31. Air Accidents (Commonwealth Government Liability) Act 1963

Possible consequential amendments to this Act.

32. Commonwealth Motor Vehicles (Liability) Act 1959

Consequential amendments to this Act required.

33. Railways Standardisation (South Australian Agreement) Act 1949

This Act incorporates an agreement with South Australia to construct a standard gauge railway to Darwin. It parallels a similar agreement scheduled to the Northern Territory, Acceptance Act 1910 (see above). Depending on the arrangements made with the Commonwealth at Statehood, it may be necessary to amend this Act.

34. Human Rights and Equal Opportunity Commission Act 1986

Consequential amendments only to this Act to reflect the status of the new State.

35. Tertiary Education Commission Act 1977

Depending on decisions taken as to the status of the University College on Statehood, amendments may be required to this Act.

F TERMS OF REFERENCE

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

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

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

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

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

(I) legislative power;

(II) executive powers; and

(III) judicial powers; and

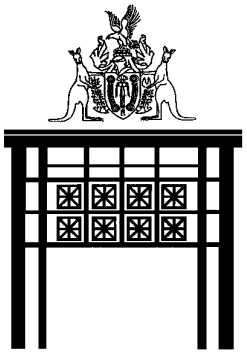
(IV) the method to be adopted to have a draft new State constitution approved by or on behalf of the people of the Northern Territory; and

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

CHAPTER 4

INFORMATION PAPER NO. 2

ENTRENCHMENT OF A NEW STATE CONSTITUTION



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Select Committee on Constitutional Development

INFORMATION PAPER NO. 2

ENTRENCHMENT OF A NEW STATE CONSTITUTION

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

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INFORMATION PAPER NO. 2

Entrenchment of a New State Constitution

A paper issued for the information of the public by the
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CONTENTS

INTRODUCTION

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 terms of reference were made when the Committee was reconstituted on 28 April 1987 following the March 1987 election. The main portion of the Committee's current terms of reference is set out in Part E below. The 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 provision for the Select Committee to inquire into and to report and make recommendations on the issues, conditions and procedures pertinent to the entry of the Northern Territory into the federation as a new State, this being in addition to its main task in relation to a new State constitution.

Discussion and Information Papers

(a) The Select Committee decided to issue a number of discussion papers for public comment on matters arising from the terms of reference. Two such discussion papers have already been issued, 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.

The purpose of these papers is 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) The Select Committee has also issued an abbreviated paper, with illustrations, based on the first of those discussion papers, entitled "Proposals for a new State Constitution for the Northern Territory".

(c) The Select Committee is also desirous of issuing information papers to the public on issues relevant to a grant of Statehood to the Northern Territory by way of background, to assist members of the public in formulating their views on the various matters of importance. The Select Committee has already issued one such information paper, as follows:

* Information Paper No. 1, Options for a Grant of Statehood.

(d) This further information paper constitutes the second in this series, and deals with the matter of how a new State constitution can be entrenched; that is, how such a constitution can be made in a manner that limits the powers, whether of the Commonwealth or of the new State, to amend it in the future. The purpose of this paper is not to discuss the type of provisions that could be entrenched.

(e) To some extent, the subject of entrenchment has already been discussed in the first of the discussion papers mentioned above, dealing with a proposed new State constitution for the Northern Territory. The subject of entrenchment in relation to the legislature was dealt with in Part E paragraph 3 of that paper. That same subject, in relation to the judiciary, was dealt with in Part O of that paper. The subject of entrenchment generally was dealt with in Parts P and Q of that paper. The Committee also dealt with the recognition of local and community government in a new State constitution (Part R), the entrenchment of guarantees of Aboriginal ownership of land and possibly other Aboriginal rights in the new State constitution (Part S) and invited comment on the possible inclusion of other guarantees of human rights in that constitution (Part T). It is not proposed to deal further with these matters in this paper, although public comment is still invited upon them.

The Merits of Entrenchment

(a) A "constitution" is the fundamental legal document of any social or political entity, governing its existence and operation and establishing its rights and obligations and those of its members. In the Select Committee's view, there is considerable merit in the suggestion that such a fundamental law should not be easy to change. Rather, it is a law that in some respects is more akin to Aboriginal traditional law, a law that should continue into the future. It should not be subject to the whim of the legislators at any particular future point in time who might perceive some need for change for some limited or narrow purpose.

(b) The Select Committee took the view in the first discussion paper that, generally speaking, it favoured some degree of entrenchment of the whole of the new State constitution. The constitution should be a document that is accorded special status in the law and should only deal with those matters considered to be of vital importance in the functioning of the new State and its institutions. Matters of lesser importance should be relegated to ordinary legislation.

(c) The Select Committee added that entrenchment should comprise or include the requirement that any proposed change be submitted to and be supported by a specified majority of new State electors at a referendum. It may be considered appropriate that for certain provisions, any change may require more than a simple majority of voters in any referendum. Certain minimal provisions would be necessary dealing with referendums in the new State constitution (Part P, paragraph l(d) and (e) at pages 82-83).

(d) The mechanism of entrenchment may be thought more important to some sections of the Territory public than others. For example, the Select Committee is aware that Aboriginal people maintaining traditional lifestyles are particularly concerned about their land, law, language and religion. Entrenchment in a constitution can provide a legal method of safeguarding these interests and removing them from the control of politicians.

Double Entrenchment

(a) The Select Committee considers it to be desirable that, whatever the method chosen of amending the new State constitution (i.e. referendum or some other method), that method should itself be entrenched in the new State constitution. This is known as "double entrenchment". It ensures that amendment of the constitution by some other method cannot be achieved by changing the amendment mechanism itself. This is in effect the position under the Commonwealth Constitution.

(b) On the basis of the Select Committee's views referred to above, the provision in the new State constitution dealing with the method of amendment should be such that both it and the rest of that constitution are only capable of being changed by a referendum of new State electors.

B. THE COMMONWEALTH CONSTITUTION AND ENTRENCHMENT

1. Prior to federation in 1901, each of the Self-governing Australian colonies had their own constitutions, with powers (subject to Royal reservation and assent) of amendment vested in the colonial legislatures. No referenda were required for change.

2. Section 106 of the Commonwealth Constitution was designed to continue those colonial constitutions at federation as State constitutions, subject only to the provisions of the Commonwealth Constitution. Section 106 provides -

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

3. It is to be observed that section 106 also continues, subject to the Commonwealth Constitution, the constitution of a new State as at its admission or establishment.

4. In addition to section 106, the Commonwealth Constitution in sections 107 and 108 also continued the powers of the Colonial Parliaments that became States and their colonial laws. However these sections may not apply to the Northern Territory if it becomes a State, as it is doubtful that the Northern Territory has the status of a "colony" for the purposes of these sections.

5. It seems clear that section 106 is intended to have a continuing effect in relation to State constitutions. That is, the protection given by that section continues to operate in respect of a State constitution during the continued existence of that State.

6. However there are a number of legal questions concerning the correct interpretation of section 106, the answers to which are not clear, as follows :-

   (a) Does the section only operate to guarantee State constitutions that were in operation prior to the grant of Statehood? Put another way, does the section protect new State constitutions that only became legally operational at the time of the grant of Statehood, or is it necessary for those constitutions to have been in operation before that time?

   (b) Does the section only guarantee State constitutions contained in documents that are so labelled as the "Constitution" of those States? In other words, is the label critically important for the purpose of the section, or does the section extend to protect any new State laws of a "constitutional" nature?

   (c) Are all provisions contained in State constitutions guaranteed by the section, or is the guarantee limited to only certain types of provisions. For example, does the section only extend to provisions dealing with the basic framework of the principal State institutions? Alternatively, does the section go further to protect, for example, provisions in State constitutions dealing with State powers or limitations on State powers?

(d) What is the effect of the reference in the section which makes it "subject to this (the Commonwealth) Constitution"? Does this mean that the section and the protection it affords to State constitutions can be overridden by the exercise of the legislative powers of the Commonwealth Parliament?

7. The greatest concern is of course the danger that the Commonwealth Parliament might seek to legislate after Statehood in a way that directly affects the provisions of the new State constitution. There is judicial authority to support the view that, section 106 notwithstanding, the Commonwealth Parliament can validly enact legislation of general application under some federal head of legislative power which only incidentally affects a State constitution. How far the Commonwealth Parliament can go beyond this is not clear. It is to be noted that the main source of federal legislative power in section 51 of the Commonwealth Constitution is itself expressed to be "subject to this Constitution".

8. The latter issue in paragraph 7 would be particularly important if a State constitution entrenched certain provisions, such as Aboriginal traditional ownership of land, and the Commonwealth Parliament sought, by ordinary legislation enacted under a federal head of legislative power, to alter the effect of those provisions. Although arguably the Commonwealth legislation would be invalid, the issue is not beyond doubt.

9. On one legal view, an effect of section 106 is to incorporate State constitutions into the Commonwealth Constitution as if they were all part of the same document. If this view is correct, it would seem to follow that State constitutions could be amended by successfully using the national referendum procedure in section 128 of the Commonwealth Constitution. There is a further question whether this gives rise to the inference that State constitutions can only be amended by such a national referendum or, as contemplated in the wording of section 106 itself, by the mechanism for amendment contained in those State constitutions.

10. The comments in the recent High Court decision in Re Tracey; Ex.pt. Ryan (1989) 63 A.L.J.R. 250 per Mason C.J., Wilson and Dawson JJ. at page 258 (second column) and Brennan and Toohey JJ. at page 269 (first column) and page 271 (second column) see also Gaudron J. at page 282, (second column) suggest that reliance may be placed on section 106 to strike down Commonwealth laws that interfere with State judicial powers and their exercise, and not just the State judicial institutions themselves. This reinforces the view that State constitutions, including provisions therein that relate to the exercise of powers by the essential constitutional organs of that State and the protection of civil rights which those organs assure to citizens, are protected by section 106.

11. Apart from section 106, the High Court has developed a doctrine by implication from the Commonwealth Constitution designed to protect the States. This doctrine prevents the Commonwealth Parliament from legislating in a way that discriminates against States and their agencies by placing on them special burdens or disabilities, or that operates to destroy or curtail their continued existence or their capacity to function as governments. However it is not clear how far the protection of section 106 extends beyond this doctrine. This doctrine has been successfully relied upon in two court cases. There has been less reliance by the existing States on section 106 in litigation.

12. There is a further consideration in relation to new States only. Once a new State is admitted or established under section 121 of the Commonwealth Constitution, and the Commonwealth Parliament has passed the necessary legislation granting Statehood and fixing the terms and conditions of the grant, there is a view that the Commonwealth Parliament may not thereafter be able to legislate to alter these constitutional arrangements. The power under section 121 can only be exercised at the time of the grant and once exercised it is said to be exhausted. This may provide added support for the view that the Commonwealth Parliament could not, by subsequent ordinary legislation, affect the constitutional provisions applicable to the new State. However, as no new State has ever been created in Australia before, the correctness of this view is uncertain.

13. The matters raised in this Part were referred for a legal opinion to Professor Colin Howard. A copy of his opinion dated 29 June 1989 is set out in Schedule 1 to this Information Paper. A copy of subsequent correspondence to and from Professor Howard clarifying the application of two recent cases is set out in Schedule 2 to this Information Paper.

C. EFFECT OF ENTRENCHMENT ON NEW STATES

1. It is clear that a new State can be legally bound by its constitution, including any special entrenchment provisions (such as those requiring a referendum for change) contained in that constitution. The rights and obligations contained in a new State constitution would as a result be binding on the new State, its Parliament and Government, and any breach of those rights and obligations would be enforceable in the courts in accordance with the terms of that constitution.

2. This binding effect referred to in paragraph 1 above may be achieved by one or more of the following methods -

   (a) Under section 6 of the Australia Act 1986, which is binding on both existing and new States (see the definition of "State" in section 16(1) of that Act to include new States), a law made by the Parliament of a State as to the constitution, powers and procedures of that Parliament is of no force and effect unless it is made in the "manner and form" required by a law made by that Parliament.

   If the constitution of the new State had effect as a law of the Parliament of the new State, and if that constitution also required a successful referendum for any change before that change was carried into effect by legislation of the Parliament, it would be a "manner and form" provision within section 6. As such, the new State and its Parliament would be legally bound to observe the referendum requirement.

   (b) Such entrenchment may also be binding on a new State as a consequence of the wording of section 106 of the Commonwealth Constitution (see Part B above), in that it provides that the new State constitution should continue "until altered in accordance with the Constitution of the (new) State".

   (c) Further, Commonwealth legislation granting Statehood under section 121 of the Commonwealth Constitution could itself make it clear that the new State was bound by the terms of its own constitution.

D. EFFECT OF ENTRENCHMENT ON COMMONWEALTH

1. As indicated in Part B, the extent to which the Commonwealth, its Parliament and Government, are bound by the provisions of State constitutions is a matter of some legal uncertainty. This uncertainty extends to the constitution of a new State created under section 121 of the Commonwealth Constitution although, as discussed above, there may be an added reason to support a limitation on Commonwealth power in this regard.

2. There would at least be some reticence on the part of the Commonwealth to seek to override entrenched new State constitutional provisions, given these doubts and the risks inherent in any resulting litigation.

3. The Commonwealth would also have to consider the effect of any constitutional guarantees already contained or implied in the Commonwealth Constitution. Thus, for example, if the entrenched provisions included guarantees of Aboriginal traditional ownership of land and if the Commonwealth sought to modify those provisions, there would be the added consideration that the Commonwealth must provide just terms if its legislation results in the acquisition of property in terms of section 51(xxxi) of the Commonwealth Constitution. The effect of the doctrine already referred to in Part B paragraph 11 would also have to be considered.

4. Whether a future Commonwealth Parliament would ever seek to override entrenched provisions in a new State constitution of course involves not only legal considerations, but also political and other considerations. Given the methodology proposed by the Select Committee for the adoption of a new State constitution in the Northern Territory, involving substantial involvement and support from within the Territory community, there may well be strong resistance to any such Commonwealth intrusion. This resistance may be reflected in any increased federal Parliamentary representation that the new State may have.

5. If the above factors are not considered to be adequate, and if it desired to remove all doubts as to the inability of the Commonwealth to directly interfere with a new State constitution, the only solution presently available would be to remove those doubts by way of an amendment to the Commonwealth Constitution as a consequence of a successful national referendum. For several reasons, the Select Committee does not at this stage favour a national referendum on Statehood (see Information Paper No. 1, Part B at pages 3-4), or for that matter on any particular aspect of Statehood, although it invites comment on this matter.

E. TERMS OF REFERENCE

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

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

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

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

A. A constitution for the new State and the principles upon which it should be drawn, including;

(I) legislative power;
(II) executive powers;
(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.

SCHEDULE 1

Memorandum of Advice

from Prof. Colin Howard

Northern Territory Statehood

1. I am asked to advise the Select Committee of the Legislative Assembly of the Northern Territory of Australia on Constitutional Development, a bipartisan committee of the Legislative Assembly. I am indebted to instructing solicitor for the background material, discussion paper and citations which accompany the brief.

2. In general terms the advice sought is on the extent to which the constitution of a new State, formerly the Northern Territory but admitted to Statehood under s.121 of the Commonwealth Constitution, would be constitutionally protected from subsequent Commonwealth legislation. My advice is to include consideration of six topics specifically mentioned in the brief.

3. It is apparent from the background materials that the Committee's advice to the Legislative Assembly in due course may include recommendations that a number of the provisions of the proposed State constitution for the Northern Territory be entrenched, the method of entrenchment envisaged being by way of referendum requiring a specified majority for its passage. As I understand the matter, the cause of concern to which my advice is to be directed is whether such entrenched provisions would be vulnerable to being overridden by Commonwealth legislation enacted within the scope of the legislative powers of the Australian Parliament. I am nevertheless not asked to confine my advice to entrenched provisions but to consider generally the situation of a new State constitution with respect to subsequent Commonwealth legislation. This being the nature of the problem, it is convenient to proceed in the first instance by taking up the particular matters specially mentioned in the brief.

4. The extent to which s.106 of the Commonwealth Constitution protects a new State constitution. For convenience of reference I reproduce the text of s.106.

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

5. I agree with instructing solicitor that although the primary purpose of s.106 appears to have been to preserve continuity between the pre-federation colonial constitutions of the original States and their post-federation State constitutions, except to the extent that they were necessarily altered by the fact of federation, the section is not well drafted to express this purpose. In support of that interpretation, and I agree, instructing solicitor cites Victoria v. Commonwealth (1971) 122 C.L.R. 353, 371-2, 386; New South Wales v. Commonwealth (1975) 135 C.L.R. 337, 372; and Western Australia v. Wilsmore (1981) 33 A.L.R. 13, 16.

6. In para. 3 of my previous advice dated 31 October 1986 I expressed the opinion, which I still hold, that no particular significance is to be attached to the contrast between the words "admission" and "establishment" which appear in both s.121 and s.106 of the Commonwealth Constitution. Nevertheless it serves to emphasize that the power to admit new States encompasses not only new States formed within Australia but also new States added by territorial expansion of Australia. In the latter category New Zealand was the most prominent possibility at the time of federation. In my view, in such a case s.106 has basically much the same constitutional effect on the new State as it did on the original States. That is to say, the section has the effect of continuing the pre-federation constitution of the new State except to the extent that it is necessarily modified by the fact of becoming a State and, to some extent perhaps, by terms and conditions imposed under s.121.

7. It will be recalled also from my previous advice, passim, that the terms and conditions available under s.121 do not extend to imposing upon a new State any restriction which would preclude it from being properly described as, or from having the status of, a State within the meaning of the Commonwealth Constitution. I am still of the same opinion on this point too and observe in the present context that it harmonizes with the apparent intention and effect of s.106 as well as of s.121.

8. The question becomes therefore whether a similar mode of interpretation can be extended to the remaining category, the case of a new State being formed from an area within Australia, specifically in this instance the Northern Territory. One immediate difference from the preceding situations is that the concept of the constitution which is notionally to be continued is of itself less clear was than the case with the original States or would be the case with such a separate body politic as New Zealand. In those instances the prospective new State already has a reasonably well defined constitution which derives from a history wholly independent of the Commonwealth. That is not the case with the Northern Territory.

9. Whatever the precise content of any former constitution which is continued by virtue of s.106, the argument is strong that the intention and effect of s.106 is to preserve at least part of that constitution independently of the Commonwealth Constitution; and see the citations in para. 5 above. It is not possible to apply this line of thought to the Northern Territory because constitutionally it exists in consequence only of the Commonwealth Constitution and of Commonwealth legislation thereunder. There is nothing constitutionally independent of those sources to continue. In this situation it can be argued that the establishment of the former Territory as a State cannot alter the legislative quality of its pre-State constitution: it was Commonwealth legislation before Statehood, hence its continuation must mean that it remains Commonwealth legislation after Statehood. If this argument is correct, the new State's constitution in such a case can be further argued to be subject not merely to amendment by referendum under s.128 (a danger which may be shared by all States notwithstanding s.106) but by an ordinary exercise of Commonwealth legislative power.

10. In my opinion such an argument overlooks a fundamental feature of admission as a new State. I refer again to my previous advice. The interpretation of s.121 which I there advanced, and which I still believe to be the correct understanding of that section, depended ultimately upon

the meaning to be attached to the use of the word "State" not merely in s.121 but throughout the Commonwealth Constitution. Section 106 is expressly subject to the Constitution and is therefore subject to s.121, which includes no such limitation. It follows that the reference to States in s.106 must be read in the same sense as in s.121.

11. It follows further that any argument that after its establishment as a State the new State, whatever its origins, remains subject to Commonwealth legislative power to any greater extent than any other State is inconsistent with s.121 and therefore also with s.106. It follows further that the Northern Territory (Self-Government) Act 1978 cannot be validly continued by the Commonwealth Parliament as an incident of the admission of the Northern Territory to Statehood because that statute is manifestly inadequate for, and indeed in many respects inconsistent with, the status of being a State of the Australian federation.

12. Some of the difficulties that have been thought to arise out of s.106, as applied to the Northern Territory case, are the consequence, as with s.121, of its interpretation having been approached in too narrow a context. Discussion has hitherto been much conditioned by the unique situation of the original States in light of their former status as colonies. The constitutional consequences which have flowed from that status, particularly the peculiar and often obscure post-federation relation of the original States with the United Kingdom, have no relevance to the application of s.106 to the admission to Statehood of the Northern Territory.

13. The problem presented by the pre-federation colonial constitutions of the original States was how, and to what extent, to cut down the operation of those constitutions to a point where, as separate bodies politic, the status of the original States became consistent with the terms of the Commonwealth Constitution. By contrast the problem presented by the Northern Territory, in order that its constitution after admission to Statehood should be consistent with s.106, is not how to cut it down to Statehood but how to enlarge it up to Statehood. This can hardly be done by continuing anything. In my view it can be done only by designing an entirely new document, consistent with the status of Statehood, which upon the admission or establishment of the Northern Territory as a State becomes, in the words of s.106, "the Constitution of the State".

14. Although I agree with instructing solicitor that s.106 would be clearer if it referred to "as from" instead of "as at" the establishment of the new State, I see no particular difficulty in ensuring that a wholly new constitution becomes the instrument which is treated technically as having been continued by s.106. In all probability all that is needed is to include in the Commonwealth statute which enacts it an expression to the effect that the constitution is deemed to be the constitution of the new State as at the moment of its admission or establishment. Alternatively the wording could be taken from s.121 and refer to the new constitution becoming the new State's constitution immediately "upon" its admission or establishment. Yet another possibility is to combine the two into some such composite expression as "upon and at" admission or establishment.

15. Under this head therefore I arrive at the following conclusions:-

(i) the appropriate Commonwealth power to establish the new State and enact all matters incidental thereto derives from s.121 of the Commonwealth Constitution;

(ii) the appropriate mode of proceeding is to enact the constitution of the new State as an original document expressed to take effect simultaneously with the coming into existence of the new State;

(iii) such a constitution would receive the same protection from s.106 of the Commonwealth Constitution as the constitution of any other State in the matter of its alteration;

(iv) and, if it be relevant, it is undesirable to complicate the matter by any reliance on s.122 of the Commonwealth Constitution because (a) there is no need to do so, and (b) it is unlikely that a law for the government of a prospective new State is properly characterized as also a law for the government of a territory.

16. The extent to which the implied immunity of the States from discriminatory Commonwealth legislation protects a new State constitution.

The origin and basis of this rule are set out in Howard, Australian Federal Constitutional Law, 3rd ed., at pp. 173-180. Its origin is the judgment of Dixon J. in the State Banking Case, Melbourne Corporation v. Commonwealth (1947) 74 CLR 31, 82-4. His views were effectively adopted by the rest of the court in the following year in the Bank Nationalization Case, Bank of New South Wales v. Commonwealth (1948) 76 CLR 1. Since then the existence of the rule has not been doubted but the High Court has declined several invitations to apply it (Howard, 180-183).

17. There is neither reason nor authority to suggest that a new State would be any less entitled than an original State to rely on the discrimination immunity. My understanding of s.121 similarly supports that view. The rule is that the Commonwealth, by virtue of the very fact of federation, cannot enact a law which singles out the States, or presumably any one or more of them, in a manner which restricts or controls them in the exercise of their executive government powers. So much is well established in principle. It does not however fully answer the question asked of me, which is directed to protection of the whole of the new State's constitution, not only its executive power.

18. In its own terms, and on the facts of the cases cited in paragraph 16 above, the discrimination rule does not extend so far. Yet in some circumstances it surely must apply. By definition a Commonwealth law which purports to amend a State constitution in a manner which restricts, controls or prohibits the exercise of a State power of any description must be a discriminatory law, for it cannot apply to the population at large.

19. If this be correct, the question next arises whether a State, by entrenching certain rights or guarantees in its constitution in the manner previously referred to, can exclude the operation of a Commonwealth law on subject matters otherwise within its scope. In the case of a new

State of the description now in contemplation this question is less complicated than with an original State because there is no need for uncertainty about what is its constitution.

20. A distinction has to be drawn between a Commonwealth law which purports to operate directly upon the entrenched clause in the State constitution and a law which operates upon a different subject matter in a manner which effectively nullifies the safeguard of the entrenched clause. In light of both s.106 and the discrimination doctrine it seems clear that a purported law of the former variety would be ineffective. A law of the latter variety of general application however would be prima facie effective pursuant to the relevant legislative power of the Commonwealth, supported if necessary by the inconsistency rule of s.109.

21. Entrenched guarantees in a State constitution would normally be construed as limited in their operation to the State legislature. The case we are considering however does suggest other possibilities. They arise out of the novel character of the conversion of the Northern Territory into a new State and the accompanying need to draft an entirely new constitution.

22. One is that if clear guarantees on such matters as those mentioned in my instructions, namely, land rights, sacred sites, customary law, religion and language, were included in the new constitution in a suitably entrenched form they could be said to go the essential character of the new State: the type of society within the general Australian framework which that particular State wished to be. From this it could be argued that a Commonwealth law which effectively negated any of the entrenched guarantees would be invalid to that extent in its application to the new State. In that form the argument would have to rest upon implication, either as an extension of the existing discrimination doctrine or as a new but closely analogous doctrine.

23. Alternatively the same result might be reached by relying on the terms and conditions clause of s.121. It can be said that it is contrary to the clear import of s.121, particularly taken in conjunction with s.106, that the Commonwealth, having neglected opportunity before the admission of the new State to require modifications to its proposed constitution, should subsequently be able to enact legislation which effectively nullifies an important part of that constitution.

24. A further alternative is the argument that the Commonwealth legislation in question directly contravenes s.106, and is to that extent invalid, because it prevents the State constitution from continuing as at the establishment of the State. The natural assumption, if one reads s.106 without such a problem as the present in mind, is that the word "continue" has exactly the same range of reference as the word "altered". It is apparent from s.128 that the word "alter" in the Commonwealth Constitution means formally amend. Hence the most obvious application of "continue" is to preserve State Constitutions from formal amendment by the Commonwealth, except possibly under s.128. This is not necessarily its only application.

25. Unquestionably a great deal has changed since 1901 in the practical operation of the State constitutions insofar as that bears upon relations between the Commonwealth and the States and their respective powers. The changes owe much to High Court interpretation and to the operation of s.109 of the Commonwealth Constitution. But owing to the vagueness of the

concept of the constitutions of the original States, and the absence from them of any such guarantees as those under discussion, the present question has never arisen. That question is whether formally entrenched guarantees in a State constitution, which formed part of that constitution as at the establishment of the State and operate in restriction of its legislative powers, are protected by s.106 from being set at naught by Commonwealth legislation on the ground that such an event would be a discontinuance of the State constitution even though accomplished without formal amendment.

26. Notwithstanding anything said by Isaacs J. in R.v. Barger (1908) 6 CLR 41, 83, and A-G for Queensland v. A-G for the Commonwealth (1915) 20 CLR 148, 172, in a different era of constitutional interpretation, the matter is not settled in favour of Commonwealth legislative power by the "subject to this Constitution" clause of s.106. The main source of relevant Commonwealth legislative power is s.51, which is similarly subject to the Constitution. The two sections cannot be subject to each other, so the two reservations cancel each other out, cf Australian Railways Union v. Victorian Railways Commissioners (1930) 44 CLR 319, 392, Dixon J.

27. Neither does it assist to contend that a State cannot extend constitutional protection to a matter merely by including it in its Constitution Act. Guarantees of the kind under consideration are unquestionably proper objects of constitutional protection. Doubts which have arisen about the scope of constitutional protection accorded to the original States by s.106, cf Evatt J. in Stuart-Robertson v. Lloyd (1932) 47 CLR 382, 491-2, and NSW v. Bardolph (1934) 52 CLR 455, 459-60, have been a natural consequence of uncertainty about what s.106 means when it refers to the constitutions of the original States. Such doubts need not arise in the present case.

28. Although, therefore, the argument that Commonwealth laws which effectively nullified entrenched guarantees in the constitution of the new State would be in direct conflict with s.106 is novel, and for that reason devoid of authority, the question which it raises is by no means unimportant or the suggested solution far-fetched. I include it in this advice as a serious contention without suggesting, of course, that it would necessarily carry the day any more than the arguments outlined in paragraphs 22, 23 and 24 hereof.

29. Under this head therefore I arrive at the following conclusions:-

(i) the constitution of a new State would be protected to at least the same extent as the constitutions, whatever they may be thought to be, of the original States by the discriminatory legislation doctrine

(ii) in practice the degree of protection is likely to be greater, especially if that doctrine is combined with s.106 of the Commonwealth Constitution, because matters which in character can be legitimately regarded as having constitutional status, including guarantees of various kinds, can be expressly included in the new constitution as at the establishment of the new State;

(iii) and although the consequence of my advice under both this and the previous head is that the new State constitution could not be formally amended by Commonwealth legislation, it is a novel question, on which no firm conclusion can be drawn, whether guarantees included in the new State constitution, being of a character appropriate for constitutional protection, can be effectively nullified in practice by Commonwealth laws of general application.

30. Whether the constitution of a new State would be in a different position in relation to the discrimination doctrine from the constitutions of the original States. For the most part I have answered this question already under the previous head, the answer being no. There is nothing in the reasoning of the State Banking Case, especially the judgment of Dixon J, to suggest that any distinction be drawn for this purpose between original and new States. If anything, the reasoning implies the contrary because, as I set out at length in my previous advice, the word "State" in s.121 means that there is no such thing as second class Statehood.

31. Other relevant constitutional provisions of doctrines. I am not asked to deal with the entrenchment process itself but I express my agreement with instructing solicitor that there is no reason to doubt that it would be effective for the end in view. Section 128 of the Commonwealth Constitution may be argued to be relevant also on the theory that power to amend State constitutions can be found in it, e.g., by first removing or amending s.106 or, alternatively, on the basis that State constitutions are within, or at all events are now within, the expression "This Constitution" in s.128.

32. I confess that amending a State constitution in reliance on s.128 strikes me as a highly theoretical exercise, unless perhaps as a technique for effectuating an uncontentious co-operative change of some description in constitutional arrangements. It is inconceivable that any attack on a State constitution by way of s.128 would have the smallest prospect of success. Even in the unlikely event that it passed it might well founder on the discrimination doctrine.

33. I have concluded earlier in this advice that both s.106 and the discrimination doctrine protect State constitutions, original or new, from direct amendment by Commonwealth legislation. I agree with instructing solicitor (p.9 of his paper on s.106) that if the view (to which he refers at pp.7-8) that State constitutions are incorporated in the Commonwealth Constitution is correct, the consequence is that s.128 operates as yet a further protection.

34. Timing of new constitution. I have adverted to this matter in paragraph 14 above.

35. Draft Information Paper No. 2. The only statement which I believe needs correction is the sentence in paragraph 10 on pp.9-10 that the doctrine has been successfully relied upon in several cases. The only clear instance that I can recall is the State Banking Case. With reference to paragraph 4, p.6, in my view ss.107-8 have no application to the present case for the reason given.

36. I so advise.

Sgd/-

Latham Chambers
29 June 1989

Prof. C. Howard

SCHEDULE 2

3 August 1989

Professor C Howard
Owen Dixon Chambers
205 William Street
MELBOURNE VIC 3000

Dear Professor Howard

Re: Northern Territory Statehood

I am grateful for your advice in this matter dated 29 June 1989.

May I please refer to the implied immunity of States doctrine with which you have dealt.

Do you think that the decision in Queensland Electricity Commission v Queensland (1985) 159 C.L.R. 192 could be regarded as another example of a case where the High Court has applied this doctrine to strike down Commonwealth legislation? I refer to your comment in paragraph 35 of your opinion.

Do you feel that the comments in Re Tracey, Ex.pt. Ryan (1989) 63 A.L.J.R. 250 per Mason C.J., Wilson and Dawson JJ. at page 258 (second column) and Brennan and Toohey JJ. at page 269 (first column) and page 271 (second column) (see also Gaudron J. at page 282, second column) justify any additions to the draft information paper? These comments suggest that reliance may be placed on section 106 of the Constitution to strike down Commonwealth laws that interfere with State judicial powers and their exercise, and not just the State judicial institutions themselves. This would seem to reinforce the view that State constitutions, including provisions therein that relate to the exercise of powers by the essential constitutional organs of that State and the protection of civil rights which those organs assure to citizens, are protected by section 106.

I would much appreciate your further comments on these matters.

Yours sincerely

Sgd/
GRAHAM R NICHOLSON
Crown Counsel

Fax 608 8686

C/- Clerk M
Owen Dixon Chambers
205 William Street
MELBOURNE VIC 3000

7 August 1989

Mr G.R. Nicholson
Crown Counsel for the Northern Territory
GPO Box 1722
DARWIN NT 0801

Dear Mr Nicholson,

In response to your letter of 3 August 1989, I thank you for recalling to my attention the Queensland Electricity case. It does indeed provide a further instance of the State immunity doctrine and attracted attention at the time for that very reason. My comment in paragraph 35 of the advice is too widely expressed. It should refer to two clear instances, not one.

I am equally obliged for the citations to Re Tracey. They seem to me to justify the insertion on p.9 of the draft information paper of an additional paragraph immediately following paragraph 9 to take account of them. The wording you use in your letter to me seems to me, with respect, entirely apt save that "This would seem to reinforce" could well be strengthened to "This reinforces".

Yours sincerely

Sgd/-
Colin Howard

Chapter 5

INTERIM REPORT NO. 1

A NORTHERN TERRITORY CONSTITUTIONAL CONVENTION

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

SESSIONAL COMMITTEE ON CONSTITUTIONAL DEVELOPMENT

INTERIM REPORT NO. 1

A NORTHERN TERRITORY CONSTITUTIONAL CONVENTION

FEBRUARY 1995

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Sessional Committee on Constitutional Development

INTERIM REPORT NO. 1

A NORTHERN TERRITORY CONSTITUTIONAL CONVENTION

February 1995

An Interim Report prepared by the
Sessional Committee on Constitutional Development

MEMBERSHIP OF THE COMMITTEE

The Hon. S P Hatton, MLA (Chairman)

Mrs M A Hickey, MLA (Deputy Chairman)

Mr J D Bailey, MLA

Mr M J Rioli, MLA

Mr T D Baldwin, MLA

Mr P A Mitchell, MLA

Committee Staff:

Mr Rick Gray (Secretary)

Mrs Yoga Harichandran (Administrative Assistant)

Mr Graham Nicholson (Legal Adviser)

CONTENTS

A. SUMMARY OF RECOMMENDATIONS

For the convenience of those considering this report the recommendations are consolidated below:

Recommendation 1: (p.10)

The Committee recommends that a Constitutional Convention be held in the Northern Territory.

Recommendation 2: (p.10)

The Committee recommends the enactment of legislation, at the appropriate time, to provide for the establishment of a Convention, to authorise and require it to carry out the task of framing a new constitution for the Northern Territory, that constitution to be adopted at a subsequent Northern Territory referendum, and to enable the Convention to be provided with the necessary powers and resources in order to carry out this task.

Recommendation 3: (p.11)

The Committee recommends not to have a wholly nominated Convention as it is inconsistent with the principle of representative democracy which principle should form the basis of a new Northern Territory constitution.

Recommendation 4: (p.11)

The Committee recommends that at least three quarters of the representatives that are on the Convention be elected and that the remainder be nominated.

Recommendation 5: (p.12)

The Committee recommends that:

1. Northern Territory groups or organisations be represented on the Convention by an appropriate method of nomination, as prescribed in the legislation, such as from the following:

    * Northern Territory Aboriginal Groups (ATSIC Regional Councils in the Northern Territory, Land Councils);
    * Nominees of Northern Territory Local and Community Government, through the Local Government Association of the Northern Territory;
    * Employer Organisations in the Northern Territory;
    * Trade Unions in the Northern Territory;
    * Ethnic Organisations in the Northern Territory;
    * Youth; and
    * Aged.

2. Any failure to nominate should not invalidate the proceedings of the Convention:

Recommendation 6: (p.13)

The Committee recommends that in addition to the other elected and nominated members, the members of this Sessional Committee as at the time of the nomination date for the Convention be members of the Convention, together with the then Chief Minister and Leader of the Opposition.

Recommendation 7: (p.13)

The Committee recommends a system of multi-member electorates.

Recommendation 8: (p.14)

The Committee recommends:

1. a Convention with 10 electorates of 5 representatives to be elected in each; and
2. that an electoral distribution should be carried out within the 20% tolerance rule, and subject thereto, be designed to give some particular emphasis to the interests of non-urban and Aboriginal communities.

Recommendation 9: (p.14)

The Committee recommends that:

1. persons nominating for election to the Convention be required to have resided in the Northern Territory for a period of six months prior to nomination and otherwise be on the roll for elections to the Northern Territory Legislative Assembly; and
2. voters for nominees to the Convention be required to be on the roll for elections to the Northern Territory Legislative Assembly.

Recommendation 10: (p.15)

The Committee recommends that:

1. there not be a fixed maximum number of sitting days for the Convention and that the fixing of a final reporting date toward the end of 1997 should be sufficient; and
2. if the Convention then considers it is getting close to resolution but is not yet able to finalise the draft constitution, it should have power to request an extension of time from the Administrator.

Recommendation 11: (p.16)

The Committee recommends that:

1. the Convention should be charged with preparing and adopting a new Northern Territory constitution;
2. it should be required to meet within the time after the election that is specified in the legislation;

3. the method and procedures whereby the Convention goes about its task should be left to the Convention, provided that the legislation should incorporate an initial set of standing orders to enable it to commence its work, subject to later variation by the Convention;

4. it should be required to meet in public; and

5. a quorum for the Convention should be fixed.

As to sub-recommendation 3 above, Mr Bailey has submitted a dissenting view in that he considers that the voting requirements in respect of issues brought before the Convention should be based on more than just a simple majority and that this requirement should be stipulated in the enabling Act.

Recommendation 12: (p.16)

The Committee recommends that:

1. the Convention be given the capacity to engage a clerk and other officers plus consultants and advisers, who should not have a right to speak or vote in the Convention; and

2. the Convention should, if it so requires, seek the assistance of the staff of the Sessional Committee and such other persons and resources made available by arrangement with the Speaker of the Legislative Assembly.

Recommendation 13: (p.16)

The Committee recommends that an adequate appropriation of funds be made to cover the expenses of the Convention, and that the Convention be subject to normal budgetary requirements, administered through the Legislative Assembly.

Recommendation 14: (p.17)

The Committee recommends that following the adoption of the new Northern Territory constitution that:

1. the Convention be required to report to the Administrator;

2. the report be required to be tabled in the Northern Territory Legislative Assembly and to be published;

3. the Legislative Assembly should then debate that Report, and should have power by resolution to refer any matter back to the Convention for further consideration and report back; and

4. subject thereto, the constitution as adopted should be required to be submitted to a referendum of Northern Territory voters within the time specified in the legislation.

Recommendation 15: (p.17)

The Committee recommends that there should be provision for the making of regulations as to all matters arising under the enabling Act, including as to the detailed method of nomination and election to the Convention and also as to the holding of the subsequent Northern Territory referendum, including the submission of the draft constitution in discreet parts to that referendum if thought appropriate by the Convention.

B. 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 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 and on 27 June 1994, it was against reconstituted with no further change to its terms of reference — see Appendix 1.

(b) The original resolutions were passed in conjunction with proposals then being developed in the Northern Territory for a grant of Statehood to the Northern 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.

2. Purpose of this Interim Report

(a) The Committee is aware that the Chief Minister for the Northern Territory has publicly announced the target date for a grant of Statehood for the Northern Territory of 1 January 2001, the Centenary of Federation. Without necessarily endorsing this target date, the Committee has resolved upon a strategy and timetable for actioning its terms of reference which would facilitate the achievement of that target date, including as to the formulation and adoption of a new constitution for the Northern Territory.

(b) Given the proposals for the establishment of a Territory Constitutional Convention as part of this strategy, and the need for legislation to be drafted at an appropriate time to set up that Constitutional Convention, the Committee has resolved to prepare this Interim Report with its recommendations as to how that Constitutional Convention should be established. This should facilitate the preparation and passage of the necessary legislation.

(c) Before proceeding to a discussion of its specific recommendations, the Committee first considers some background issues as to the use of conventions in Australia and the USA.

3. Discussion and Information Papers

(a) The Committee has prepared and issued a number of Discussion and Information Papers arising from these terms of reference. These included the *Discussion Paper on Representation in a Territory Constitutional Convention*[1], for ease of reference

[1] Northern Territory Legislative Assembly Select Committee on Constitutional Development, 1987, Legislative Assembly of the Northern Territory, Darwin.

called the *"Discussion Paper"* — a copy of which is set out in Appendix 2 of this Interim Report.

(b) That *Discussion Paper* made it clear that both the Northern Territory Government and this Sessional Committee (then a Select Committee) advocated the holding of a Northern Territory Constitutional Convention to frame a new "home-grown" constitution for the Northern Territory after the Legislative Assembly of the Northern Territory had received and dealt with the final report of this Committee. Reference should also be made to the Committee's Information Paper No. 1, *Options for a Grant of Statehood*[2] in this regard. The view that there should be a Territory Constitutional Convention has since been maintained by the Sessional Committee. The new Territory constitution as adopted by that Constitutional Convention would then be submitted to a referendum of Northern Territory electors for approval, and if so approved, would be submitted to the Commonwealth as part of proposals for further Territory constitutional development, perhaps as a new State.

4. Submissions on the Discussion Paper

(a) The list of persons and organisations that commented on the Committee's *Discussion Paper* is set out in Appendix 3 of this Interim Report.

(b) None of these commentators were opposed to the concept of a Territory Constitutional Convention. Rather, the concept seems to be one that is capable of attracting wide community support and of creating a feeling that this is an opportunity for a wide cross section of that community to participate in the process of Northern Territory constitution making.

(c) Several of the commentators referred to the need for some broad based system for determining membership on the Convention that reflected the different peoples and groups resident in the Northern Territory. Beyond that, the commentators concentrated on the issues of the method of selection of members of the Convention, qualifications of members, representation of particular groups on the Convention, the use of specialists and consultants and procedural matters.

(d) The Committee in its *Discussion Paper* suggested that there were three basic ways to constitute the Convention membership -

(i) Wholly elected,
(ii) Wholly nominated; and
(iii) Partly elected/partly nominated.

The *Discussion Paper* discussed the advantages and disadvantages of each of these options.

(e) Most of the commentators discussed these options, and most of them favoured a system of mixed elected/appointed members. A few of them suggested a specified breakup between the two, varying from equal numbers, to a 75%/25% division or a 2/3rds/1/3rd division, both favouring elected members. Only a few commentators

[2] Northern Territory Legislative Assembly Select Committee on Constitutional Development, 1987, Legislative Assembly of the Northern Territory, Darwin: p,6.

favoured a wholly elected Convention or a wholly nominated Convention. There was also some strong comments against a wholly nominated Convention.

(f) Consistent with the view that the Convention should reflect a broad spectrum of Northern Territory views, a number of commentators made suggestions directed at achieving this. Thus the desirability for the representation of rural interests and remote communities, of Aboriginal peoples, of business interests, trade unions, local and community government, political parties, ethnic groups and professional groups (among others) were all mentioned, some of them by several commentators. Most commentators appeared to favour a limitation of representation to Territorians only, although a few expressly mentioned the possibility of interstate or even international representation as advisers or specialists. The possibility of a system of election by a system of proportional representation was referred to in passing, as was a system of single or multiple member electorates. Some commentators favoured restrictions on the participation of politicians, constitutional lawyers, academics and public servants, with the possibility of some of these being non-voting consultants. The desirability of equal male/female representation was also advocated.

(g) Procedurally, some commentators stressed the need for the Convention to be adequately resourced, the need for it to be open to the public, the capacity for the Convention to determine its own procedures and to seek expert advice, the desirability of having prior public meetings in major centres, and the suggestion that the draft constitution emanating from the Convention be referred back to the Legislative Assembly for comments before going to a Northern Territory referendum.

(h) The Committee is grateful for all of these expressions of views and has taken them into account in preparing this Interim Report.

C. BACKGROUND

1. Constitutional Conventions in Australia

(a) It is useful to describe the past use of conventions in this country in the framing or reviewing of constitutions. This is a matter that was briefly referred to in the Committee's *Discussion Paper*, but it may assist in the implementation of the Committee's recommendations if this was done in somewhat more detail in this Report.

(b) The constitutions of the Australian self-governing colonies (later the original States) were framed by the legislatures of each colony under Imperial Legislation. The method of constitutional conventions was not used.

(c) In the case of the mechanisms used in the lead up to federation in 1901, the position is a little more complicated. There had been an Inter-colonial Convention in Sydney in 1883, which lead to the passage of the Imperial *Federal Council of Australasia Act* of 1885 establishing the Federal Council. However, this scheme was a failure. Then following the Australasian Federation Conference in Melbourne of 1890, composed entirely of official Parliamentary delegates from the colonies. It was this Conference that resolved to call together a full-scale Convention, empowered by the various Colonial Legislatures "*to consider and report upon an adequate scheme for a Federal Constitution*". It further resolved that the Convention should consist of not more than 7 members from each of the self-governing colonies and not more than 4 members from each of the Crown colonies.

(d) The National Australasian Convention began in Sydney in 1891, comprised entirely of delegates appointed pursuant to resolutions of the respective colonial legislatures, including New Zealand. It was at this Convention that drafting of a new federal constitution first began in earnest.

(e) After 1891, there was then a delay of a few years before the matter was reactivated with a view to holding another Federal Convention on an elected basis. Eventually, empowering legislation was enacted in most of the Australian colonies for the election of delegates to the next Convention, with the task of framing a federal Constitution under the Crown in the form of a Bill for enactment by the Imperial Parliament. A copy of the New South Wales *Australasian Federation Enabling Act*, 1895, is set out in Appendix 4 of this Interim Report. The South Australian *Australasian Federation Enabling Act* (South Australia), 1895, No. 632, extending expressly to the Northern Territory, was in very similar terms.

(f) Under these enabling Acts, elections were to be held for 10 representatives of each colony by qualified electors in that colony, with each colony as one electoral district. The principle of equality of representation was a feature. Any person elected or eligible for election to either colonial house of Parliament was eligible for election to this Convention. The enabling Acts further provided that the drafts of the constitution were to be submitted to the colonial legislatures for comment between Convention sittings. The final draft was to be submitted to a referendum of colonial voters on a simple 'yes' - 'no' basis before transmission to the Queen for enactment by the Imperial Parliament. The result of the elections (or selection by Parliament in WA)

in the 5 Colonies that first participated was that most of the delegates were colonial parliamentarians, but a few were not. The Convention first met in Adelaide in 1897.

(h) The Adelaide Convention then appointed 3 select Committees dealing with constitutional machinery, finance and the judiciary. The delegates reassembled for the second session of the Convention in Sydney, together with the newly elected delegates from Western Australia. It then adjourned to its third session in Melbourne in 1898, which brought it to an end. From this emerged a draft constitution, which, subject to some last minute changes, was eventually accepted by the Australian voters and enacted into law by the Imperial Parliament in the *Commonwealth of Australia Constitution Act*, 1900, effective from 1 January 1901.

(i) Since then, there has been *a Royal Commission on the Australian Constitution* (1929) and *a Joint Committee of the Commonwealth Parliament on Constitutional Review* (1959). In more recent times, the various Australian Parliaments resolved to join together in a Convention to review the Australian Constitution. The Convention of nominated delegates, including from the Northern Territory, first met in Sydney in 1973. It was later extended to include local government delegates. It continued to meet on various occasions up until 1985, by which time it had lost the support of the Federal Government.

(j) In 1985, the Commonwealth Attorney-General announced the establishment of an appointed *Constitutional Commission* to review the Australian Constitution. It was assisted by 5 Advisory Committees. Its final Report was delivered in 1988. A few of its recommendations for change were then put to a national referendum in conjunction with some other proposals but all failed.

(k) The conclusion to be reached is that while the mechanism of constitutional conventions has been used at a federal level, it has not been employed at a State level in Australia. But this does not lead the Committee to conclude that it is an inappropriate method at a State (or Territory) level.

2. Constitutional Conventions in the USA

(a) The use of elected constitutional conventions for both constitution-making and also for constitutional revision has been a feature of the USA system at all levels. This is no doubt associated with the concept that political authority in that country is derived from the people.

(b) The first wave of USA State constitutions, including those in the first year after independence, were drafted quickly, usually by the State legislatures. However, Pennsylvania's 1776 constitution was drafted by a separate convention elected for the purpose. The second wave of State constitutions were adopted in a more deliberate fashion, often using specifically elected conventions. Thus, for example, the convention that drafted the New York Constitution in 1777 took a period of 8 months. In Massachusetts, the process of constitution-making stretched from 1776 to 1780, leading to the unsuccessful legislatively proposed constitution of 1778 and ultimately the famous Massachusetts Constitution of 1780, the oldest USA constitution still in effect.

(c) In 1787, a convention of States was held which resulted in the adoption of the current USA Constitution and its subsequent ratification by the States. That Constitution itself incorporates a mechanism for further conventions for the purposes of constitutional amendment, subject to ratification by three fourths of the States (Article V).

(d) The most recent States to be admitted to the USA federation, Alaska (1959) and Hawaii (1959) both used the mechanism of elected constitutional conventions to draft their new State constitutions. A copy of the *Alaska Constitutional Convention Enabling Act* of 1955 is at Appendix 5 of this Interim Report. It provided for an elected Convention of 55 delegates, based on election districts with variable numbers, the elections to be conducted without any reference to political party affiliations. The Convention was limited to a maximum of 75 meeting days (with provision for adjournments). Its resultant constitution was required to be submitted to Territory electors for ratification and upon ratification was then submitted through the President to the Congress for its approval by an Enabling Congressional Act.

(e) Commonly, USA State constitutions provide for constitutional conventions to be held for the purposes of constitutional revision, as well as other methods of revision. An example is in Article XVII of the Hawaii Constitution, a copy of which is set out in Appendix 6 of this Interim Report. Several such conventions have been held in Hawaii. In 1986, a provision for mandatory periodic conventions was rejected by the voters in Hawaii. Up to 1987, more than 230 State constitutional conventions had been convened.

(f) The mechanism of a constitutional convention has also been used in USA territories. Thus the constitution of the Commonwealth of Puerto Rico was adopted by an elected convention in 1951 and was brought into operation. In 1982, voters in the District of Colombia approved an initiative to call a constitutional convention to turn the District into a new State and to adopt a new constitution. The constitution was adopted by the convention and ratified by District voters but has not been implemented by Congress.

D. A NORTHERN TERRITORY CONSTITUTIONAL CONVENTION

1. Establishment of a Convention

(a) Given the view already expressed by the Committee elsewhere that the Northern Territory should adopt its own, "home grown" constitution, the Committee adheres to the view that a Territory Constitutional Convention is the most appropriate method to frame a constitution for the Northern Territory as the Northern Territory moves towards a grant of Statehood. It provides an excellent means by which a wide cross-section of the Northern Territory community can participate in framing their own fundamental rules as to how the Northern Territory and its government is to operate. Such a Convention would be assisted by the recommendations and publications of this Committee and by the subsequent deliberations of the Northern Territory Legislative Assembly on the Report of this Committee. The Convention's draft constitution would in turn be submitted to Northern Territory electors at a referendum before being presented to the Commonwealth for implementation by the national Parliament as part of further Northern Territory constitutional development. By this democratic method, it could fairly be said that it would be a "home-grown" constitution that reflected the needs and aspirations of Territorians generally.

Recommendation: 1

The Committee recommends that a Constitutional Convention be held in the Northern Territory.

(b) Such a Convention will have to be established by legislation in order to carry out its task of framing the new constitution and to enable that constitution to be put to a Territory referendum.

(c) There is a question whether it is within the legislative capacity of the Northern Territory Legislative Assembly to enact this legislation under the *Northern Territory (Self-Government) Act* 1978. The Committee believes that it is within that Assembly's legislative capacity to do so, although the Northern Territory Government may wish to consider this matter further. In this regard, the plenary grant of legislative power in section 6 of that Act is very broad. The legislation would merely enable the machinery of the Convention to be established and for it to carry out its task, but would not give legal effect to the resultant constitution. The Committee recognises that only the national Parliament can legally implement that constitution.

Recommendation: 2

The Committee recommends the enactment of legislation, at the appropriate time, to provide for the establishment of a Convention, to authorise and require it to carry out the task of framing a new constitution for the Northern Territory, that constitution to be adopted at a subsequent Northern Territory referendum, and to enable the Convention to be provided with the necessary powers and resources in order to carry out this task.

2. Composition of the Convention

(a) Having reviewed the comments on the Committee's previous *Discussion Paper* and having considered the matter generally, the Committee considers that it would not be appropriate to have a wholly nominated Convention. While the method of nomination may be a method of ensuring that specified interest groups in the community are involved, it would have the fatal flaw that it could not be said to be democratic in any sense. It is very likely that it would also meet with objections from those interest groups which failed to be nominated or which considered they were under-represented. It may also meet with objections from the Commonwealth Government, which must implement any proposals for further Northern Territory constitutional development.

Recommendation: 3

The Committee recommends not to have a wholly nominated Convention, as it is inconsistent with the principle of representative democracy, which principle should form the basis of the new Northern Territory constitution.

(b) On the other hand, the Committee sees considerable advantages in the capacity to nominate representatives of key Northern Territory groups onto the Convention in conjunction with elected representatives. Such a mechanism was favoured by a majority of commentators. It ensures that those key groups having a vital interest in the future of the Northern Territory are not overlooked in the framing and adoption of the new constitution. The Committee identifies below some of the key Northern Territory groups which it considers should be so represented.

(c) The Committee sees it as important and that it is consistent with the democratic principle to have a majority of elected representatives on the Convention. Several ratios were suggested by the commentators favouring a mixture of elected and nominated delegates, from equal numbers, to a two-thirds/one-third ratio and a three-quarters/one-quarter ratio.

Recommendation: 4

The Committee recommends that at least three-quarters of the representatives that are on the Convention be elected and that the remainder be nominated.

(d) The key Territory interest groups or organisations that could nominate representatives on the Convention may include the following:

* Northern Territory Aboriginal Groups (ATSIC Regional Councils in the Northern Territory, Land Councils).

* Nominees of Northern Territory Local and Community Government, through the Local Government Association of the Northern Territory.

* Employer Organisations in the Northern Territory.

* Trade Unions in the Northern Territory.

* Ethnic Organisations in the Northern Territory.

* Youth.

* Aged.

There may be other Northern Territory groups or organisations which consider that they should have automatic representation, but they should be required to first put up a compelling argument for nomination without election.

Recommendation: 5

The Committee recommends that

1. Northern Territory groups or organisations be represented on the Convention by an appropriate method of nomination, as prescribed in the legislation, such as from the following:

    * Northern Territory Aboriginal Groups (ATSIC Regional Councils in the Northern Territory, Land Councils);
    * Nominees of Northern Territory Local and Community Government, through the Local Government Association of the Northern Territory;
    * Employer Organisations in the Northern Territory;
    * Trade Unions in the Northern Territory;
    * Ethnic Organisations in the Northern Territory;
    * Youth; and
    * Aged.

2. any failure to nominate should not invalidate the proceedings of the Convention.

(e) There is also the question of the extent of the involvement in the Convention of members of the Northern Territory Legislative Assembly. One possibility is that those individual members should be able to stand for election to the Convention. There is also the question whether any of those members should be members of the Convention - for example, the Chief Minister and the Leader of the Opposition. Further, there is a good argument that the six members of the Sessional Committee on Constitutional Development, being a bipartisan Committee of members, made up of equal numbers of Government and Opposition members, should be members of the Convention. This Committee has been closely involved with the preparation of the draft Constitution.

(f) There is a counter argument that politicians should not be permitted to stand for election or to be nominated to the Convention. Alternatively there is an argument that if they can stand, they should not be able to do so on the basis of their party affiliations. The Committee has considered whether these are realistic limitations in a

small jurisdiction like the Northern Territory, where the affiliations of politically active individuals are usually well known. The Committee considers that there should not be any exclusions of specific categories of persons from nomination.

Recommendation: 6

The Committee recommends that in addition to the other elected and nominated members, the members of this Sessional Committee together with the then Chief Minister and Leader of the Opposition, as at the time of the nomination date for the Convention, be members of the Convention,

(g) As to the method of election of representatives, the Committee is aware of the need to ensure that urban, non-urban and Aboriginal communities are adequately represented. On the other hand, the Committee sees it as important to maintain the democratic principle and not to depart too far from the principle of one vote, one value. The present tolerance of 20% in the *Northern Territory (Self-Government) Act* 1978 seems reasonable for this purpose.

(h) The possibility for electoral mechanisms for the Convention vary from treating the whole of the Northern Territory as one electorate and using a system of proportional representation, to the use of multi-member or single member electorates.

(i) The Committee considers that the method of one dectorate for the whole of the Northern Territory is too unwieldy and would result in a very long ballot paper and confusion amongst voters. A system of single member electorates would, if a sufficient number of representatives was to be chosen, result in very small electorates, smaller than those of present Northern Territory Legislative Assembly electorates. It may also tend to result in a less representative cross-section of the community on the Convention. Accordingly the Committee feels that a system of multi-member electorates, of, say, 5 representatives per electorate would be appropriate. This should ensure that ballot papers are of a manageable size, while at the same time facilitating a more representative selection from the community.

Recommendation: 7

The Committee recommends a system of multi-member electorates.

(j) As to the size of the total membership of the Convention, the Committee considers that the acceptable range is between 50 and 100 representatives. If existing Northern Territory Legislative Assembly electorates were to be used, this would result in 25 electorates of 5 representatives each, a total of 125 elected representatives. These, plus the nominated representatives on a three quarters/one quarter ratio, the members of the Sessional Committee including the then Chief Minister and Leader of the Opposition, would result in approximately a 174 member Convention. However, a smaller Convention could be based on a lesser number of electorates. For example, it would be possible to have 10 electorates of five representatives each, electing a total of 50 representatives, plus, say, 16 nominated representatives, the members of the Sessional Committee, including the then Chief Minister and Leader of the Opposition, making approximately a 74 member Convention. This total is more than the number of

delegates used for the Convention for the original USA Constitution and the Alaskan Constitution, but is still a manageable size.

(k) On balance, the Committee favours a Convention with 10 electorates of five representatives to be elected in each. This would result in a Convention that would not be so large that it would be excessively difficult to manage, and not too small so as to be unrepresentative of a broad cross section of the Northern Territory community. It would also be less expensive to run than a much larger Convention. Furthermore, the Committee favours that an electoral distribution should be carried out for the Convention within the 20% tolerance rule, and subject thereto, be designed to give some particular emphasis to the interests of non-urban and Aboriginal communities.

Recommendation: 8

The Committee recommends:

1. a Convention with 10 electorates of 5 representatives to be elected in each; and
2. that an electoral distribution should be carried out within the 20% tolerance rule, and subject thereto, be designed to give some particular emphasis to the interests of non-urban and Aboriginal communities.

(l) The Committee supports the view that women should be encouraged to equally participate in the Convention but does not make any recommendations designed to prescribe such equal participation in any way.

(m) There is a question whether both the persons nominating to the Convention and voters should also be required to have resided in the Northern Territory for a reasonably long period, in order to eliminate persons with no permanent interest in the Northern Territory. The Committee refers by way of comparison to its tentative recommendations in its *Discussion Paper on A Proposed New State Constitution for the Northern Territory*[3] of a 6 month residential requirement in the Northern Territory for persons nominating to the Northern Territory Parliament. The Committee feels that this is also a sufficient period of residence for nominees to the Convention, having regard to democratic principles.

Recommendation: 9

The Committee recommends that:

1. persons nominating for election to the Convention be required to have resided in the Northern Territory for a period of 6 months prior to nomination and otherwise be on the roll for elections to the Northern Territory Legislative Assembly; and
2. voters for persons nominating for election to the Convention be required to be on the roll for elections to the Northern Territory Legislative Assembly.

[3] Northern Territory Legislative Assembly Select Committee on Constitutional Development, 1987, Legislative Assembly of the Northern Territory, Darwin: p,20.

3. *Procedural Issues*

(a) The Committee, in developing its strategies designed to meet the target date of 2001, has adopted a possible timetable for a Convention to be held between mid 1996 and late 1997. This would mean that the Convention elections would have to be held in the first part of 1996. The Convention would meet from time to time during the following period as it determined, with power to adjourn from time to time.

(b) In the *Alaska Constitutional Convention Enabling Act*, the Convention was limited to not more than 75 meeting days, but with power to adjourn for periods not exceeding 15 days at a time for the purpose of holding public meetings. This limitation was designed to ensure that the Convention concentrated on bringing its task to an end within a reasonable time by the adoption of a constitution.

(c) The Committee sees some advantage in prescribing the maximum number of meeting days and a time limit within which the Convention must report with a new constitution. On the other hand, the Committee is aware of the complexities of the Convention's task, particularly in seeking a constitutional settlement acceptable to both Aboriginal and non-Aboriginal people in the Northern Territory, and does not want to be too prescriptive in limiting the Convention time-wise.

Recommendation: 10

The Committee recommends that:

1. there not be a fixed maximum number of sitting days for the Convention, and that the fixing of a final reporting date toward the end of 1997 should be sufficient; and

2. if the Convention then considers it is getting close to resolution but is not yet able to finalise the draft constitution, it should have power to request an extension of time from the Administrator.

(d) At the same time, the Committee feels that the legislation should specify a date within which the Convention should commence work on the preparation of the new constitution and that the Convention should be provided with some initial standing orders. Thereafter, the Convention should be free to determine its own procedures, providing it meets in public and has a quorum.

(e) Mr Bailey has a dissenting view as to the specification of the voting majority required for the Convention. He considers that the voting requirements in respect of issues brought before the Convention should be based on more than just a simple majority and that this requirement should be stipulated in the enabling Act.

Recommendation: 11

The Committee recommends that:

1. the Convention should be charged with preparing and adopting a new Northern Territory constitution;
2. it should be required to meet within the time after the election that is specified in the legislation;
3. the method and procedures whereby the Convention goes about its task should be left to the Convention, provided that the legislation should incorporate an initial set of standing orders to enable it to commence its work, subject to later variation by the Convention;
4. it should be required to meet in public; and
5. a quorum for the Convention should be fixed.

As to sub-recommendation 3 above, Mr Bailey has submitted a dissenting view in that he considers that the voting requirements in respect of issues brought before the Convention should be based on more than just a simple majority and that this requirement should be stipulated in the enabling Act.

(f) The Convention will need to have the capacity to obtain administrative assistance and expert advice. In part, this could be provided through the Northern Territory Legislative Assembly, including the staff of the Sessional Committee. The expert advice could be obtained locally or elsewhere.

Recommendation: 12

The Committee recommends that:

1. the Convention be given the capacity to engage a clerk and other officers plus consultants and advisers, who should not have a right to speak or vote in the Convention; and
2. the Convention should, if it so requires, seek the assistance of the staff of the Sessional Committee and such other persons and resources made available by arrangement with the Speaker of the Northern Territory Legislative Assembly.

(g) The Convention will require adequate funding within normal budgetary controls applicable to the Northern Territory Legislative Assembly.

Recommendation: 13

The Committee recommends that an adequate appropriation of funds be made to cover the expenses of the Convention, and that the Convention be subject to normal budgetary requirements, administered through the Northern Territory Legislative Assembly.

(i) The legislation will need to prescribe the procedures following the completion of the new constitution by the Convention. These procedures should include the tabling and publication of the Convention's report and debate in the Northern Territory Legislative Assembly on that

report, with a possibility of a reference back to the Convention. It should also include the ultimate submission of the new constitution to a Territory referendum within a limited time.

Recommendation: 14

The Committee recommends that following adoption of the new Northern Territory constitution that:

1. the Convention be required to report to the Administrator;

2. the report be required to be tabled in the Northern Territory Legislative Assembly and to be published;

3. the Northern Territory Legislative Assembly should then debate that Report, and should have power by resolution to refer any matter back to the Convention for further consideration and report back; and

4. subject thereto, the constitution as adopted should be required to be submitted to a referendum of Northern Territory voters within the time specified in the legislation.

(j) There will be a number of other matters necessary to implement the legislation, including details of electoral mechanisms and procedures. The Committee suggests that these be left to regulations under the legislation.

Recommendation: 15

The Committee recommends that there should be provision for the making of regulations as to all matters arising under the enabling Act, including as to the detailed method of nomination and election to the Convention and also as to the holding of the subsequent Northern Territory referendum, including the submission of the draft constitution in discreet parts to that referendum if thought appropriate by the Convention.

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E. APPENDICES

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APPENDIX 1

TERMS OF REFERENCE

(AS CONTAINED IN THE RESOLUTION OF

THE NORTHERN TERRITORY LEGISLATIVE ASSEMBLY)

JUNE 1994

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TERMS OF REFERENCE
(AS CONTAINED IN THE RESOLUTION OF
THE NORTHERN TERRITORY LEGISLATIVE ASSEMBLY
27 JUNE 1994)

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

AND WHEREAS insofar as it is constitutionally possible the equality should apply as on the date of the grant of statehood to the new State;

AND WHEREAS it is necessary to draft a new State constitution;

(1) during the present session of this Assembly - 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;

(b) the issues, conditions and procedures pertinent to the entry of the Northern Territory into the Federation as a new State;

(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 and Australian populations;

(3) unless otherwise ordered, the Committee consist of Mr Bailey, Mr Baldwin, Mr Hatton, Mrs Hickey, Mr Mitchell and Mr Rioli;

(4) the Chief Minister and the Leader of the Opposition, although not Members of the Committee, may attend all meetings of the Committee; may question witnesses; and may participate in the deliberations of the Committee, but shall not vote;

(5) the Chairman of the Committee may, from time to time, appoint a Member of the Committee to be the Deputy Chairman of the Committee and that the Member so appointed shall act as Chairman of the Committee at any time when there is no Chairman or when the Chairman is not present at a meeting of the Committee;

(6) in the event of an equality of voting, the Chairman, or the Deputy Chairman when acting as Chairman, shall have a casting vote;

(7) the Committee have power to appoint subcommittees and to refer to any such subcommittee any matter which the Committee is empowered to examine;

(8) four Members of the Committee constitute a quorum of the Committee and two members of a subcommittee constitute a quorum of the subcommittee;

(9) the Committee or any subcommittee have power to send for persons, papers and records, to adjourn from place to place, to meet and transact business in public or private session and to sit during any adjournment of the Assembly;

(10) the Committee shall be empowered to print from day to day such papers and evidence as may be ordered by it and, unless otherwise ordered by the Committee, a daily Hansard shall be published of such proceedings of the Committee as take place in public;

(11) the Committee have leave to report from time to time and any Member of the Committee have power to add a protest or dissent to any report;

(12) the Committee report to the Assembly as soon as possible after 30 June each year on its activities during the preceding financial year;

(13) unless otherwise ordered by the Committee, all documents received by the Committee during its inquiry shall remain in the custody of the Assembly provided that, on the application of a department or person, any document, if not likely to be further required, may, in the Speaker's discretion, be returned to the department or person from whom it was obtained;

(14) members of the public and representatives of the news media may attend and report any public session of the Committee, unless otherwise ordered by the Committee;

(15) the Committee may authorise the televising of public hearings of the Committee under such rules as the Speaker considers appropriate;

(16) the Committee shall be provided with all necessary staff, facilities and resources and shall be empowered, with the approval of the Speaker, to appoint persons with specialist knowledge for the purposes of the Committee;

(17) nothing in these Terms of Reference or in the Standing Orders shall be taken to limit or control the duties, powers or functions of any Minister of the Territory who is also a Member of the Sessional Committee;

(18) the Committee be empowered to consider the minutes of proceedings, evidence taken and records of similar committees established in the previous Assembly; and

(19) the foregoing provisions of this Resolution, so far as they are inconsistent with Standing Orders, have effect notwithstanding anything contained in the Standing Orders.

APPENDIX 2

DISCUSSION PAPER ON REPRESENTATION IN A TERRITORY CONSTITUTIONAL CONVENTION

OCTOBER 1987

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LEGISLATIVE ASSEMBLY OF NORTHERN TERRITORY
SELECT COMMITTEE ON CONSTITUTIONAL DEVELOPMENT

DISCUSSION PAPER ON REPRESENTATION IN A TERRITORY CONSTITUTIONAL CONVENTION OCTOBER 1987

A. BACKGROUND

1. In the Chief Minister's policy statement, Towards Statehood, (28 August 1986), a three-stage process was proposed for the making of the new State constitution. The three stages were:

   (i) The preparation of a draft constitution by the Select Committee on Constitutional Development;

   (ii) The development and adoption of a proposed constitution by a Northern Territory Constitutional Convention for submission to a referendum; and

   (iii) A referendum of Northern Territory electors to approve the constitution as ratified by the Convention.

   The Chief Minister stressed the condition that the Convention must represent "a broad cross-section of community interests and opinions".

2. The Select Committee on Constitutional Development has also considered the constitution-making process and, in November 1986, endorsed the Chief Minister's proposal. It also undertook "to prepare for inclusion in its report to the Legislative Assembly [before June 1988] recommendations on representation at the proposed Constitutional Convention. To that end, discussion has taken place within the Committee but except for a decision that the preferred Convention size should be between fifty and sixty, the Committee has not yet determined its attitude to representation. Before any recommendation is made, the Committee wishes to receive public comment on the issue. This paper addresses the salient questions to be resolved.

B. REPRESENTATION

1. There are three basic ways to constitute the Convention membership. They are:

   (i) Wholly-elected;
   (ii) Wholly-nominated; and
   (iii) Partly elected/partly nominated.

   To the extent that it is elected, the question arises as to the electoral and voting systems which will be most appropriate. To the extent that it is nominated, salient questions are how the nomination process should be conducted and who should do the nominating.

2. (i) Wholly-elected conventions are the rule in the U.S.A. constitutional experience. Because of the electoral system devised (a combination of at-large and precinct contests) and the

deliberate avoidance of overt partisanship, the outcome usually produced an adequate representational profile and thus a broad political legitimacy and community acceptance. As opposed to the 1891 Convention which was wholly nominated by the respective colonial parliaments, the Australian Constitutional Convention (which substantially drafted the federal constitution) was also directly elected.

(ii) Advantages:

a) Most "democratic" option;
b) Confers political legitimacy and acceptability;
c) May be required by Commonwealth government; and
d) Depending on electoral system used, a fair representation could be achieved.

(iii) Disadvantages:

a) Costly and time-consuming;
b) If turnout low, representation may not be adequate;
c) If electoral system ill-chosen, representation again may be deficient; and
d) Suitable candidates may not offer for election.

3. The electoral system and voting procedure used will have to be chosen with the view of providing "a broad cross-section of community interests and opinion". It is unlikely that single-member constituencies would achieve that result as minority interests do not fare well under such circumstances. They would certainly do better at an "at-large" election using the Territory as one electorate (as with Senate elections) but it would probably, given the weight of "urban" voters and Darwin voters in particular, not produce a reasonable regional balance. Thus, the most appropriate system would be a series of multi-member electorates (of varying sizes) covering regional areas. Assuming a Convention of fifty-five members, Greater Darwin would return twenty-two members, Alice Springs eleven, Katherine four, Tennant Creek and Nhulunbuy two each, northern "rural" and southern "rural" seven each. A single transferable voting procedure [i.e. the full Senate variant] would enable a wide range of community opinion to be represented.

4. (i) A wholly-nominated convention also presents a number of advantages and disadvantages.

(ii) Advantages:

a) Less costly to convene than a fully-elected convention;
b) Allows for a deliberate choice of candidates thereby ensuring reasonable representation;
c) May ensure participation of best-suited and qualified representatives; and
d) Could allow involvement of "non-Territorians".

(iii) Disadvantages

a) Lacks the same legitimacy as a fully-elected Convention;
b) May be unacceptable to Commonwealth Government;
c) Likely to be criticised as "rigged" or unintentionally unrepresentative;
d) Difficulty of ensuring places and balance for the myriad of Territory interests; and
e) members may see themselves as "delegates" rather than "trustees" and represent their "sponsors" rather than .he wider Territory concerns. In that circumstance, agreement on sensitive issues may be hard to reach and the resultant constitution could follow "the

lowest common denominator" approach which may prejudice its acceptance at a referendum.

(iv) The Select Committee believes that, if the Convention is to be nominated, the final choice of nominees should be made by the Legislative Assembly on advice from the Select Committee. Nominations could be sought from designated groups or specific individuals. Public advertisement could also be employed to elicit nominations from the general community. It is important that all significant bodies of opinion (whether organised or not) obtain some degree of representation. To enable the Select Committee to identify all parties deserving or desirous of representation (and the extent of that representation) on the Convention, it seeks expressions of interest from such parties. Comment is also welcomed on the desirability and practicability of having non-Territorians or Territory parliamentarians as members. So too is the proportion of "specialists" (those nominated for their particular expertise, qualifications and experience) to "generalists" (those who have some broad appreciation of constitutional subjects).

(v) The type of membership should relate to the form in which the Convention operates. If it undertakes most of its business in plenary session, the membership appropriate-or such a style will be different from that of a Convention which conducts most of its business in specialist committees. A paper prepared by a Select Committee member is based around "specialist" membership. He proposed a structure of four committees to deal with legislative, executive, judicial and "other matters" aspects respectively. The Convention Chairman and the Committee Convenors are to be selected on the grounds of national eminence, capacity and acceptability. Committee membership which is to include two M.L.As, is to be chosen for its particular qualifications and a minority could come from outside the Territory. Any scheme which gives prominence to a strong committee structure will tend to require similar "specialist" members. Public comment on the form which the Convention should take is also sought. Particular attention should be given to the roles of committees and plenary sessions.

5. The third approach - the mixed model - offers a range of membership possibilities. At one extreme, there could be a predominance of elected members, at tile other a predominance of nominated. As a hybrid model, the mixed option has a combination of the advantages and disadvantages pertinent to the wholly-elected and wholly-nominated models. But, it does have the additional benefit, if the majority of members are elected, of allowing participation of key groups (such as the Legislative Assembly, land councils, local and community government organisations, or any other major body of opinion demonstratively excluded in the electoral process). In that way, nomination of a certain proportion of the Convention can ensure an adequate representation of Territory interests.

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APPENDIX 3

LIST OF SUBMISSIONS

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LIST OF SUBMISSIONS

Name	Organisation
	Women's Advisory Council
	NT Council of Govt. School Organisations
	NT BAR ASSOCIATION
Kevin ANDERSON	NT Community Government Association
Susan ANDRUSZKO	Darwin City Council
John ANTELLA	Darwin City Council
John ANTELLA	NT Local Government Association
Harry COEHN	Office Of Equal Opportunity
Mark CROSSIN	NT Trades and Labour Council
Raphael CROWE	NT Confederation of Industry / Commerce
Rod ELLIS	NT Trades and Labour Council
John FAWCETT	
John HAVNEN	
Phillip HOCKEY	
Anthony HOSKING	
Earl JAMES	
Sheila KEUNEN	
R G KIMBER	
Noel LYNAGH	NT Local Government Association
Peter McNAB	
Francis PERCEVAL	
Lynette POWIERZA	Office Of Equal Opportunity
John PUPUNGAMIRRI	
Maureen ROBERTS	
Sue SCHMOLKE	Women's Advisory Council
Jim THOMSON	

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APPENDIX 4

AUSTRALIAN FEDERATION

ENABLING ACT, 1895 (NSW) NUMBER XXIV

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AUSTRALIAN FEDERATION ENABLING ACT, 1895 (NSW)
NUMBER XXIV

An Act to enable New South Wales take part in the framing, acceptance, and enactment of a Federal Constitution for Australia [23rd December, 1895.]

WHEREAS it is proposed that Legislative provision shall be made by the Colonies for the framing, acceptance, and enactment of a Federal Constitution for Australasia: And whereas it is desirable that New South Wales should be represented at the Convention, which it is proposed shall frame the said Constitution : Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as the "Australasian Federation Enabling Act, 1895."

2. In this Act the following terms bear the meanings set opposite to them respectively -

"Colonies" — The Colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, and Western Australia, and the Province of South Australia, including the Northern Territory.

"Constitution" — The Federal Constitution framed or accepted pursuant to this Act.

"Convention" — The Convention provided for by this Act..

"Governor" — The Governor, with the advice of the Executive Council.

"Prescribed "-- Prescribed by Regulation made under this Act.

"Proclamation" — Proclamation by the Governor published in the *Gazette*.

"Representatives of New South Wales" — The Representatives of New South Wales in the Convention.

3. The chief objects of this Act are to provide as follows:

(I) For the representation of New South Wales at a Convention consisting of the Representative of each Colony represented, charged with the duty of framing a Federal Constitution for Australasia.

(II) For submitting the Constitution so framed to the electors for the Legislative Assembly for acceptance or rejection by direct vote.

(III) For transmitting the Constitution for enactment by the Imperial Parliament

4. This Act shall come into operation on a day to be fixed by proclamation, when two Colonies, in addition to New South Wales, have adopted legislation providing, in respect of those Colonies, for the election of the representatives of those Colonies at the Convention.

5. This Act is divided into four Parts, as follows:-

PART l.—-*The Convention*

PART II —*The submission to the Electors.*

PART III — *The transmission for Legislative Enactment.*

PART IV — *Supplemental*

PART I

The Convention

6. The Convention shall consist of ten Representatives of each Colony represented.

7. The Convention shall be charged with the duty of framing for Australasia a Federal Constitution under the Crown in the form of a Bill for enactment by the Imperial Parliament

8. Every Member and every person eligible for membership of either House of Parliament shall be eligible for membership of the Convention as a Representative of New South Wales. And any one hundred or more electors duly qualified to vote for election of a Member of the Legislative Assembly shall be entitled in the prescribed manner to nominate any eligible person, whose consent in writing shall accompany such nomination for such membership, and after such nomination has closed, the list persons so nominated, with their residence and occupation, be advertised in the alphabetical order of their surnames at least three times in every newspaper published in the Colony.

9. The seat of a Representative of New South Wales shall be vacated—

(I) By resignation under his hand addressed to the Go vernor.

(II) By absence, without the leave of the Convention, from any five sittings thereof.

(III) By any other circumstance, except absence from the Assembly, which in the case of a Member of the Legislative Assembly would vacate his seat in the Assembly.

10. The first vacancy occurring pursuant to the preceding section shall forthwith be filled by the appointment by the Governor of the candidate who, not being, nor having been, a Member of the Convention was highest on the Poll. Every subsequent appointment to be made in like manner.

11. Every person being the holder of an Elector's Right shall be qualified and entitled to vote for the election of Representatives of New South Wales.

12. The first election of Representatives of New South Wales shall take place on a day to be fixed by Proclamation, which day, as nearly may be conveniently practicable, shall be the same as the day of first election of Representatives of other Colonies.

13. The voting shall be taken throughout New South Wales as one Electoral District, and every voter shall vote for the full number of Representatives required, otherwise the vote shall be rejected as informal.

14. No person shall vote more than once at the election of Representatives of New South Wales.

15. If any question arises respecting the validity of an election or return the same shall be heard and determined by a Committee appointed by the Convention as prescribed. And Part V of the Parliamentary Electorates and Elections Act of 1893 shall *mututis mutandis*, apply in respect of the powers, duties, and proceedings of the said Committee acting under the authority of this section.

16. The result of every election for Representatives of New South Wales shall be reported to and certified by the Chief Secretary in manner prescribed, whose certificate shall be conclusive, except in proceedings for contesting the validity of the election.

17. When the first elections have been held in three or more Colonies, a meeting of the Convention shall be convened for such time and place as a majority of the Governors of such Colonies may decide, or in case of an equal division, as the Governor of the senior of such Colonies may fix.

18. The Convention may adopt Standing Orders, and may provide for keeping and publishing records and journals of its proceedings, and for the conduct of its business in such manner as may be thought fit; and in cases not otherwise provided for, the proceedings of the Convention shall be regulated by the Standing Orders and practice of the House of Commons so far as applicable.

19. The Convention shall at its first meeting, before proceeding to the despatch of any other business, elect a Member of the Convention to be the President thereof.

20. The President may resign his office, or he may be removed from office by a vote of the Convention; and upon his ceasing to be a member of the Convention his office shall become vacant.

21. In the case of the absence of the President the Convention may choose some other Member of the Convention to perform his duties during his absence.

22 Whenever a vacancy occurs in the office of President, such vacancy shall forthwith be filled by a fresh election.

23. The presence, exclusive of the President, of at least of the total number of the Members of the Convention shall be necessary to constitute a meeting of the Convention for the exercise of its powers.

24. The Convention may appoint Committees of its Members which shall report to the Convention.

25. Questions arising in the Convention shall be by a majority of the votes of the Members present, other than the President; and when on any division the votes are equal, but not otherwise, the President shall have a vote, and his vote shall decide the question.

26. When the Constitution has been framed by the Convention, copies thereof shall be supplied to the Members of the Convention, and the President shall declare the sitting of the Convention adjourned to a time and place to be fixed by the Convention, not being less than sixty nor more than one hundred and twenty days thereafter. And as soon as convenient the draft Constitution shall be submitted for consideration to each House of Parliament sitting in Committee of the Whole, and such amendments as may be desired by the Legislature, together with the draft Constitution, shall be remitted to the Convention through the Senior Representative.

27. On the reassembling of the Convention, the Constitution as framed prior to the adjournment shall be reconsidered together with such amendments as shall have been forwarded by the various Legislatures, and the Constitution framed shall be finally adopted with any amendments that may be agreed to.

28. So soon as the Convention has finally adopted a Federal Constitution as required by the preceding section, and has disposed of all incidental business, copies certified by the President shall be supplied in duplicate to the Members Convention, and the President shall declare the proceedings of the Convention closed.

29. The Representatives of New South Wales shall cease to hold office at the expiration of a period to be proclaimed by the Governor in the *Gazette.*

30. New South Wales shall contribute to the payment of the expenses of the meeting and proceedings of the Convention in the proportion which the population of New South Wales bears to the total population of the Colonies represented at the Convention and the Colonial Treasurer shall make such payment accordingly out of the Consolidated Revenue Fund.

PART II

The Submission to the Electors.

31. Within fourteen days after the close of the proceedings of the Convention, the certified copies of the Constitution shall be forwarded by the President of the Convention and by the Representatives of New South Wales or one of them to the Governor.

32. So soon as practicable after the close of the proceedings of the Convention, the question of the acceptance or rejection of the Constitution shall be referred and submitted to the vote of all persons in New South Wales qualified and entitled to vote for the election of Members of the Legislative Assembly.

The voting shall be taken throughout New South Wales as one Electoral District.

33. Each voter shall vote by ballot "Yes" or "No" on the question, in accordance with the direction on the Ballot paper in the Schedule hereto, and all votes shall be taken on the same day.

34. No person shall vote more than once on the question.

35. The majority of votes shall decide the question, and if the Constitution be thereby rejected, no further action shall be taken pursuant to this Act: Provided that any number of votes in the affirmative less than fifty thousand shall be equivalent to the rejection of the Bill.

PART III

The Transmission for Legislative Enactment.

36. If two Colonies, in addition to New South Wales, accept the Constitution, both Houses of Parliament may adopt Addresses to the Queen, praying that the Constitution may be passed into law by the Imperial Parliament upon receipt of similar addresses from the Parliaments of two such Colonies.

37. When Addresses have been agreed to pursuant to the preceding section, the same shall be transmitted to the Queen with a certified copy of the Constitution

PART IV

Supplemental

38. If any person votes or attempts to vote more than once contrary to sections fourteen or thirty-five he shall be liable to a penalty not exceeding fifty pounds, or, at the option of the Court, to imprisonment not exceeding six calendar months.

39. For the purpose of holding elections of Representatives of New South Wales, and of submitting the acceptance or rejection of the Constitution to the electors, the Governor may cause writs to be issued in such form and addressed as he thinks fit.

40. Unless and until otherwise prescribed, the laws relating to the conduct of elections for the Legislative Assembly, the proceedings before and at and subsequent to such elections, the trial of disputed elections, electoral offences, and all incidental matters, shall apply, *mutatis mutandis,* to the election of Representatives of New South Wales, and to the proceedings for submitting the acceptance or rejection of the Constitution to the electors.

41. The Governor may make regulations prescribing the mode of nominating candidates, of holding elections of Representatives of New South Wales, and submitting the acceptance or rejection of the Constitution to the electors, and generally for the purposes of carrying into effect such provisions of this Act as relate to New South Wales.

42. All such regulations shall be published in the *Gazette*, and on such publication shall have the force of law; and all such regulations shall be laid before both Houses of Parliament within fourteen days after the making thereof, or if Parliament be then sitting, or if Parliament be not then sitting, within fourteen days after the next meeting of Parliament.

43. Any such regulation may provide for the enforcement thereof by penalty not exceeding fifty pounds, or, at the option of the Court, by imprisonment not exceeding six calendar months.

44. Penalties imposed by, and offences against, the provisions of this Act, or any regulations made thereunder, may be recovered, heard, and determined by a Police or Stipendiary Magistrate, or any two Justices of the Peace in Petty Sessions.

THE SCHEDULE

AUSTRALASIAN FEDERAL CONSTITUTION.

Ballot Paper.

Are you in favour of the propped Federal Constitution Bill?

"YES"

"NO"

If you are in favour of the Bill strike out the above word "No."

If you are against the Bill strike out the above word "Yes."

APPENDIX 5

ALASKA CONSTITUTIONAL CONVENTION

ENABLING ACT - 1955

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Extract from the Alaska Constitutional Convention Enabling Act.

Alaska Constitutional Convention Enabling Act
CHAPTER 46
SESSION LAWS OF ALASKA
1955

AN ACT

To provide for the holding of a constitutional convention to prepare a constitution for the State of Alaska; to submit the constitution to the people for adoption or rejection; to prepare for the admission of Alaska as a State; to make an appropriation; and setting an effective date.

(C.S. for HB. 1)

Be it Enacted by the Legislature of the
Territory of Alaska:

Section 1. A constitutional convention, comprised of delegates elected by the legal voters of the Territory of Alaska, shall assemble at the University of Alaska, College, Alaska, on the 8th day of November, 1955, at ten o'clock a.m., or as soon thereafter as a quorum shall be present, for the purpose of preparing and agreeing upon a constitution for the proposed State of Alaska. The convention shall meet for not more than seventy-five days but may, at its discretion, recess for a period of not to exceed fifteen days for the purpose of holding public hearings in Alaska on proposed provisions of the constitution.

Section 2. Delegates to the convention shall possess the qualifications of legal voters of Alaska and shall have been residents of Alaska for not less than three years immediately preceding the first day of the convention. The holding of the office of delegate or any other office of the convention shall not constitute a disqualification for selection for or the holding of any other office, and the holding of any other office, except an appointive office under the Federal Government shall not constitute a disqualification for election to or the holding of office as a delegate or any other office of the convention.

Section 3. There are hereby created the following election districts from which delegates to the convention shall be elected. These election districts shall be comprised of the several recording districts of Alaska which shall be known as "local election districts", the judicial divisions of Alaska, and the Territory of Alaska at Large:

Election District No. l—Ketchikan and Hyder Recording Districts.
Election District No. 2—Wran-gell and Petersburg Recording Districts.
Election District No. 3—Sitka Recording District.
Election District No.4—Juneau Recording District.
Election District No. 5—Haines and Skagway Recording Districts.
Election District No. 6—First Judicial Division.
Election District No. 7—Cape Nome and Wade Hampton Recording Districts.
Election District No. 8—Fair-haven and Noatak-Kobuk Recording Districts.
Election District No. 9—Second Judicial Division.
Election District No. 10—Cordova and McCarthy Recording Districts.
Election District No. 11—Valdez and Chitina Recording Districts.
Election District No. 12—Seward and Whittier Recording Districts.
Election District No. 13—Kenai, Homer and Seldovia Recording Districts.
Election District No. 14—Kodiak and Aleutian Islands Recording Districts.
Election District No. 15—Anchorage Recording Districts.
Election District No. 16—Palmer, Wasilla and Talkeetna Recording Districts.
Election District No. 17—Illiam, Kvichak and Bristol Bay Recording Districts.
Election District No. 18—Third of the Judicial Division.
Election District No. 19—Bethel, Kuskokwim, Mt. McKinley Innoko, Nulato, Nenana, Hot Springs, Rampart and Fort Gibbon Recording Districts.
Election District No. 20—Fairbanks Recording District

Election District No. 21—Fourth Judicial Division.
Election District No. 22—Territory of Alaska at Large.

Section. 4. The convention shall consist of fifty-five delegates apportioned among the election districts as follows:

Election District No. 1 — One Delegate.
Election District No. 2 — One Delegate.
Election District No. 3 — One Delegate
Election District No. 4 — One Delegate
Election District No. 5 — One Delegate
Election District No. 6 — Seven Delegates
Election District No. 7 — One Delegate
Election District No. 8 — One Delegate
Election District No. 9 — Four Delegates
Election District No. 10 — One Delegates
Election District No. 11 — One Delegate
Election District No. 12 — One Delegate
Election District No. 13 — One Delegate
Election District No. 14 — One Delegate
Election District No. 15 — One Delegate
Election District No. 16 — One Delegate
Election District No. 17 — One Delegate
Election District No. 18 — Twelve Delegates
Election District No. 19 — One Delegate
Election District No. 20 — One Delegate
Election District No. 21 — Eight Delegates
Election District No. 22 — Seven Delegates.

Section 5. A special election for the election of delegates shall be held throughout Alaska on September 13, 1955. The Governor of Alaska shall prepare and furnish all ballots, certificates, and forms necessary for the holding of the election, which shall in general be conducted, including the making of returns, the canvassing of ballots, and the ascertaining of results substantially in the manner fixed by the laws governing the election of legislators in general elections in Alaska, including rotation of names on the ballot. The Governor may employ such technical and other personnel as may be necessary to assist him in the preparation for and conduct of the election provided for herein. The governor may make such reasonable rules and regulations regarding the conduct of the election, the counting of ballots, the preparation, transmission and canvassing of returns, and other matters relating to the election, as may appear necessary and are consistent with the purposes of the special election provided for herein.

Section 6. Candidates for the office of delegate shall be nominated by petition filed in person or by mail with the clerk of the court of the judicial division in which the candidate is a resident on or before May 10, 1955. Each petition shall be accompanied by a fee of ten dollars, except that the fee for candidates for election from the Territory at large shall be forty dollars. Each nominating petition shall be signed by legally qualified voters of Alaska residing within the election district in and for which the delegates nominated are to be elected equal in number to at least five per cent of the number of votes cast in the election district in the General Election of 1954, provided that no nominating petition need contain more than two hundred signatures nor may it contain less than fifty signatures, in any election district.

Section 7. Each nominating petition shall contain the name of not more than one candidate and shall set forth the name, place of residence and post office address of the candidate thereby nominated, that the nomination is for the office of delegate to the constitutional convention to be convened on November 8, 1955, that the petitioners are legally qualified to vote for such candidates and pledge themselves to support and vote for the person named in such petition, and that this petition, together with all other petitions theretofore signed by them, does not nominate a greater number of candidates than the number of delegates to be elected in the election district for which the nominations are made. Every voter signing a nominating petition shall add to his signature his place of residence, post office address, and street number, if any. No voter shall sign a petition or petitions for a greater number of candidates than are to be elected in the election district in which he resides, except that any petitioner may sign not more than seven petitions of candidates for election as delegates from the district composed of the Territory of Alaska at large, in addition to the petition or petitions of candidates from the petitioner's local and judicial election districts. It is the intent of this Act that qualified petitioners may sign not more nominating petitions than there are delegates authorized from the local and judicial election districts in which the petitioner resides, and in addition may sign not more than seven nominating petitions for candidates seeking election from the Territory at Large.

Section 8. Each nominating petition shall, before it may be filed with the clerk of the court, contain an acceptance of such nomination in writing, signed and verified by an oath or affirmation of the candidate

therein nominated, upon or annexed to such petition. Such acceptance shall certify that the candidate shall have been a resident of the election district for which he is nominated for at least one year and that he is a qualified voter in the election district for which he is nominated. Such acceptance shall also certify that the nominee consents to enter as a candidate at the ensuing special election for the election of delegates to a constitutional convention, and that if elected he agrees to take office and serve as a delegate from the election district in which he is nominated.

Section 9. If any delegate from any election district shall die, resign, or otherwise become disqualified from serving, or if a vacancy occurs for any reason whatsoever, the vacancy shall be filled by the candidate not theretofore certified as elected who received the next highest number of votes amongst the candidates in the election district in which the vacancy occurred. If a vacancy should again occur in such district, it shall be filled in like manner from amongst the remaining candidates. Any election contest which results in a tie shall be resolved by the drawing of lots between the competing candidates, and the loser of the drawing shall be considered second only to the winner and shall hold such standing among the balance of the winning candidates.

Section 10. All nominating petitions and their acceptances shall when filed be and remain open for public inspection during regular business hours, at the office where filed until May 20, 1955; thereafter they shall be transmitted to the Governor of Alaska for determination of the candidates nominated and for permanent filing in the office of the Secretary of Alaska. Determination of the validity of petitions shall be made initially by the Governor of Alaska, and recourse by candidates believing themselves aggrieved may be had by appeal from the determination of the Governor to the canvassing board, the decision of which shall be final. Objections to petitions may be raised by any qualified voter of the election district from which the candidate is nominated, and such objection must be stated in writing to the Governor of Alaska on or before May 25, 1955. Not later than May 31, 1955, the Governor shall make his determination as to the candidates nominated from each election district and shall thereupon certify the names designated for placement on the ballot for each such district.

Section 11. The election of delegates shall be conducted without any reference to the political party affiliations of the candidates, and the ballots used shall be nonpartisan in every respect. A separate ballot shall be prepared for each local election district, and each such ballot shall contain (a) the names of the candidates running for the office of delegate from that district, (b) the names of the candidates running for the office of delegate from the judicial division election district in which the local election district is situated, and (c) the names of the candidates running for the office of delegate from the district which comprises the Territory at Large.

Section 12. The candidate or candidates receiving the greatest number of votes in the election district for which nominated shall be deemed elected for that district, and the Governor of Alaska shall issue to them certificates of election in the manner otherwise prescribed by law for per-sons elected to the Legislature of Alaska.

Section 13. The Governor of Alaska shall open the convention and preside until temporary officers are selected. The convention shall be the judge of the qualifications of its members, their election, or appointment. It shall have the power by vote of a majority of the delegates to which the body is entitled to choose a president and secretary and all other appropriate officers, to prescribe their functions, powers and duties, and to make rules and regulations for the conduct of its business. Following its organization the convention shall declare on behalf of the people of the proposed State that they adopt the Constitution of the United States; thereafter, the convention shall proceed to prepare a constitution, which shall be republican in form and shall contain the provisions expressly required by any Act of the Congress of the United States providing for the admission of Alaska as a State, and a State government for the proposed States, and for this purpose the convention shall have power to make ordinances and to take all measures necessary or proper in preparation for the admission of Alaska as a State of the Union.

Section 14. After a constitution and State government have been framed, the convention shall provide by ordinance for submission of the constitution, and such ordinances as may properly be submitted, to the people of the proposed State for ratification or rejection at an election to be held at a date to be fixed by the convention not less than forty

nor later than one hundred twenty days from the date of adjournment of the convention, at which election the persons entitled to vote for delegates under this Act shall be entitled to vote on the ratification or rejection of the constitution and the ordinances submitted, under such rules and regulations as the convention may prescribe. The returns of this election shall be made to the Governor of Alaska and shall be canvassed substantially in the manner now provided by law for the canvass of votes cast in Territorial Elections.

Section 15. The convention shall provide by ordinance that after the constitution and ordinances submitted shall have been ratified by the people of the Territory by a majority of the legal votes cast thereon, the Governor shall forthwith submit a certified copy of the same through the President of the United States to the Congress for approval or disapproval, together with a statement of the votes cast thereon.

Section 16. The convention shall provide by ordinance that in case of the ratification of the constitution by the people and of its approval by the Congress, or by the President, as may be provided in the Enabling Act, there shall be a process of election, at such time and in such manner as the convention may prescribe, in which the qualified voters of Alaska shall choose officers for a full State government, including a governor, members of the legislature, such other officers as the constitution shall prescribe, and the authorized number of Representatives and Senators in the Congress of the United States. The persons elected hereunder shall assume their offices, and the State government shall become in effect, at the time and in the manner that the Congress may provide in enabling the admission of Alaska as a State.

Section 17. Until the admission of Alaska as a State, all of the officers of the Territory shall continue to discharge the duties of their respective offices in and for the Territory of Alaska, and the laws of the Territory shall also remain in force and effect.

Section 18. The convention shall have power to incur such expenses as may be necessary, including but not limited to expenses for employment of such clerical, technical, and professional personnel as it may require, in order to exercise the powers conferred and to perform the duties imposed by this Act.

Section 19. The delegates shall receive a per diem of twenty dollars for each day in attendance at, including time spent going to and returning from, the convention; and they shall be reimbursed for their actual travel costs incurred in attending upon their duties as delegates. In addition they shall receive for their services the sum of fifteen dollars per day as compensation for each day's attendance while the convention is in session.

Section 20. There is hereby appropriated the sum of $300,000, or so much thereof as may be necessary, for defraying the expenses of the elections provided for herein and the expenses of the convention, including compensation of the delegates, and for all other purposes of this Act. The disbursements for all costs attributable to the elections of delegates to the convention, not to exceed $60,000, shall be made upon vouchers certified by the Governor of Alaska. All other disbursements of monies appropriated vouchers certified by the president of the convention.

Section 21. This Act shall be in effect on and after its passage and approval, or upon its becoming law without such approval.

Approved March 19, 1955

APPENDIX 6

THE CONSTITUTION OF THE STATE OF HAWAII

ARTICLE XVII

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THE CONSTITUTION OF THE STATE OF HAWAII

ARTICLE XVll

REVISION AND AMENDMENT

METHODS OF PROPOSAL

SECTION 1. Revisions of or amendments to this constitution may be proposed by constitutional convention or by the legislature.

CONSTITUTIONAL CONVENTION

SECTION 2. The legislature may submit to the electorate at any general or special election the question, "Shall there be a convention to propose a revision of or amendments to the Constitution?" If any nine-year period shall elapse during which the question shall not have been submitted, the lieutenant governor shall certify the question, to be voted on at the first general election following the expiration of such period.

ELECTION OF DELEGATES

If a majority of the ballots cast upon such a question be in the affirmative, delegates to the convention shall be chosen at the next regular election unless the legislature shall provide for the election of delegates at a special election

Notwithstanding any provision in this constitution to the contrary, other than Section 3 of Article XVI, any qualified voter of the district concerned shall be eligible to membership in the convention.

The legislature shall provide for the number of delegates to the convention. the areas from which they shall be elected and the manner in which the convention shall convene. The legislatures shall also provide for the necessary facilities and equipment for the convention. The convention shall have the same powers and privileges. as nearly as practicable. as provided for the convention of 1978.

MEETING

The constitutional convention shall convene not less than five months prior to the next regularly scheduled general election.

ORGANIZATION; PROCEDURE

The convention shall determine its own organization and rules of procedure. It shall be the sole judge of the elections, returns and qualifications of its members and. by a two-thirds vote may suspend or remove any member for cause. The governor shall fill any vacancy by appointment of a qualified voter from the district concerned.

RATIFICATION; APPROPRIATIONS

The convention shall provide for the time and manner in which the proposed constitutional revision or amendments shall be submitted to a vote of the electorate: provided that each amendment shall be submitted in the form of a question embracing but one subject and provided further, that each question shall have designate spaces to mark YES or NO on the amendment.

At least thirty days prior to the submission of any proposed or amendments, the convention shall make available for public inspection, a full text of the proposed amendments. Every. public library, office of the clerk of each county. and the chief election officer shall be provided such texts and shall make them available for public inspection. The full text of any proposed revision or amendments shall also be made available for inspection at every polling place on the day of the election at which such revision. or amendments are submitted.

The convention shall as provided by law, be responsible for a program of voter education concerning each proposed revision or amendment to submitted to the electorate.

The revision of amendments shall be effective only if approved at a general election by a majority of all the votes tallied upon the question, this majority constituting at least fifty per cent of the total vote cast at the election, or at a special election by a majority of all the votes tallied upon the question, this majority constituting at least thirty per cent of the total number of registered voters.

The provisions of this section shall be self-executing, but the legislature shall make the necessary appropriations and may enact legislation to facilitate their operation.

AMENDMENTS PROPOSED BY LEGISLATURE

SECTION 3. The legislature may propose amendments to the constitution by adopting the same in the manner required for legislation, by a two-thirds vote of each house on final reading at any session, after either or both houses shall have given the governor at least ten days written notice of the final form of the proposed amendment, or, with or without such notice, by a majority vote of each house on final reading at each of two successive sessions.

Upon such adoption, the proposed amendments shall be entered upon the journals, with the ayes and noes, and published once in each of four successive weeks in at least one newspaper of general circulation in each senatorial district whereto such a newspaper is published within the two months period immediately preceding the next general election.

At such general election the proposed amendments shall be submitted to the electorate for approval or rejection upon a separate ballot.
The conditions of and requirements for ratification of such proposed amendments shall be the same as provided in section 2 of this article for ratification at a general election.

VETO

SECTION 4. No proposal for amendment of the constitution adopted in either manner provided by this article shall be subject to veto by the governor.

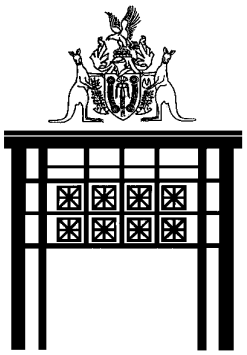
CONFLICTING REVISIONS OR AMENDMENTS

SECTION 5. If a revision or amendment: proposed by a constitutional convention is in conflict with a revision or amendment proposed by the legislature and both are submitted to the electorate at the same election and both are approved, then the revision or amendment proposed by the convention shall prevail. If conflicting revisions or amendments are proposed by the same body and are submitted to the electorate at the same election and both are approved, then the revision or amendment receiving the highest number of votes shall prevail.

Chapter 6

Exposure Draft - Parts 1 to 7:

A new Constitution
for the Northern Territory
and
Tabling Statement



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Sessional Committee on Constitutional Development

Exposure Draft - Parts 1 to 7:

A new Constitution for the Northern Territory and

Tabling Statement

June 1995

Presented and Ordered to be Printed by the Legislative Assembly of the Northern Territory on 22 June 1995

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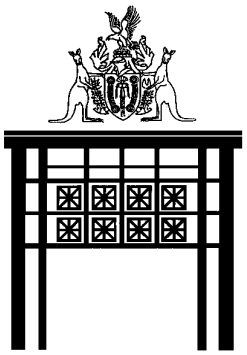

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Sessional Committee on Constitutional Development

Exposure Draft - Parts 1 to 7:

A new Constitution for the Northern Territory and Tabling Statement

June 1995

An Exposure Draft Constitution for the Northern Territory

prepared by the Sessional Committee on Constitutional Development.

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MEMBERSHIP OF THE COMMITTEE

The Hon. S P Hatton, MLA (Chairman)

Mrs M A Hickey, MLA (Deputy Chairperson)

Mr J D Bailey, MLA

Mr T D Baldwin, MLA

Mr W W Lanhupuy, MLA

Mr P A Mitchell, MLA

Committee Staff:

Mr Rick Gray (Secretary)

Mrs Yoga Harichandran (Administrative Assistant)

Mr Graham Nicholson (Legal Advisor)

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INTRODUCTION

The Northern Territory Legislative Assembly Sessional Committee on Constitutional Development, formerly a Select Committee, in responses to its terms of reference, has been working for some years on matters that could be dealt with in a new constitution for the Northern Territory.

The Committee has been proceeding with the preparation of a draft constitution in the light of the various submissions and comments made to it.

The work reached the point where an exposure draft of the main elements of the proposed constitution has been prepared. That exposure draft follows this introduction. It is annotated with an explanation of each clause, with variations that would be required in the event that a republican system of government was to be adopted, and if the constitution was to be brought into operation before any grant of Statehood to the Territory. Cross references to the Committee's issued papers are also included for ease of reference.

The exposure draft does not include some essential provisions not yet finalised, such as the amendment procedures, transitional arrangements and definitions. Other matters may yet be included.

This exposure draft if issued for public comment and submissions before the Committee settles the draft constitution and finally reports to the Legislative Assembly. It does not represent the final views of the Committee. In some cases, it offers one or more alternatives where members have not been able to agree on a particular position.

Following final report to the Legislative Assembly, the further procedure for adoption of the Constitution previously, outlined in the Committee's issued papers are envisaged. These include a Territory Constitutional Convention and Territory referendum.

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 and on 27 June 1994, 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 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 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 and Australian populations."

DISCUSSION AND INFORMATION PAPERS AND REPORTS

The Committee has prepared and issued a number of papers and an interim report arising from its 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, *Citizens' Initiated Referendums.*

* Discussion Paper No. 4, *Recognition of Aboriginal Customary Law*.

* Discussion Paper No. 5, *The Merits or Otherwise of Bringing an NT Constitution into Force Before Statehood*.

* Discussion Paper No. 6, *Aboriginal Rights and Issues - Options for Entrenchment.*

* Discussion Paper No. 7, *An Australian Republic? Implications for the Northern Territory*.

* Discussion Paper No. 8, *A Northern Territory Bill of Rights?*

* Discussion Paper No. 9, *Constitutional Recognition of Local Government.*

* Information Paper No. 1, *Options for a Grant of Statehood*.

* Information Paper No. 2, *Entrenchment of a New State Constitution.*

* Interim Report No. 1, *A Northern Territory Constitutional Convention.*

TABLING STATEMENT

delivered in the Northern Territory Legislative Assembly on 22 June 1995 by the Hon. Steve Hatton, MLA Chairman, Sessional Committee on Constitutional Development

I lay on the table an Exposure Draft of a proposed Northern Territory constitution.

I move that the paper be printed.

Mr Speaker, I move that the Assembly note the paper.

Mr Speaker, some years ago, this House took the bold initiative of establishing a Select Committee to draft a new constitution for the Northern Territory. This was a bipartisan Committee and I am pleased to say it still is a bipartisan Committee. Let me express my appreciation for the co-operation of both sides of this House that are represented on this Committee and for the excellent work of its past and present Members. Their contribution has been outstanding. The Committee has worked hard over the years, researching, preparing papers, holding hearings and a variety of other activities directed at promoting the cause of a new, homegrown Territory constitution. We have worked well together. The Members are committed to work towards the constitutional development of the Northern Territory, with the maximum involvement of the citizens of the Northern Territory in the process. This necessarily involves the preparation of a new constitution for a new Millennium. Our terms of reference require as much, and now you see the first fruits of our labours, the first draft of the essential parts of a new constitution.

Let me assure Honourable Members that this is only a first draft, not the final proposals of the Committee. It is not a complete draft. Additional draft clauses will be released for comment as they are completed.

The Exposure Draft takes into account the many comments and submissions received by the Committee in response to its previous invitations. It seeks to provoke discussion and further comment. Let the citizens of the Territory be assured that their wishes will be taken into account and given weight. It is a process that is not going to be rushed. It is an ongoing process, seeking to achieve the maximum degree of consensus as to how the Northern Territory should be governed. We are all tired of having the future of the Northern Territory decided by people thousands of kilometres from this place. Let Territorians decide on this matter. Let us chart our own future within the Australian federation.

Mr Speaker, the essential aspects are there in this Exposure Draft for all to read — the legislature, the executive, the judiciary, the sources of law of the Northern Territory — there are 7 parts to this Exposure Draft, and further parts will be added later this year.

In particular, for the first time in Australia's constitutional history, we recite in the Exposure Draft the history and circumstances of the Aboriginal people of this Country. The first Preamble reads —

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

This recognises the major role of Aboriginal people in the foundation of this Country and the great contribution they have to make. They are an integral and valued part of the Territory community.

Mr Speaker, the Exposure Draft takes into account the possibility that Australia could become a Republic on or before the Northern Territory constitution comes into effect. In that event, the Exposure Draft indicates that certain changes will be required. Further information on this can be obtained by reference to the Committee's Discussion Paper no. 7, *An Australian Republic? Implications for the Northern Territory.*

In addition, if the constitution was to be brought into operation before a grant of Statehood to replace the *Northern Territory (Self-Government) Act* 1978; slight changes may also be required. The Exposure Draft also indicates these. The annotations on each clause are to assist public discussion and include a short description of each clause plus cross references to the Committee's Discussion and Information Papers and Reports.

Moreover, the Committee recognises that there will be no major constitutional development in the Northern Territory without the support and recognition of the basic rights of Aboriginal people. However, there is a concern in Aboriginal society which values its various indigenous cultural circumstances, particularly land rights, sacred sites, and customary law; the concern being that these rights should be constitutionally protected, otherwise they could be at risk after Statehood.

This Exposure Draft reflects a recommendation to satisfy these concerns, whilst presuming the transfer of the *Aboriginal Land Rights (Northern Territory) Act* 1976 to become a law of the Northern Territory.

Part of this proposal is to introduce the concept of organic laws into our new constitution. This type of law would have precedence over other statutory laws and would require a large majority

of votes of Parliament — two thirds or three quarters of the Members of the House over two consecutive sittings with a minimum time gap of two months — to be enacted or amended.

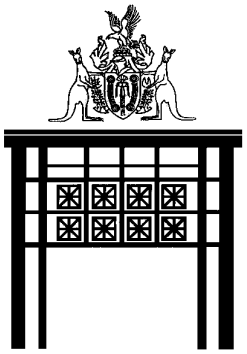
Other matters are included in the Exposure Draft, such as the acquisition of less than freehold interests over Aboriginal land on just terms, for the public benefit. It also includes restrictions on voluntary dealings over freehold Aboriginal title after judicial enquiry. This can only happen after the Aboriginal people concerned have been fully informed and where there is a genuine desire on the part of those Aboriginal people to enter into the proposed transaction. Furthermore, the enquiry must be satisfied that the proposed transaction is also in the interests of those Aboriginal people concerned.

Issues associated with Aboriginal rights, including land rights, are clearly amongst the most sensitive issues associated with the development of our own constitution. The Committee's proposal is aimed at finding a means of addressing these issues in a way that can receive broad support from within the Northern Territory community.

This Exposure Draft is based on the premise that the Northern Territory is to be placed on an equal footing with existing States as a precondition to any grant of Statehood. Let us not accept any second class grant. Let us insist on our constitutional rights as a new State in the same way as existing States. This equality will be achieved in part by inviting all Territorians to participate in the process of adopting their own constitution. In other respects, equality will be achieved by negotiating acceptable terms and conditions for Statehood with the Commonwealth Government. These negotiated matters may not all be dealt with in the Northern Territory constitution as such, but will be incorporated in a memorandum of agreement between the two Governments. One condition must, however, be accepted; namely, that the Commonwealth will accept the new constitution — as finally adopted by Territorians in a Constitutional Convention and as passed in a Territory referendum — without further change.

Mr Speaker, many changes to the Exposure Draft will no doubt be made in the future. Let us have open discussion on the matter. We do not seek to avoid debate, but rather seek to encourage it. The final document undoubtedly will have been considered in detail through the long process of Committee deliberations, Assembly debate and the Territory Constitutional Convention. Territorians must be allowed to frame their own constitution as a framework for a united and peaceful society into the 21st Century. It must be a document for all Territorians and they must have a sense of ownership of it. Let us have the vision to work towards that end.

Mr Speaker, I commend the Exposure Draft to Honourable Members.



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Sessional Committee on

Constitutional Development

Exposure Draft - Parts 1 to 7:

A new Constitution for the Northern Territory

June 1995

NORTHERN TERRITORY OF AUSTRALIA

EXPOSURE DRAFT CONSTITUTION

PART 6 - THE JUDICIARY

PART 7 - ABORIGINAL RIGHTS

PREAMBLE

It is normal for a Constitution to have a Preamble. The Preamble would be a part of the Constitution and could affect its meaning and interpretation, but would not in itself be directly enforceable.

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

Purpose of the Clause: Preamble 1

Provide for the first time in Australia some constitutional recognition of the Aboriginal people, their system of governance and laws and their relationship with the land and with their natural and spiritual environment prior to European occupation. This follows from the rejection of the doctrine of *terra nullius* in the *Mabo* case. The draft Constitution that follows contains specific references to Aboriginal rights as existing at the present time.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: The possibility of a Preamble to the new Constitution as to Aboriginal Rights and Human Rights was raised in *Discussion Paper on A Proposed New State Constitution for the Northern Territory,* 1987: (Parts S &T). See also Discussion Paper No. 4, *Recognition of Aboriginal Customary Law,* 1992,: p.43, Discussion Paper No. 6, *Aboriginal Rights and Issues - Options for Entrenchment,* 1993: p32, Discussion Paper No. 8, *A Northern Territory Bill of Rights*:? p51.

2. In 1788, that part of Australia East of the 135th parallel of Longitude East was proclaimed a Colony of Great Britain as The Colony of New South Wales;

3. By Letters Patent of 1825, the boundaries of the Colony of New South Wales were extended to the 129th parallel of longitude East, thus encompassing all of the area of the Northern Territory;

4. The Northern Territory remained a part of the Colony of New South Wales (except for that period in 1846 when it became, and while it remained, part of The Colony of North Australia) until 1863 when, by Letters Patent, it became a part of the Province of South Australia;

5. The Province of South Australia became a State of the Commonwealth on the proclamation of the Commonwealth of Australia in 1901 under the Commonwealth of Australia Constitution Act of the Imperial Parliament;

6. The *Northern Territory Acceptance Act 1910* of the Commonwealth of Australia provided for the ratifying of an Agreement between the Commonwealth and the State of South Australia for the surrender by that State to, and the acceptance by the Commonwealth of, the Northern Territory and provided for the acceptance by the Commonwealth of the Northern Territory;

7. By the Constitution of the Commonwealth it is provided that the Parliament of the Commonwealth may make laws for the government of any Territory surrendered by any State to and accepted by the Commonwealth;

8. The Parliament of the Commonwealth, by the *Northern Territory (Administration) Act 1910*, made provision for the government of the Northern Territory, and by the *Northern Territory Supreme Court Act 1961* provided for its Supreme Court;

Purpose of the Clause: Preamble 2 through to 8

Provides for a summary of the historical and constitutional development of the Northern Territory from 1788 to 1911 when the Northern Territory came under Commonwealth control as a territory of the Commonwealth. These parts of the Preamble largely follow the wording of the recitals in the Northern Territory (Administration) Act and in the Northern Territory (Self-Government) Act.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See previous comments under Preamble 1.

9. In 1978, because of the political and economic development of the Northern Territory, the Parliament of the Commonwealth, by the *Northern Territory (Self-Government) Act 1978*, conferred self-government on the Northern Territory and, for that purpose provided, among other things, for the establishment of separate political, representative and administrative institutions in the Northern Territory and gave the Northern Territory control over its own Treasury;

Purpose of the Clause: Preamble 9

Provides for the recognition of the Northern Territory in 1978 as self-governing Territory of the Commonwealth under the Northern Territory Self-Government) Act, establishing its own political, representative and administrative institutions, including its own Treasury. This Preamble basically follows the wording in that Act.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See previous comments under Preamble 1.

10. The self-government conferred on the Northern Territory by the *Northern Territory (Self-Government) Act 1978* was a limited grant of legislative and executive powers, the Commonwealth retaining certain reserve powers and a power to disallow Northern Territory legislation. There was also retained in the Parliament of the Commonwealth a

plenary grant of legislative powers in respect of the Northern Territory under section 122 of the Constitution of the Commonwealth, unlimited by subject matter;

Purpose of the Clause: Preamble 10

This preamble notes that under Self-Government, the Northern Territory was granted only limited legislative and executive powers and that under section 122 of the Australian Constitution the Commonwealth has still retained ultimate control of the Northern Territory over Northern Territory matters.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See previous comments under Preamble 1.

11. In 1979 the Parliament of the Commonwealth enacted the *Northern Territory Supreme Court (Repeal) Act 1979* and the Legislative Assembly of the Northern Territory enacted the *Supreme* Court *Act;*

Purpose of the Clause: Preamble 11

Provides that the Commonwealth in 1979 passed legislation allowing the Northern Territory to establish its own Supreme Court by a Territory Act, thus completing the transfer of the three traditional arms of government to the Northern Territory — legislature, executive and judiciary.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See previous comments under Preamble 1.

12. A Committee of the Legislative Assembly of the Northern Territory on the Constitutional Development of the Northern Territory was established in 1985, and produced and tabled various papers and reports in the Legislative Assembly**,** including a draft constitution for the Northern Territory;

Purpose of the Clause: Preamble 12

Provides for the recognition of the work done by the Northern Territory Legislative Assembly Sessional Committee (previously Select Committee) on Constitutional Development in promoting issues on constitutional development and the development of a draft constitution for the Northern Territory

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See previous comments under Preamble 1.

13. The Legislative Assembly of the Northern Territory, by the *Constitutional Convention Act 1996*, established a Convention comprising a broad representation of the community of the Northern Territory to receive and consider the recommendations of the Legislative Assembly on the establishing and form of a new Constitution for the Northern Territory and, on the x day of xxx 1998 that Convention, in accordance with the Act, ratified a draft of that Constitution, in the following form, to be put to a referendum of the electors of the Northern Territory for approval;

Purpose of the Clause: Preamble 13

Provides for the recognition of the work done by a Constitutional Convention made up of participants from all walks of life in the Northern Territory in formulating a final Northern Territory constitution as put to the people of the Northern Territory in a referendum. Such a Convention was proposed by the Committee for the purpose of producing a settled draft of the new Constitution before it was put to a Northern Territory Referendum.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See previous comments under Preamble 1 and note the Interim Report No. 1, *A Northern Territory Constitutional Convention,* 1995.

14. On the approval of this Constitution at that referendum by a vote of more than the number of Northern Territory electors prescribed in legislation enacted by the Legislative Assembly of the Northern Territory, it is intended to submit the Constitution as so approved to the Commonwealth to be adopted as the Constitution of the Northern Territory and for the contemporaneous repeal of the *Northern Territory (Self-Government) Act 1978* of the Commonwealth;

Purpose of the Clause: Preamble 14

Provides for the recognition of the Northern Territory constitution as adopted by the people of the Northern Territory and voting in a referendum. It anticipates that the draft Constitution as settled by the Constitutional Convention will in fact be passed at that referendum, following the procedure originally proposed by the Committee.

Variations:

(a) Republic: No change. However, if Australia as a whole becomes a Republic, before the new Constitution comes into force, this may also need to be reflected in a new Preamble after this clause.

(b) Pre—Statehood: This clause has been drafted to formally recognise that the *Northern Territory (Self-Government) Act* will be repealed by the Commonwealth Parliament and that the new Constitution of the Northern Territory will be recognised by the Commonwealth Parliament either prior to a grant of Statehood or at the point of that grant.

Reference to Discussion and Information Papers: See previous comments under Preamble 1.

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

Purpose of the Clause: Preamble 15

Provides that this document as adopted by the people of the Northern Territory voting at a referendum is to be the Constitution of the Northern Territory. It assumes that the referendum will be successful, although of course if it is not successful, the Constitution will not proceed to the next stage of implementation by the Commonwealth.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See previous comments under Preamble 1.

NOW THEREFORE it is declared that this is the Constitution of the Northern Territory.

PART 1 - THE NORTHERN TERRITORY

1. ESTABLISHMENT OF BODY POLITIC

There is hereby established a body politic under the Crown in and for the Northern Territory of Australia by the name of the Northern Territory.

Purpose of the Clause: 1

This is a fundamental clause in the new Constitution. It provides for the establishment of a new political entity under the Crown for the Northern Territory of Australia and for the new name of the political body to be called the Northern Territory. This entity will be the new Government of the Northern Territory under the new Constitution and will replace the political entity established under the *Northern Territory (Self-Government) Act* 1978. If the Northern Territory also becomes a new State, this new political entity will be the new State Government for the Northern Territory.

Variations:

(a) Republic: Delete "under the Crown" in the clause.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: It is implicit in the various papers issued by the Committee that the new Constitution will establish a new Government for the Northern Territory, but with elements of continuity with the existing Northern Territory Government under the *Northern Territory (Self-Government) Act*. *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987, makes the point that while Australia remains formally monarchical in structure, the new Territory Government must be likewise be formally monarchical - see Part G. See also the Committee's Discussion Paper No. 7, *An Australian Republic? Implications for the Northern Territory,* 1994 in regard to the implications for the Northern Territory should Australia become a Republic.

PART 2 - THE LEGAL SYSTEM OF THE NORTHERN TERRITORY

Division 1 - Laws of the Northern Territory

2.1 THE LAWS

The laws of the Northern Territory consist of -

(a) this Constitution;

(b) the Organic Laws;

(c) the Acts of the Parliament;

(d) laws of the Northern Territory in force immediately before the commencement of, and continued in force by, this Constitution;

(e) laws made under or adopted by or under this Constitution or any of those laws, including subordinate legislative enactments;

(f) the common law of the Northern Territory; and

(g) other laws recognised by this Constitution.

Purpose of the Clause: 2.1

This Clause defines what are the laws of the Northern Territory under the new Constitution. It includes a new category of Organic laws (see clause 2.3 below). It will also include Aboriginal customary law on the same basis as the common law in force in the Northern Territory,

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: The subject of Northern Territory sources of law is discussed in Discussion Paper No. 4, *Recognition of Aboriginal Customary Law,* 1992: Part D. At page 4 of that Paper, the Committee noted that it is a fundamental principle that the public should be able to ascertain with some certainty what the laws are applicable to the Territory as part of the rule of law. It was not unreasonable to expect the new Constitution to specify the sources of law applying to the community.

2.1.1 ABORIGINAL CUSTOMARY LAW

Aboriginal customary law, to the extent of its existence in the Northern Territory immediately before the commencement of this Constitution —

Alternative 1	Alternative 2
(a) shall be recognised as a source of law in the Northern Territory, and (b) apart from where it is implemented and enforced as part of the common law of the Northern Territory or the practice of the courts, shall not be implemented or enforced by the Northern Territory, its institutions (including judicial institutions), instrumentalities, officers (including law enforcement officers), employees or agents except to the extent that is expressly provided under this Constitution or by or under an Organic Law or an Act of the Parliament.	(a) shall be recognised as a source of law in the Northern Territory; (b) may be implemented or enforced in respect of any person, but only under and in accordance with that Aboriginal customary law where that person considers that he or she is bound by that law; (c) may also be implemented or enforced in so far as it is part of the common law of the Northern Territory or in accordance with the practice of the courts; but subject to (b) and (c) above, shall not be implemented or enforced by the Northern Territory, its institutions (including judicial institutions), instrumentalities, officers (including law enforcement officers), employees or agents except to the extent that is expressly provided under this Constitution or by or under an Organic Law or an Act of the Parliament.

Purpose of the Clause: 2.1.1

Provides for the first time for the recognition of current Aboriginal customary law as a source of law in the Northern Territory, for its continued implementation and enforcement among Aboriginal persons themselves by traditional Aboriginal methods and also pursuant to court decisions to the extent that it is already part of the common law or pursuant to existing court practice, but otherwise only as provided by this Constitution, an Organic Law, or an Act of the Parliament. Two alternatives are offered for consideration.

> **Alternative 1 -** The first alternative omits any reference to the enforceability of Aboriginal customary law as between Aboriginal people themselves. It will be left to the courts to decide to what extent it will be given effect to as a source of law.
>
> **Alternative 2 -** The second alternative includes reference to enforceability of Aboriginal customary law as between Aboriginal people themselves in accordance with that law, thus making it clear that it is an enforceable system of law in respect of those persons who consider themselves bound by it.

In addition, under either alternative, the existing law and practise will also continue.

Subject thereto, Northern Territory institutions and officers will only be able to enforce Aboriginal customary law in so far as the Constitution, an Organic Law or an Act of Parliament so permits.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See Discussion Paper No. 4, *Recognition of Aboriginal Customary Law,* 1992; and Discussion Paper No. 6, *Aboriginal Rights and Issues - Options for Entrenchment,* 1993.

2.2 CONSTRUCTION OF LAWS

All Northern Territory Laws (other than this Constitution) shall be read and construed subject to -

(a) in any case - this Constitution, the Commonwealth of Australia Constitution Act and the Constitution of the Commonwealth and the *Australia Act 1986*;

(b) in the case of Acts of the Parliament and laws of the Northern Territory in force immediately before the commencement of, and continued in force by, this Constitution (but not including any subordinate legislative enactments made under such Acts or laws) - any relevant Organic Laws;

(c) in the case of subordinate legislative enactments - the Organic Laws and the laws by or under which they were enacted or made; and

(d) in the case of other laws in force in the Northern Territory - the laws mentioned in paragraphs (a), (b) and (c),

and so as not to exceed the authority to make them properly given, to the intent that where any such law would, but for this section, have been in excess of the authority so given shall nevertheless be a valid law to the extent to which it is not in excess of that authority.

Purpose of the Clause: 2.2

This provides for the priority of laws of the Northern Territory, giving the new Constitution (as well as the main federal constitutional documents) first priority as the fundamental law of the Northern Territory, with Organic laws second, Acts of the Parliament and previous Acts still in force third, subordinate legislation fourth, with common law and other sources of Northern Territory law (including Aboriginal customary law) equal next. This basically accords with the current priority of laws in the Northern Territory but gives the new Constitution a fundamental status, introduces a new category of Organic laws of special importance, and equates Aboriginal customary law with the common law.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See Discussion Paper No. 4, *Recognition of Aboriginal Customary Law,* 1992, as to the entrenched status of the new Constitution, and Information Paper No. 2, *Entrenchment of a New State Constitution,* 1989.

2.3 ORGANIC LAWS

(1) For the purposes of this Constitution, an Organic Law is a law of the Northern Territory -

(a) that is declared by this Constitution to be an Organic Law;

(b) that is an Act of Parliament which itself expressly states that it is an Organic Law.

(2) A Bill for an Act of Parliament that is expressly stated to be an Organic Law shall not when enacted take effect as an Organic Law unless -

(a) it was supported on its second and third readings by a division in each case in accordance with the Standing Rules and Orders of the Parliament with an affirmative vote equal to or more than a **[to be left blank - refer to a NT Constitutional Convention]** majority of the total number of members of the Parliament at the time of those respective divisions, and whether or not the Bill was amended;

(b) there was, a period of at least 2 calendar months between voting on its second reading and voting on its third reading;

(c) if the Bill was amended in Committee other than by way of minor drafting or consequential amendments, there was a period of at

least 2 calendar months between voting on the last amendment to the Bill and voting on its third reading as amended; and

(d) there was an opportunity in its second reading for debate on its merits.

(3) the Parliament may in a Bill for an Organic Law or by a Bill to be enacted in the same manner as an Organic Law increase (but not decrease) the percentage of affirmative votes specified in section 2.3 (2) in respect of an Organic Law or class of Organic Laws, and when enacted in accordance with this section it has effect accordingly.

(4) The Speaker shall present to the Governor for assent an Organic Law passed in accordance with this section, and on doing so must certify to the Governor that the requirements of this section have been complied with.

(5) The certificate referred to in subsection (4) shall state -

(a) the date on which the votes on the second and third readings of the Bill were taken; and

(b) in relation to each vote -

(i) the total number of members of the Parliament at the time; and

(ii) the respective numbers of members of the Parliament voting for and against the proposal,

and is, in the absence of proof to the contrary, conclusive evidence of the matters so stated.

(6) Nothing in this section prevents an Organic Law from -

(a) making any provision that might be made by an Act of the Parliament and which is expressly declared by that Organic Law as not being subject to the Organic Law procedures in this Constitution; or

(b) requiring any provision to be made by an Act of the Parliament that might otherwise be so made,

but any such provision may be altered by the same majority that is required for any other Act of the Parliament;

Purpose of the Clause: 2.3

This introduces a new concept of Organic laws, having a superior constitutional status to ordinary Acts but less status than the Constitution itself. They will either be Organic laws declared by the new Constitution or Acts which are enacted by the Parliament in accordance with special procedures and declared to be Organic laws (e.g. the patriated *Aboriginal Land Rights (Northern Territory) Act*. Parliament will therefore decide which laws will become Organic by following this procedure. Subsequent amendments to Organic laws will be difficult to effect.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: The possibility of using Organic laws was raised in Discussion Paper No. 6, *Aboriginal Rights and Issues - Options for Entrenchment,* 1993: for Aboriginal Land Rights: pp15-16; for a possible Bill of Rights in Discussion Paper No. 8, *A Northern Territory Bill of Rights?,* 1995: p.51; and for local government in Discussion Paper No. 9, *Constitutional Recognition of Local Government,* 1995.

Division 2 - Altering the Constitution and Organic Laws

[CLAUSES YET TO BE DRAFTED]

PART 3 - THE PARLIAMENT OF THE NORTHERN TERRITORY

Division 1 - Legislative Power

3.1 LEGISLATIVE POWER OF NORTHERN TERRITORY

(1) The legislative power of the Northern Territory is vested in the Parliament

(2) Subject to this Constitution, the Parliament has power, with the assent of the Governor as provided by this Constitution, to make laws for the peace, order and good government of the Northern Territory.

Purpose of the Clause: 3.1

. 3.1(1) Provides that the legislative power of the Northern Territory belongs to the new Parliament of the Northern Territory as the central democratic institution of the Northern Territory.

. 3.1(2) Provides that under the Constitution the new Northern Territory Parliament has power, after the Governor has assented, to make laws on all subjects relating to the Northern Territory, subject only to the new Constitution itself.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: For further information on the legislative power of the Parliament of the Northern Territory, see *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: p9.

3.2 ASSENT TO PROPOSED LAWS

(1) Every proposed law passed by the Parliament shall be presented to the Governor for assent.

(2) On the presentation of a proposed law to the Governor for assent, the Governor shall, subject to this section, declare that he or she -

(a) assents to the proposed law; or

(b) withholds assent to the proposed law.

(3) The Governor may return the proposed law to the Parliament with amendments that he or she recommends.

(4) The Parliament shall consider the amendments recommended by the Governor and the proposed law, with those or any other amendments, or without amendments, may be again presented to the Governor for assent, and subsection (2) applies accordingly.

Purpose of the Clause: 3.2

3.2(1) Provides that every proposed law passed by the Parliament has to be presented to the Governor for his assent, before it can become law.

3.2(2) Provides power to the Governor to give his or her assent to the proposed law or he or she can withhold assent. Under subsequent provisions, the decision to assent will normally be exercised in accordance with the advice of the responsible Northern Territory Ministers.

3.2(3) Provides power for the Governor to return the proposed law back to the Parliament with amendments to the proposed law that he or she recommends. Again, this will normally be exercised in accordance with advice from the Executive Council.

3.2(4) provides for the Parliament that in the event the Governor has returned a proposed law with amendments if any, it may consider the proposed law with amendments if any before again presenting the proposed law to the Governor for his or her assent. This is consequential on the previous provision.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: As to the power of assent to laws, see *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: p10.

3.3 PROPOSAL OF MONEY VOTES

An Act, vote, resolution or question, the effect of which is to dispose of or charge any revenues, loans or other moneys received by or on behalf of the Northern Territory, shall not be proposed in the Parliament unless the purpose for which such revenues, loans or other moneys are to be disposed of or charged by reason of the Act, vote, resolution or question has, in the same session, been recommended by message of the Governor to the Parliament.

Purpose of the Clause: 3.3

Provides for Parliament that it cannot in the same session of Parliament pass laws or pass resolutions on money matters relating to the disposal of those monies or charge any revenues, loans or other monies received by the Northern Territory unless recommended by the Governor in a message to the Parliament. This ensures that the initiation of financial proposals must come from the responsible Ministers only through their advice to the Governor.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: p62.

3.4 APPROPRIATION AND TAXATION LAWS NOT TO DEAL WITH SUBJECTS OTHER THAN THOSE FOR WHICH APPROPRIATION MADE OR TAXATION IMPOSED

(1) A proposed law which provides for the appropriation of revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation.

(2) Laws imposing taxation and proposed laws which provide for the appropriation of revenue or moneys for purposes other than the ordinary annual services of the Government shall deal with no matter other than the imposition and collection of that taxation and the purposes in relation to which it is imposed, or the subject in relation to which the revenue or moneys are to be appropriated, as the case may be.

Purpose of the Clause: 3.4

3.4 (1) Provides that when Parliament deals with a proposed law on revenue or for moneys for the ordinary annual services of the Government that the proposed law can only deal with that matter.

3.4 (2) Provides that when Parliament deals with a proposed law that imposes taxes or appropriates revenue or moneys for other purposes over and above the annual services of Government, it can only deal with that matter. Other matters can't be added.

Variations:

(a) Republic: No change

(b) Pre—Statehood: No change

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: p62.

3.5 POWERS, PRIVILEGES AND IMMUNITIES OF PARLIAMENT

The power of the Parliament includes the power to make laws -

(a) declaring the powers, privileges and immunities of the Parliament and of its members, committees and officers; and

(b) providing for the manner in which powers, privileges and immunities so declared may be exercised or upheld.

Purpose of the Clause: 3.5

Provides for the Parliament to make laws as to the powers, privileges and immunities of Parliament and its officers, for example, how members of Parliament, Parliamentary Committee's and officers of the Parliament will conduct themselves in the course of every day business of Parliament.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: p9.

Division 2 - Constitution and Membership of Parliament

3.6 THE PARLIAMENT

(1) There shall be a Parliament of the Northern Territory which shall consist of a single house.

(2) The Parliament shall be constituted by such numbers of members as prescribed by an Act.

(3) Subject to this Constitution, the members of the Parliament shall be directly elected as prescribed by an Act.

Purpose of the Clause: 3.6 - Sub-clauses (1) through to (3)

3.6 (1) Provides that there would be a new Parliament consisting of a single house.

3.6 (2) Provides for Parliament to pass legislation dealing with the number of members that Parliament will have.

3.6 (3) Provides for Parliament to make general electoral laws.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: - unicameral Parliament: pp15-18; - numbers of members: p18-19; - electoral laws: pp29-34.

Alternative 1 - Single Member Electorates	**Alternative 2 - Single or Multi-Member Electorates**	**Alternative 3 - Equal Multi-Member Electorates**
(4) For the purposes of the election of members of the Parliament, the Northern Territory shall be divided into as many electoral divisions as there are members to be elected.	(4) For the purpose of the election of members of the Parliament, the Northern Territory shall be divided into such electoral divisions, (whether as single or multi-member electoral divisions, or a combination of both) as prescribed by an Act.	(4) For the purpose of the election of members of the Parliament, the Northern Territory shall be divided into such electoral divisions, each division to return 2 or more members, but the same number as each other division, as prescribed by an Act.
(5) For the purposes of subsection (4), an electoral division shall contain a number of electors which is, as far as practicable and having regard to such factors as are prescribed by an Act, equal to the number in respect of each other electoral division.	(5) For the purposes of subsection (4), an electoral division shall contain a number of electors which, when divided by the number of members to be elected for the electoral division, is, as far as practicable and having regard to such factors as are prescribed by an Act, equal to the number so calculated in respect of each other electoral division.	(5) For the purposes of subsection (4), an electoral division shall contain a number of electors which is, as far as practicable and having regard to such factors as are prescribed by an Act, equal to the number in respect of each other electoral division.

Purpose of the Clause: 3.6 - Sub-clauses (4) and (5)

3.6 (4) & (5) Provides for the nature of the electorates for the Parliament. Three alternatives are offered —

Alternative 1 - Constitutionally this will require single member electorates of approximately equal numbers of electors;

Alternative 2 - Constitutionally this gives Parliament the option of single or multi member electorates (or a combination), but still with approximately equal numbers of electors per member;

Alternative 3 - Constitutionally this will require multi member electorates with an equal number of members in each, but still with approximately equal numbers of electors per member.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: on single/multi member electorates: pp31-33.

(6) A member of the Parliament shall, before taking his or her seat, make and subscribe an oath or affirmation of allegiance in the form in Schedule 2 and also an oath or affirmation of office in the form in Schedule 3.

(7) An oath or affirmation under subsection (6) shall be made before the Governor or a person authorised by the Governor to administer it.

Purpose of the Clause: 3.6 (6) and (7)

Provides that members of the Parliament will make an oath or affirmation of allegiance before the Governor or a person authorised by the Governor to administer it.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: No reference.

3.7 QUALIFICATIONS OF ELECTORS

All persons who are, under a law of the Commonwealth, qualified to vote at an election of a member of the House of Representatives of the Parliament of the Commonwealth for the Northern Territory and who have resided in the Northern Territory for not less than 3 calendar months immediately before the polling day of the election, are qualified to vote at an election of members of the Parliament.

Purpose of the Clause: 3.7

Provides a guarantee of the franchise for the new Parliament in that all persons who are entitled by law to vote at an election of a member of the House of Representatives and who have resided in the Northern Territory for 3 months can vote for the members of that Parliament.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: pp33-34.

3.8 VOTING AT ELECTIONS

Each person qualified to vote at an election of members of the Parliament is entitled to vote only once and the method of voting shall, as far as practicable, be by secret ballot as prescribed by an Act.

Purpose of the Clause: 3.8

Provides that a person who is qualified to vote at an election can only vote once and that as far as it practicable will be by secret ballot.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: pp34 & 38.

3.9 WRITS FOR ELECTIONS

Writs for the election of members of the Parliament shall be issued by the Governor on the advice of the Executive Council or the Premier.

Purpose of the Clause: 3.9

Provides for the Governor acting on the advice of the Executive Council or the Premier to issue writs for election of members of the Parliament.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: In relation to the issue of electoral writs, the general proposal is that the Governor acts in accordance with the advice of his or her Ministers - see *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: pp34, 53.

3.10 TERM OF OFFICE OF MEMBER

Subject to this Constitution, the term of office of a member of the Parliament commences on the date of his or her election and ends immediately before the date of the next general election of members of the Parliament.

Purpose of the Clause: 3.10

Provides for the term of office of a member of Parliament commences on the date of his or her election and the term of office will cease immediately before the date of the next general election.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: As to term of office see *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: pp23-28.

3.11 DATE OF ELECTIONS

(1) Subject to this Constitution, a general election of members of Parliament shall be held on a date determined by the Governor on the advice of the Executive Council or the Premier.

Purpose of the Clause: 3.11 (1)

Provides the general rule that an election to the new Parliament shall be held on a date determined by the Governor on the advice of the Executive Council or Premier.

Variations:

(a) Republic: No change

(b) Pre—Statehood: No change

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: pp23-28.

Alternative 1 - No Fixed Term	**Alternative 2 - Three Year Partial Fixed Term**	**Alternative 3 - Fixed Four Year Term**
(2) The period from the date of a general election of members of the Parliament to the date of the next succeeding general election shall be not more than 4 Years.	(2) The period from the date of a general election of members of the Parliament to the date of the next succeeding general election shall be not more than 4 Years.	(2) Subject to subsection (4), the Parliament, unless sooner dissolved in accordance with this Constitution, shall expire on the expiration of the Friday immediately before the fourth anniversary of the polling day for the last general election of members of the Parliament, and the general election of members of the new Parliament shall be held on the first Saturday after that Friday.
(3) Subject to this Constitution, the Governor may dissolve the Parliament on the advice of the Executive Council or the Premier, but not otherwise.	(3) Subject to this Constitution, the Governor may dissolve the Parliament on the advice of the Executive Council or the Premier, but not otherwise.	(3) Except as provided in subsections (4) and (5), the Governor shall not dissolve the Parliament.
(4) No provision. (see (5) below)	(4) Except as provided in subsection (5), the Governor shall not dissolve the Parliament within a period of 3 years from the commencement of the first meeting of the Parliament after a general election of members of the Parliament.	(4) The Governor may dissolve Parliament within 2 months before it is due to expire under subsection (2) where- (a) the general election would otherwise be required to be held during the same period as a Commonwealth election; (b) the Parliament would otherwise expire on a public holiday; or

		(c) where the Governor, in his or her sole discretion, considers that there are exceptional circumstances for bringing forward the general election, and the general election shall be held not later than the Saturday referred to in subsection (2).

Purpose of the Clause: 3.11 - Sub-clauses (2) through to (4)

There are 3 options for consideration that provides for the term of office of the new Parliament:

Alternative 1 - Constitutionally, this would allow a maximum 4 year term subject to early dissolution such that a general election can be called by the Governor at any time;

Alternative 2 - Constitutionally this will allow a maximum 4 year term, but will require the Parliament to sit for at least a 3 year fixed term (which cannot be terminated earlier except in limited circumstance, see below);

Alternative 3 - Constitutionally this will require a 4 year fixed term of the Parliament.

Variations:

(a) Republic: No change

(b) Pre—Statehood: No change

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: pp23-28. The Committee favoured the partially fixed 4 year term, but offers 3 options.

Alternative 1 - No Fixed Term	**Alternative 2 - Three Year Partial Fixed Term**	**Alternative 3 - Fixed Four Year Term**
(5) If -	(5) If -	(5) If -
(a) the Premier resigns or vacates his or her office or a vote of no confidence in the Government has been carried in the Parliament by a majority of its members present and voting in the Parliament; and	(a) the Premier resigns or vacates his or her office or a vote of no confidence in the Government has been carried in the Parliament by a majority of its members present and voting in the Parliament; and	(a) the Premier resigns or vacates his or her office or a vote of no confidence in the Government has been carried in the Parliament by a majority of its members present and voting in the Parliament; and
(b) the Governor has not been able, within such time as he or she considers	(b) the Governor has not been able, within such time as he or she considers reasonable, to	(b) the Governor has not been able, within such time as he or she considers reasonable, to appoint a

reasonable, to appoint a member of the Parliament who the Governor considers commands or is likely to command the general support of a majority of members of the Parliament, to form a government, the Governor may dissolve the Parliament and may do so without the need to refer the matter to, or act on the advice of, the Executive Council or the Premier.	appoint a member of the Parliament who the Governor considers commands or is likely to command the general support of a majority of members of the Parliament, to form a government, the Governor may dissolve the Parliament and may do so without the need to refer the matter to, or act on the advice of, the Executive Council or the Premier.	member of the Parliament who the Governor considers commands or is likely to command the general support of a majority of members of the Parliament, to form a government, the Governor may dissolve the Parliament and may do so without the need to refer the matter to or act on the advice of the Executive Council or the Premier, and the general election shall be held as soon as the Governor considers it to be practicable thereafter but in any event not later than the Saturday referred to in subsection (2).
(6) No provision.	(6) Subject to subsection (5), the Governor may also dissolve the Parliament at any time after the expiration of the period of 3 years referred to in subsection (4), but only on the advice of the Executive Council or the Premier and not otherwise.	(6) No provision.

Purpose of the Clause: 3.11 - Sub-clauses (5) and (6)

This specifies for the limited circumstances in which the Governor may appoint a new Premier or dissolve the Parliament otherwise than in accordance with the advice of the existing responsible Ministers. In other circumstances, the Governor will normally follow the advice of those responsible Ministers (see below). Three alternatives are provided, depending on whether the term of office is a maximum 4 year term, a 4 year term with a partially fixed term of 3 years, or a fixed 4 year term. In the case of the second alternative, a subclause (6) is also required in relation to dissolution in the last year of the 4 year term.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: pp23-28. As to the circumstances in which the Governor may decide to summon another person to be Premier or to dissolve Parliament, see the Discussion Paper on *A Proposed New Constitution for the Northern Territory,* 1987: pp54-55.

3.12 RESIGNATION OF MEMBERS OF PARLIAMENT

A member of the Parliament may resign office by writing signed by the member and delivered to the Speaker or, if there is no Speaker or the Speaker is absent from the Northern Territory, to the Governor, and on the receipt of the resignation by the Speaker or the Governor, as the case may be, the office of the member becomes vacant.

Purpose of the Clause: 3.12

Provides for a member of the Parliament to resign from Parliament and that the resignation will be in writing and signed by the member. The resignation is to be delivered to the Speaker and if there is no Speaker or the Speaker is absent, be delivered to the Governor. When the member so resigns, the position of the office of the member becomes vacant.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: No discussion.

3.13 FILLING OF CASUAL VACANCY

Alternative 1 - Single Member Electoral Division	Alternative 2 - Single/Multi Member Electorates	Alternative 3 - Equal Multi Member Electorates
Where a casual vacancy in the office of a member of the Parliament occurs earlier than 3 years and 6 months after the first meeting of the Parliament following the last general election, then, within 6 months after the vacancy occurring, unless writs for a general election of members of the Parliament are sooner issued, an election shall be held in the electoral division in respect of which the vacancy occurred, for the purpose of filling the vacant office for the remainder of the term of office of the member who last held the office.	Where a casual vacancy in the office of a member of the Parliament occurs earlier than 3 years and 6 months after the first meeting of the Parliament following the last general election, then, within 6 months after the vacancy occurring, unless writs for a general election of members of the Parliament are sooner issued, a replacement member shall be selected in the manner prescribed by an Act for the purpose of filling the vacant office for the remainder of the term of office of the member who last held the office.	Where a casual vacancy in the office of a member of the Parliament occurs earlier than 3 years and 6 months after the first meeting of the Parliament following the last general election, then, within 6 months after the vacancy occurring, unless writs for a general election of members of the Parliament are sooner issued, a replacement member shall be selected in the manner prescribed by an Act for the purpose of filling the vacant office for the remainder of the term of office of the member who last held the office.

Purpose of the Clause: 3.13

Alternative 1 - This provides for a by election for a casual vacancy under a single member electorate provision.

(Alternatives 2 & 3 - single/multi member electorates or equal multi member electorates)

A different clause for by-elections for casual vacancies is required where there are multi-member electorates. This leaves the method to be prescribed by an Act of the Parliament as the method will depend upon the exact nature of the multi-member electorate system chosen.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: pp30, 34.

3.14 QUALIFICATIONS FOR ELECTION

Subject to this Constitution a person is qualified to be a candidate for election as a member of the Parliament if, at the date of nomination, the person -

(a) is an Australian citizen;

(b) has attained the age of 18 years;

(c) is entitled, or qualified to become entitled, to vote at elections of members of the Parliament; and

(d) has been resident in the Northern Territory for not less than 6 calendar months.

Purpose of the Clause: 3.14

Provides for qualifications for persons who want to nominate as a candidate for elections as a member of the new Parliament. He or she has to be an Australian citizen, must be 18 years or over, must be entitled or qualified to vote at elections of members of the Parliament and must have been a resident in the Northern Territory for not less than 6 calendar months.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: pp19-23.

3.15 DISQUALIFICATIONS FOR MEMBERSHIP OF PARLIAMENT

(1) A person is not qualified to be a candidate for election as a member of the Parliament if, at the date of nomination -

(a) the person -

(i) is a member of either house of the Federal Parliament or of a State or Territory legislature (by whatever name called) of another State or Territory of the Commonwealth;

(ii) is the Governor-General, Administrator or head of government of the Commonwealth or the Governor, Administrator or head of government of a State or Territory of the Commonwealth; or

(iii) holds office, of whatever tenure, as a judge under a law of the Commonwealth or of a State or Territory of the Commonwealth;

(b) the person -

(i) holds an office or appointment, prescribed for the purpose of this section by an Act, under a law of the Commonwealth or a State or Territory of the Commonwealth; or

(ii) not being the holder of such an office or appointment, is employed by the Commonwealth, by a State or Territory of the Commonwealth or by a body corporate established for a public purpose by such a law, and prescribed for the purposes of this section by an Act, and he or she is entitled to any remuneration or allowance (other than reimbursement of expenses reasonably incurred) in respect of that employment;

(c) the person is an undischarged bankrupt; or

(d) the person has been convicted and is under sentence of imprisonment (including while on parole or under a suspended sentence) for one year

or longer for an offence against the law of the Commonwealth or of a State or Territory of the Commonwealth.

Purpose of the Clause: 3.15 (1)

Provides for the criteria for persons who are disqualified from being a candidate for a member of the Parliament at the date of nominations.

A person cannot stand if -

(a) he or she is a member of Parliament of a State or the Commonwealth;

(b) is the Governor General of Australia, the Administrator or Governor of a State or Territory;

(c) holds office as a judge under any law of the Commonwealth, State or Territory;

(d) holds any public office that is prescribed by an Act of the new Parliament or otherwise is employed on remuneration by any public employer as prescribed by an Act of the new Parliament.;

(e) is an undischarged bankrupt; or

(f) has been convicted under any law of the Commonwealth, State or Territory and is under sentence of imprisonment (including while on parole or a suspended sentence) for one year or longer.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: pp19-23.

(2) A person elected as a member of the Parliament who, immediately before being so elected -

(a) held an office or appointment (other than an office or appointment prescribed for the purposes of this section by an Act) under a law of the Northern Territory; or

(b) not being the holder of an office or appointment under such a law, was employed by the Northern Territory or by a body corporate established for a public purpose by an Act (other than employment prescribed for the purposes of this section by an Act),

and who was entitled to any remuneration or allowance (other than reimbursement of expenses reasonably incurred) in respect of that office, appointment or employment, ceases, by force of this subsection, to hold such office, appointment or employment on being so elected.

Purpose of the Clause: 3.15 (2)

Provides that a person elected to the new Parliament who previously held an Northern Territory office or appointment or was employed by the Northern Territory, other than an office, appointment or employment prescribed under clause 3.15(1), automatically ceases to hold same upon election to the new Parliament. This will enable the person to nominate and campaign, but continue to hold the existing office, appointment or employment if not elected.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: pp19-23.

(3) A member of the Parliament vacates office if he or she -

(a) becomes a person to whom any of the paragraphs of subsection (1) applies;

(b) ceases to be an Australian citizen;

(c) without the permission of the Parliament, fails to attend the Parliament for 7 consecutive sitting days of the Parliament;

(d) ceases to be entitled, or qualified to become entitled, to vote at elections of members of the Parliament; or

(e) takes or agrees to take, directly or indirectly, any remuneration, allowance or honorarium for services rendered in the Parliament, otherwise than in accordance with, or honestly believing it to be in accordance with, an Act that provides for remuneration and allowances to be paid to persons in respect of their services as members of the Parliament, members of the Executive Council or Ministers of the Northern Territory.

Purpose of the Clause: 3.15 (3)

Provides for the vacating of the office of a member of the new Parliament if a person is disqualified from the office in accordance with section 3.15(1), ceases to be an Australian citizen, has failed to attend Parliament without seeking leave for 7 consecutive days, ceases to be entitled or qualified to be entitled to vote at election of members of the Parliament; or takes or agrees to take, directly or indirectly any remuneration or allowance or honorarium for services, not entitled under law, to that person as a member of the Parliament.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: pp19-23.

Division 3 - Procedure of Parliament

3.16 SESSIONS OF PARLIAMENT

(1) Subject to this section, the Governor may, by notice in the *Gazette*, appoint such times for holding the sessions of the Parliament as he or she thinks fit and may also, from time to time, in like manner, prorogue the Parliament.

(2) At the written request of a majority of members of the Parliament, the Governor shall, by notice in the *Gazette*, appoint a time, being not later than 14 days after the day on which he or she receives the request, for holding a session of the Parliament.

(3) The first sittings of the Parliament shall be commenced within 6 months after the declaration of the polls after a general election of members of the Parliament and thereafter shall be held not later than 6 months after the last day of the previous sittings.

Purpose of the Clause: 3.16

3.16 (1) Provides for the Governor to appoint such times for holding the sessions of Parliament and may from time to time terminate the session by prorogation without dissolving the Parliament.

3.16 (2) Provides for the majority of members of the Parliament to request the Governor to appoint a time, being no later than 14 days after the day on which he or she receives the request, for holding a session of the Parliament.

3.16 (3) Provides for sittings of the Parliament shall commence within 6 months after the declaration of the polls after a general election and within 6 months after the last day of the previous sittings.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: in regard to (1) and (2) above, no discussion, but see *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: p.35. As to (3) see *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: pp24-25, 38.

3.17 QUORUM

(1) The quorum for a sitting of the Parliament is one third of the number of seats in the Parliament at the time.

(2) The Standing Rules and Orders of the Parliament shall make provision for the action to be taken in the event of a lack of or loss of a quorum at any time.

Purpose of the Clause: 3.17

Provides for the minimum number of members that are to be present in order for Parliament to validly conduct business and the Standing Rules and Orders of the Parliament will make provision in the event where there is not the sufficient number of members to form a quorum.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: No discussion, but see *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: p35.

3.18 THE SPEAKER

(1) The Parliament shall, before proceeding to the dispatch of any other business, choose a member of the Parliament to be the Speaker of the Parliament and, as often as the office of Speaker becomes vacant, the Parliament shall again choose a member to be the Speaker.

(2) The Speaker continues to hold office until -

(a) the Parliament first meets after a general election of members of the Parliament that takes place after he or she is chosen Speaker under subsection (1);

(b) he or she resigns office by writing signed by him or her delivered to the Governor;

(c) he or she ceases to be a member of the Parliament otherwise than by reason of the dissolution of the Parliament; or

(d) he or she is removed from office by the Parliament,

whichever first occurs.

(3) The Speaker has such functions, powers and privileges as are imposed or conferred on him or her by or under a law of the Territory.

Purpose of the Clause: 3.18

3.18 (1) Provides for the Office of Speaker and that the office is to be filled by a member of the Parliament, chosen by other members of the Parliament.

3.18 (2) Provides for the Speaker to hold office until the Parliament first meets after a general election, he or she resigns in writing delivered to the Governor, ceases to be a member of the Parliament or is removed from office by the Parliament.

3.19 (3) Provides that the powers, functions and privileges of the Speaker will be incorporated in legislation passed by the Parliament.

"Law of the Territory" will be defined to include this Constitution, an Organic Law, an Act, subordinate legislation and the common law applicable in the Territory.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: pp36, 38.

3.19 ACTING SPEAKER

The Standing Rules and Orders of the Parliament may provide for the appointment of an Acting Speaker and for a further Acting Speaker in place of the Acting Speaker, and for all matters incidental to such an appointment.

Purpose of the Clause: 3.19

Provides that the Standing Rules and Orders of the Parliament will make provision for the appointment or otherwise of an Acting Speaker.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: pp36, 38.

3.20 VOTING IN PARLIAMENT

(1) Subject to this Constitution, questions arising in the Parliament shall be determined by a majority of votes.

(2) The Speaker or other member presiding at a meeting of the Parliament or of a Committee of the Parliament is, in all cases, entitled to vote and shall also, where there is an equality of votes on a question, have a casting vote.

Purpose of the Clause: 3.20

3.20 (1) Provides that under this Constitution questions that arise in the Parliament will be determined by a majority of votes.

3.20 (2) Provides that the Speaker or other member presiding at a meeting of the Parliament or of a Parliamentary Committee will in all cases be entitled to vote on a question and where the votes are equal, he or she shall have a casting vote.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern Territory*, 1987: pp35-36.

3.21 VALIDATION OF ACTS OF PARLIAMENT

Where a person who has, whether before or after the commencement of this Constitution, purported to sit or vote as a member of the Parliament at a meeting of the Parliament or of a Committee of the Parliament -

(a) was not a duly elected member by reason of his or her not having been qualified for election or of any other defect in the election of the person; or

(b) had vacated office as a member,

all things done or purporting to have been done by the Parliament or that Committee shall be deemed to be as validly done as if the person had, when so sitting or voting, been a duly elected member of the Parliament or had not vacated office, as the case may be.

Purpose of the Clauses: 3.21

Provides that all actions by the Parliament, whether or not any member was duly elected by reason of his or her not being qualified for elections or has vacated his or her position as a member of Parliament, will be deemed as valid action as if that person had been duly elected as a member of the Parliament or had not vacated office.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: No discussion, but see *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: p.35.

3.22 MINUTES OF PROCEEDINGS

(1) The Parliament shall cause minutes of its proceedings to be kept.

(2) A copy of minutes kept under subsection (1) shall, on request made by any person, be made available for inspection by the person or, on payment of such fee, if any, as is fixed by or under an Act, be supplied to the person.

Purpose of the Clauses: 3.22

Provides that all proceeding of the Parliament will be minuted.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: No discussion, but see *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: p.35.

3.23 STANDING RULES AND ORDERS

The Parliament may make Standing Rules and Orders, not inconsistent with a law of the Northern Territory, relating to the order and conduct of its business and proceedings.

Purpose of the Clauses: 3.23

Provides that the Parliament for purpose of conducting its business and proceedings will makes rules and orders which will formally be called 'Standing Rules and Orders'.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: No discussion, but see *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: p.35.

PART 4 - THE EXECUTIVE

4.1 EXTENT OF EXECUTIVE POWER

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

Purpose of the Clause: 4.1

This clause establishes the extent of the executive power of the Northern Territory Government under the new Constitution. It provides for the powers, duties and functions of the Governor, the Executive Council and Ministers of the Northern Territory to extend to the execution and maintenance of the new Constitution and the laws of the Northern Territory, including the prerogatives of the Crown applicable to the Northern Territory.

Variations:

(a) Republic: The reference to prerogatives of the Crown will have to be changed to a reference to those powers, etc., that were previously comprehended within the prerogatives of the Crown. The draft assumes that the title "Governor" will be used, whether or not the Territory has a republican system, in a similar manner to the State Governors of the USA.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: In regard to the power of the Executive, see *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: Parts F & G.

4.2 GOVERNOR

(1) There shall be a Governor of the Northern Territory who shall be appointed by Her Majesty on the advice of the Premier and who shall hold office during Her Majesty's pleasure.

(2) Subject to this Constitution, the Governor is charged with the duty of -

(a) upholding and maintaining this Constitution; and

(b) administering the government of the Northern Territory.

(3) Except as otherwise expressly provided in this Constitution or an Act, or where, in the Governor's opinion, to so act would be contrary to his or her duty under subsection (2)(a), the Governor shall act, in administering the government of the Northern Territory, only in accordance with the advice of the Executive Council.

(4) If the Governor acts in or purportedly in administering the government of the Northern Territory otherwise than in accordance with the advice of the Executive Council or a Minister of the Northern Territory duly given, he or she shall, on the first sitting day of the Parliament after so acting, cause to be tabled in the Parliament a written statement of his or her reasons for so acting.

Purpose of the Clause: 4.2

This establishes the new office of Governor to replace the Administrator under the *Northern Territory (Self-Government) Act*. 1978 It assumes that this change will be associated with a grant of statehood.

4.2 (1) Provides for the office of Governor for the Northern Territory, appointed by Her Majesty (the Queen of Australia) on the advice of the Premier in accordance with the provisions of the *Australia Act* 1986 and will hold office during Her Majesty's pleasure.

4.2 (2) Provides for duties of the Governor to uphold and maintain the provisions of this Constitution and to administer the government of the Northern Territory as the Head of State for the Northern Territory representing the Queen, in the same manner as a State Governor.

4.2 (3) Provides for the Governor to fulfil his or her duties in administering the government of the Northern Territory in accordance with advice of the Executive Council except as otherwise expressly provided for under this Constitution, an Organic Law, an Act of the Parliament or where it would not uphold and maintain the new Constitution. Thus the convention that the Governor acts on the advice of his/her responsible Ministers is elevated to a constitutional rule except in limited circumstances.

4.2 (4) Provides for the Governor to give reasons to Parliament if he or she has acted or has claimed to have acted contrary to the advice of the Executive Council or of a Minister of the Northern Territory and that a written statement detailing the reasons for the action taken be tabled in the Parliament.

Variations:

(a) Republic: If Australia (including the Northern Territory) is a Republic, the appointment of the Head of State by the Queen will need to be replaced by some other method of appointment or election.

(b) Pre—Statehood: If the new Constitution is to come into operation before a grant of Statehood, it may be necessary to continue the present method of appointment by the Governor General, to be replaced by appointment by the Queen from the grant of Statehood.

Reference to Discussion and Information Papers: See Discussion Paper No. 7, *An Australian Republic? Implications for the Northern Territory;* and *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: Parts G & H.

4.3 REMUNERATION AND OTHER TERMS AND CONDITIONS OF GOVERNOR

The Governor shall be paid out of the Public Account of the Northern Territory such remuneration, and shall be engaged on such terms and conditions, as fixed by or under an Act, which remuneration, terms and conditions shall not be reduced while the Governor continues in office.

Purpose of the Clause: 4.3

Provides for the remuneration, terms and conditions of the Governor to be fixed by an Act of Parliament and not to be reduced during any term of office.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: p49.

4.4 ACTING GOVERNOR

(1) The Parliament may, by resolution, appoint one or more persons to act in the office of Governor and to administer the government of the Northern Territory during any vacancy in the office of Governor or whenever the Governor is absent from duty or from the Northern Territory or is, for any other reason, unable to exercise and perform the powers and functions of office.

(2) An appointment of a person under subsection (1) may be expressed to have effect only in such circumstances as are specified in the resolution of the Parliament.

(3) An Acting Governor administering the government of the Northern Territory has, and may exercise and perform, all the powers and functions of the Governor.

(4) The exercise of a power or performance of a function by an Acting Governor during the absence of the Governor from the Northern Territory does not prevent the exercise of any of those powers or the performance of any of those functions by the Governor.

(5) The appointment of an Acting Governor, and any act done by a person purporting to act under this section, shall not be called in question on the grounds that the occasion for his or her so acting had not arisen or had ceased.

Purpose of the Clause: 4.4

4.4 (1) Provides for Parliament by resolution to appoint one or more persons to be Acting Governor, during any vacancy in the office of Governor or the Governor is absent from duty, or for any reason is unable to perform the powers and functions of that office.

4.4 (2) Provides for the appointment of Acting Governor can only be effected in accordance with the resolution made by Parliament.

4.4 (3) Provides for powers and functions of the Acting Governor to exercise all the powers and functions of the Governor.

4.4 (4) Provides for the Governor to exercise his powers and functions, when he or she is absent, even though there is an Acting Governor.

4.4 (5) Provides for any action done by the appointment of Acting Governor cannot be called into question on the grounds that the occasion for his or her so acting had not arisen or the action had ceased.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: No discussion.

4.5 EXECUTIVE COUNCIL

(1) There shall be an Executive Council of the Northern Territory to advise the Governor in the government of the Northern Territory.

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

(3) The Governor or his or her nominee is entitled to attend all meetings of the Executive Council, and shall preside at all meetings at which he or she is present.

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

(5) The Governor may convene such meetings of the Executive Council as he or she thinks necessary but shall convene a meeting when requested by the Premier or acting Premier to do so.

(6) A meeting of the Executive Council shall not be convened otherwise than by the Governor.

(7) Subject to the preceding provisions of this section, the procedure of the Executive Council shall be as the Council determines.

Purpose of the Clause: 4.5

4.5 (1) Provides for the establishment of the Executive Council to advise the Governor of the Northern Territory.

4.5 (2) Provides for membership of the Executive Council will comprise of members of Parliament who hold the office of Minister for the Northern Territory.

4.5 (3) Provides for the Governor or his or her nominee to attend all meetings of the Executive Council and that the Governor or his or her nominee will preside at all meetings at which he or she is present.

4.5 (4) Provides for the Governor to introduce into a meeting of the Executive Council any matter for discussion.

4.5 (5) Provides for the Governor to call meetings of the Executive Council, but he or she must call a meeting of the Executive Council when requested by the Premier or Acting Premier.

4.5 (6) Provides for the Governor to be the only person who can convene a meeting of the Executive Council.

4.5 (7) Provides for the Executive Council to determine its own rules and procedures in conducting its meetings.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: Part J.

4.6 MINISTERIAL OFFICE

There shall be such number of offices of Minister of the Northern Territory, having such respective designations, as the Governor, acting on the advice of the Premier, from time to time determines.

Purpose of the Clause: 4.6

Provides for the Governor, acting on the advice of the Premier, to determine from time to time the number of offices and designations of Minister of the Northern Territory.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: Part I.

4.7 APPOINTMENT OF MINISTERS

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

(2) If a vote of no confidence in the Government has been carried in the Parliament by a majority of its members present and voting and the Governor considers that there is another member of the Parliament who commands or is likely to command the general support of the majority of the members of the Parliament on any matter, the Governor may terminate the appointment of the Premier, and may do so without the need to refer the matter to or act on the advice of the Executive Council or the Premier.

(3) Subject to this Part, the Governor may, on the recommendation of the Premier -

(a) appoint a member of the Parliament to a Ministerial Office; and

(b) at any time, terminate the appointment.

Purpose of the Clause: 4.7

4.7 (1) Provides for the Governor to appoint as Premier of the Northern Territory the member of the Parliament who in his or her sole opinion commands or is likely to command the general support of the majority of the members of the Parliament. Thus the Premier must be the person having the confidence of a majority of the Parliament to be the leader of the Government.

4.7 (2) When read with Clause 4.7(1), provides that where there is a vote of no confidence by the Parliament in the Government, the Governor may appoint another member of the Parliament who commands or is likely to command the general support of the majority of the members of the Parliament, to be Premier, and that the Governor can terminate the appointment of the existing Premier, without having to refer the matter to or act on the advice of the Executive Council or the Premier.

4.7 (3) Provides for the Governor on the recommendation of the Premier to appoint and terminate, at any time, a member of the Parliament to be a Minister of the Northern Territory.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: Part I.

4.8 TENURE OF OFFICE

The appointment of a person to a Ministerial Office takes effect on the day specified in the instrument of appointment and terminates when -

(a) he or she ceases, by reason of his or her resignation or by reason of the provisions of section 3.15, to be a member of the Parliament;

(b) his or her appointment is terminated under section 4.7 (3) by the Governor;

(c) he or she resigns office by writing signed by him or her delivered to the Governor and the resignation is accepted by the Governor; or

(d) the first sittings of the Parliament after a general election of the Parliament that takes place after the appointment takes effect, where the Minister is not re-elected as a member.

Purpose of the Clause: 4.8

Provides for the tenure of office for a member of the Parliament who is a Minister and for the cessation of that tenure, governed by the following:

(a) if he or she ceases to be a member of Parliament or has resigned;

(b) if his or her appointment has been terminated by the Governor;

(c) if he or she resigns in writing to the Governor and the resignation is accepted; or

(d) where he or she has not be re-elected as a member of Parliament after a general election of the Parliament.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: pp58-59 and also Part H.

4.9 OATH TO BE TAKEN BY MEMBERS OF EXECUTIVE COUNCIL AND MINISTERS

(1) A member of the Executive Council shall, before entering on the duties of the member's office, make and subscribe an oath or affirmation in accordance with the form in Schedule 1.

(2) A person who is appointed to a Ministerial Office shall, before entering on the duties of the office, make and subscribe an oath or affirmation in accordance with the form in Schedule 2.

(3) An oath or affirmation under subsection (1) or (2) shall be made before the Governor or a person authorised by the Governor to administer such oaths or affirmations.

Purpose of the Clause: 4.9

Provides a member of the Executive Council and a person appointed to a ministerial office an oath or affirmation to make before the Governor as prescribed in a schedule to this Constitution.

Variations:

(a) Republic: No change, although the form of oath may change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: No discussion.

PART 5 - FINANCE

5.1 INTERPRETATION

In this Part "public moneys of the Northern Territory" means the revenues, loans and other moneys receive by or on behalf of the Northern Territory.

Purpose of the Clause: 5.1

This is a definition clause. This definition might yet wind up in the general definitions provision

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: Part K.

5.2 PUBLIC MONEYS

(1) The public moneys of the Northern Territory shall be available to defray the expenditure of the Northern Territory.

(2) The receipt, expenditure and control of public moneys of the Northern Territory shall be regulated as provided by an Act.

Purpose of the Clause: 5.2

Provides that all money of the Northern Territory received and expended will be regulated by legislation passed by the Parliament and those moneys received will be available to defray the expenditure of the Northern Territory.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: Part K.

5.3 WITHDRAWAL OF PUBLIC MONEYS

(1) No public moneys of the Northern Territory shall be issued or expended except as authorised by an Act.

(2) The public moneys of the Northern Territory may be invested in such manner as provide by or under an Act.

Purpose of the Clause: 5.3

Provides that the use of public moneys is to be regulated by legislation passed by the Parliament.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: Part K.

PART 5 - THE JUDICIARY

6.1 JUDICIAL POWER OF COURTS

(1) The judicial power of the Northern Territory shall be vested in a superior court to be called the Supreme Court of the Northern Territory (including that Court exercising its jurisdiction as the Court of Appeal and the Court of Criminal Appeal) and in such other courts as the Parliament establishes by an Act.

(2) The Supreme Court of the Northern Territory shall consist of a Chief Justice and such other Judges and officers as prescribed by an Act.

Purpose of the Clause: 6.1 - Sub-clauses (1) and (2)

6.1 (1) Provides that the judicial power of the Northern Territory shall reside in the Supreme Court of the Northern Territory, including the Supreme Court as the Court of Appeal or the Court of Criminal Appeal and in other courts established by the Parliament in legislation passed by the Parliament.

6.1 (2) Provides that the Supreme Court of the Northern Territory will consist of a Chief Justice and other judges and officers of the Court as prescribed in legislation passed by the Parliament.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: Parts N & O.

(3) The Supreme Court (including in its appellate jurisdiction both civil and criminal in relation to appeals from another court) shall be a court of general jurisdiction in civil and criminal matters relating to the Northern Territory, including as to matters arising under this Constitution or involving its interpretation and, without limitation, its jurisdiction and that of other courts established in pursuance of subsection (1) is as prescribed by an Act or by an Act of the Commonwealth or of a State or Territory of the Commonwealth.

Purpose of the Clause: 6.1 (3)

Provides that the Supreme Court of the Northern Territory will be a court of general jurisdiction in civil and criminal matters relating to the Northern Territory, including matters involving the interpretation of this Constitution, and that jurisdiction may be conferred on the Territory courts by legislation of the Northern Territory, the Commonwealth and a State.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: Part O.

(4) The jurisdiction of the Supreme Court under section (3) extends to an advisory jurisdiction in matters arising under this Constitution or involving its interpretation but only at the instance of the Governor in his or her sole discretion, the Speaker of the Parliament on the resolution of Parliament, the Executive Council or the Premier.

Purpose of the Clause: 6.1 (4)

Provides an extension of the jurisdiction of the Supreme Court of the Northern Territory to advise on matters arising under this Constitution or involving its interpretation. It can only do so when matters are submitted to the Court by the Governor in his or her discretion, the Speaker of the Parliament on the resolution of Parliament, the Executive Council or the Premier. Thus in controversial constitutional issues, for example, there will be power for the Supreme Court in open court, if necessary on an urgent application, to rule on the constitutionality of a proposed Governmental course of action before it is taken.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: No discussion, but note the duty of the Governor to maintain the new Constitution - see *Discussion Paper on A Proposed New Constitution for the Northern* Territory, 1987: p54. Thus the Governor and others specified will be able to seek the advice of the Supreme Court in public sittings before any decision by the Government is taken to act in a way that might be unconstitutional.

6.2 APPOINTMENT, REMOVAL AND REMUNERATION OF JUDGES OF THE SUPREME COURT

(1) The Chief Justice of the Supreme Court shall be appointed by the Governor in accordance with the advice of the Executive Council**,** after consultation with such bodies representing the legal profession in the Northern Territory as the Governor thinks fit.

(2) The Judges of the Supreme Court other than the Chief Justice shall be appointed by the Governor in accordance with the advice of the Executive Council**,** after consultation with the Chief Justice and such bodies representing the legal profession in the Northern Territory as the Governor thinks fit.

(3) A Judge of the Supreme Court shall not be removed from office except by the Governor on an address from the Parliament praying for the Judge's removal on the grounds of proved misbehaviour or incapacity.

(4) A Judge of the Supreme Court shall retire from office at the age of 70 years, or such greater age as is prescribed by an Act.

(5) Judges of the Supreme Court and the members of other courts established in pursuance of section 6.1(1) shall be paid out of the Consolidated Revenue Account of the Northern Territory such remuneration, and be employed on such terms and conditions, as provided by or under an Act.

(6) The remuneration or terms or conditions of appointment of a Judge shall not be reduced while the Judge continues in office.

Purpose of the Clause: 6.2

Provides for the appointment and removal of the Chief Justice and Judges of the Supreme Court of the Northern Territory in strictly limited circumstances, designed to preserve the independence of the judiciary.

6.2 (1) Provides for the Chief Justice to be appointed by the Governor acting upon the advice of the Executive Council after consultation with bodies representing the legal profession.

6.2 (2) Provides for Judges of the Court to be appointed by the Governor acting upon the advice of the Executive Council after consultation with the Chief Justice and with bodies representing the legal profession.

6.2 (3) Provides for a Judge to be removed from office by the Governor upon a motion in the Parliament to remove a Judge on the grounds of proved misbehaviour or incapacity.

6.2 (4) Provides for the retirement age of a Judge to be 70 years of age or such greater age as prescribed in legislation passed by the Parliament.

6.2 (5) and (6) Provides for the remuneration, terms and conditions of appointment of a Judge of the Supreme Court of the Northern Territory not to be reduced during a term of office.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: pp71-74, 78-79.

6.3 DOCTRINE OF SEPARATION OF POWERS

Nothing in this Constitution prevents the passing by the Parliament of an Act -

(a) conferring judicial authority on a person or body outside the Judiciary; or

(b) providing for the establishment by or in accordance with an Act, or by the consent of the parties, of arbitral, conciliatory or other tribunals, whether *ad hoc* or otherwise, outside the Judiciary,

on such terms and conditions as the Parliament thinks fit.

Purpose of the Clause: 6.3

Provides for the Parliament, on such terms and conditions it thinks fit, to confer judicial authority on a person or bodies outside the Judiciary and for the establishment, whether by legislation or by consent of parties of arbitral, conciliation or other tribunals, whether ad hoc or otherwise, outside the Judiciary. Thus the strict separation of powers doctrine, not applicable in the States, will also not be applicable in the Northern Territory to prevent the exercise of judicial power by specialised tribunals established by legislation. However, this will not affect the independence of the Supreme Court under the preceding provision.

Variations:

(a) Republic: No change.

(b) Pre—Statehood: No change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern Territory,* 1987: pp75-77.

PART 7 - ABORIGINAL RIGHTS

7.1 PROTECTION OF ABORIGINAL LAND RIGHTS

(1) Subject to this Constitution, an Organic law shall be enacted by the Parliament entitled the Aboriginal Land Rights (Northern Territory) Act which shall contain provisions based on those contained in the Aboriginal Land Rights (Northern Territory) Act 1976 of the Commonwealth as in force immediately before the commencement of this Constitution, but with variations to give effect to that Act as a law of the Northern Territory and with such other variations as are determined by the Parliament, being in either case variations in a form agreed to by the Commonwealth.

(2) Upon the enactment of an Organic law in accordance with subsection (1), that Organic law may only be amended by a further Organic law in accordance with section [amendment procedures yet to be determined], and the affirmative votes required for such an amendment under that section shall be equal to or more than ([alternative 1- twothirds] or [alternative 2 - three-quarter].

(3) Notwithstanding anything in the Aboriginal Land Rights (Northern Territory) Act as an Organic law, an estate or interest in freehold in Aboriginal land shall not be capable of being sold, assigned, mortgaged, charged, surrendered, extinguished, or otherwise disposed of unless a court or body established by an Organic law is first satisfied after enquiry that all Aborigines having an estate or interest in that land, being of full legal capacity, have been adequately informed of, and a majority of them have voluntarily consented to, the proposed transaction and that the proposed transaction is otherwise in the interests of all Aborigines having an estate or interest in, or residing on, that land.

(4) An Organic law shall provide that the court or body referred to in subsection (3) shall comprise or include in its membership a judge of the Supreme Court of the

Northern Territory and that it shall have power to conduct such enquiries as it considers necessary and to issue a summons for the attendance of witnesses and/or for the production of documents.

(5) Notwithstanding anything in the Aboriginal Land Rights (Northern Territory) Act as an Organic law, but subject to subsection (6), Aboriginal land shall not be resumed, compulsorily acquired or forfeited by or under a law of the Northern Territory,

(6) An Organic law may provide for the compulsory acquisition of an estate or interest in all or any part of Aboriginal land where that estate or interest is less than a freehold estate or interest, providing that the acquisition is on just terms and for or in furtherance of any purpose which is for the benefit of the public (other than as a park) and whether or not that purpose is to be effected by the Northern Territory or by any other person or body, and otherwise upon terms and conditions not less favourable than for the compulsory acquisition of other land under a law of the Northern Territory.

(7) Where an estate or interest in all or any part of Aboriginal land is compulsorily acquired under subsection(6), then upon the permanent cessation of the use of that acquired land for or in furtherance of any purpose which is for the benefit of the public (and whether it is the original purpose or otherwise), and if the land is still Aboriginal land, the estate or interest so acquired shall cease.

(8) An Organic law may declare that any other law of the Northern Territory is capable of operating concurrently with the Aboriginal Land Rights (Northern Territory) Act as an Organic law, and upon such a declaration, those laws shall be interpreted and applied accordingly.

Purpose of the Clause 7.1

Provides for the patriation of the *Aboriginal Land Rights (Northern Territory) Act* 1976 of the Commonwealth to the Northern Territory as a law of the Northern Territory in the form as at the commencement of the new Constitution, with such variations as are agreed with the Commonwealth. Thereafter the patriated Act can only be amended by a further Organic law passed in accordance with the restricted procedures in the new Constitution, but with a special majority requirement for which two alternatives are offered - twothirds of all the members of the Parliament or three quarters of all those members. Even then, specific features of Aboriginal land rights are to be entrenched in the Constitution, beyond amendment even by an Organic law. These constitutional guarantees will prevent any disposal of the freehold in Aboriginal land once granted without a prior independent enquiry with a Supreme Court Judge, to make sure that all Aborigines with an interest are informed, that a majority of them have voluntarily consented and that any such disposal is in the interests of the Aboriginals concerned. Otherwise the land must remain freehold Aboriginal land, although the existing provisions for disposal of lesser interests than freehold will remain. All compulsory acquisition of Aboriginal land will be excluded by the Constitution, except that the acquisition of interests less than freehold for a purpose benefiting the public will be permitted on just terms and on limited conditions. There will be power by an Organic law to declare specific laws of the Northern Territory as capable of operating concurrently with the *Aboriginal Land Rights (Northern Territory) Act*, thus removing current doubts in such matters as local government.

Variations:

(a) Republic: No change

(b) Pre--Statehood: No change

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern Territory*, *1987:* Part S; and Discussion Paper No 6, *Aboriginal Rights and Issues - Options for Entrenchment,* 1993: in particular Part D.

7.2 PROTECTION OF ABORIGINAL SACRED SITES

An Organic law shall provide for the protection of, and the prevention of the desecration to, sacred sites in the Northern Territory, including sacred sites on Aboriginal land, and in particular it shall regulate or authorise the entry of persons on those sites, and that Organic law shall provide for the right of Aborigines to have access to those sites in accordance with Aboriginal tradition and shall take into account the wishes of Aborigines relating to the extent to which those sites should be protected.

Purpose of the Clause 7.2

This clause, based on a provision of the *Aboriginal Land Rights (Northern Territory) Act* of the Commonwealth, will place the constitutional obligation on the new Parliament to have in place on an ongoing basis legislation by way of an Organic law to protect and prevent desecration to sacred sites in the Northern Territory. In relation to that legislation, there will be a constitutional guarantee that Aboriginal traditional access to sacred sites will be preserved and their wishes will be taken into account. A transitional provision in the new Constitution could declare that the existing Territory legislation on sacred sites is an Organic law.

Variations:

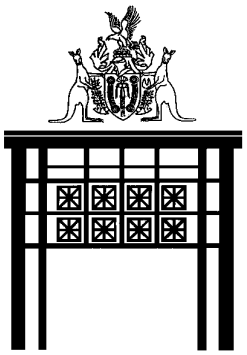
(a) Republic: No change

(b) Pre-Statehood: No change

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New Constitution for the Northern* Territory, 1987: Part S; and Discussion Paper No 6, *Aboriginal Rights and Issues - Options for Entrenchment*, 1993: Part E.

Chapter 7

Additional provisions to the Exposure Draft on a new Constitution for the Northern Territory



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

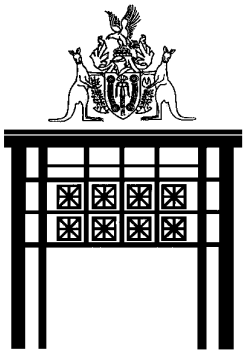
Sessional Committee on Constitutional Development

Additional provisions to the Exposure Draft on a new Constitution for the

Northern Territory

Presented and Ordered to be printed by the Legislative Assembly of the Northern Territory on 30 November 1995

November 1995



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Sessional Committee on Constitutional Development

Additional provisions to the Exposure Draft on a new Constitution for the

Northern Territory

November 1995

A document incorporating additional provisions to the Exposure Draft Constitution for the Northern Territory tabled in the Legislative Assembly on 22 June, 1995, prepared by the Sessional Committee on Constitutional Development.

Exposure Draft Northern Territory Constitution

Additional Provisions

Exposure Draft Northern Territory Constitution

Additional Provisions

MEMBERSHIP OF THE COMMITTEE

The Hon. S P Hatton, MLA (Chairman)

Mrs M A Hickey, MLA (Deputy Chairperson)

Mr J L Ah Kit, MLA

Mr J D Bailey, MLA

Mr T D Baldwin, MLA

Mr P A Mitchell, MLA

Committee Staff:

Mr Rick Gray (Secretary)

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Ms Raelene Webb (Legal Advisor)

Mrs Yoga Harichandran (Administrative Assistant)

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INTRODUCTION

The Northern Territory Legislative Assembly Sessional Committee on Constitutional Development, formerly a Select Committee, in responses to its terms of reference, has been working for some years on matters that could be dealt with in a new constitution for the Northern Territory.

The Committee has been proceeding with the preparation of a draft constitution in the light of the various submissions and comments made to it.

On 22 June an *Exposure Draft on Parts 1 to 7 on a new Constitution for the Northern Territory* was tabled in the Legislative Assembly. That Exposure Draft encapsulated the main elements of a proposed constitution for the Northern Territory.

Since that time, the Committee has proceeded in formulating additional provisions to that Exposure Draft and this document now includes some of the essential elements not canvassed in the earlier document. The additional provisions include the following:

- the amendment procedures to the Constitution and Organic laws;
- the establishment of a Standing Committee on the Constitution and Organic Laws;
- the constitutional recognition of the diverse peoples that make up the Northern Territory in respect of their language, social, cultural and religious matters; including
- the recognition of Aboriginal people of the Northern Territory to be self-determining in exercising control over all facets of their daily lives; and
- the constitutional recognition of the system of local government, including its role and function as a local governing body.

This document does not include provisions relating to the transitional arrangements and definitions, apart from defining 'Aboriginal self-determination'. Other matters may yet be included.

The format of the additional provisions follows that of the earlier document, that is, they are annotated with an explanation of each clause, with variations that would be required in the event that a republican system of government was to be adopted, and if the constitution was to be brought into operation before any grant of Statehood to the Territory. Cross references to the Committee's issued papers are also included for ease of reference.

The additional provisions canvassed in this document do not represent the final views of the Committee, however, the document is issued for the purpose of receiving public comment and submissions before the Committee settles the draft constitution and finally reports to the Legislative Assembly.

Following final report to the Legislative Assembly, the further procedure for adoption of the Constitution previously, outlined in the Committee's issued papers are envisaged. These include a Territory Constitutional Convention and Territory referendum.

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 and on 27 June 1994, 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 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 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 and Australian populations."

DISCUSSION AND INFORMATION PAPERS AND REPORTS

The Committee has prepared and issued a number of papers and an interim report arising from its 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, *Citizens' Initiated Referendums.*
* Discussion Paper No. 4, *Recognition of Aboriginal Customary Law*.
* Discussion Paper No. 5, *The Merits or Otherwise of Bringing an NT Constitution into Force Before Statehood*.
* Discussion Paper No. 6, *Aboriginal Rights and Issues - Options for Entrenchment.*
* Discussion Paper No. 7, *An Australian Republic? Implications for the Northern Territory*.
* Discussion Paper No. 8, *A Northern Territory Bill of Rights?*
* Discussion Paper No. 9, *Constitutional Recognition of Local Government.*
* Information Paper No. 1, *Options for a Grant of Statehood*.
* Information Paper No. 2, *Entrenchment of a New State Constitution*.
* Interim Report No. 1, *A Northern Territory Constitutional Convention*.
* *Exposure Draft - Parts 1 to 7: A new Constitution for the Northern Territory and Tabling Statement.*

TABLING STATEMENT

delivered in the Northern Territory Legislative Assembly
on 30 November 1995
by the
Hon. Steve Hatton, MLA
Chairman, Sessional Committee on Constitutional Development

Mr Speaker, I lay on the table a Paper entitled 'Additional Provisions to the Exposure Draft on a new Constitution for the Northern Territory'.

Mr Speaker, I move that the Paper be printed.

Mr Speaker, I move that the Assembly note the Paper.

Mr Speaker, on 22 June 1995, I laid on the table the 'Exposure Draft Parts 1 to 7: A new Constitution for the Northern Territory'. That document was the culmination of almost ten years of hard work and co-operation from both sides of the House that are represented on this Committee.

That Exposure Draft encapsulated the main elements of a proposed constitution for the Northern Territory and for the first time in Australia's constitutional history recognised the major role of Aboriginal people in the foundation of this Country and to the contribution that they have made as an integral and valued part of the Territory community.

The additional provisions to the Exposure Draft is also the culmination of the strong bipartisan effort in making a draft constitution for the Northern Territory a reality.

Mr Speaker, I would like to place on public record the contribution of past and present members of this House, in particular, the former Member for Arnhem, whose important contribution to the process of constitution-making in the Northern Territory and his

striving for reconciliation between Aboriginal and non-Aboriginal people will not be forgotten.

The former Member for Arnhem's ideals, intentions and vision for a united, harmonious and tolerant Northern Territory run through the pages of this document and the Exposure Draft. I believe that there is no more fitting way than to uphold his vision for his people than through what is expressed in these documents.

Mr Speaker, the Committee has been proceeding with the preparation of a draft constitution, and on 22 June 1995, an Exposure Draft Constitution was tabled. During those sittings, I informed the House that there would be additional clauses to be released for public comment as they were completed. Since that time, the Committee has proceeded to formulate additional provisions to that Exposure Draft and this document includes some of the essential elements that were not canvassed in the earlier document.

Mr Speaker, I wish to speak on the additional provisions. Firstly, the amendment procedures to the Constitution and Organic laws. Any amendment to the Constitution and Organic laws will require a special procedure in order to effect any change. These special measures are:

- an enactment of a Bill to amend the Constitution or an Organic law. The procedure for the passage of the Bill through the House will require it to sit for a period of at least two calendar months between voting on its second and third readings;

- during the intervening period the Bill will be submitted to a Standing Committee on the Constitution and Organic Laws which will consider and report on the proposed amendment; and

- once the Bill proposing the amendment to the Constitution has passed through the House, and upon the assent by the Governor, it shall be put to a referendum of electors of the Northern Territory qualified to vote at an election of the members of the Parliament. A referendum question must be carried at the referendum to which it is put, by valid affirmative votes equal to, or more than 50% of the total number of valid votes cast at the referendum.

It is important to note that a referendum is required, only in respect of amending the Constitution. Any amendment to an Organic law will not require it to go through the referendum stage, however, all of the other elements that are in place to amend the Constitution would apply.

Mr Speaker, I mentioned earlier the Standing Committee on the Constitution and Organic Laws and I would like to elaborate briefly in respect of its establishment. The Committee considered a number of alternatives regarding citizens' initiated referendums which ranged from constitutional change, legislative change or veto, changes in government policy, and to the recall of elected and appointed officials. In considering these issues the Committee accepted that there is some merit in the various alternatives, but it was not convinced that the advantages outweighed the disadvantages.

However, the Committee did see merit in a system which facilitates at reasonable intervals, public involvement and debate for constitutional review, providing that the final decision as to whether any proposals for constitutional change that is to be put to a referendum, is left with the new State Parliament.

The new provision in the Constitution reflects this position through the establishment of the Standing Committee. Its powers and functions would be provided by the Standing Orders of the Parliament and its membership would comprise of Members of Parliament and such other persons as specified in the Standing Orders.

The new provision also provides for a procedure in receiving petitions from persons in the Northern Territory requesting an amendment to this Constitution or an Organic law. For the Standing Committee to consider a request by petition, the petition requires that it be signed by ten (10) per cent of the electors qualified to vote at the election of the members of the Parliament.

Mr Speaker, another important addition to the Exposure Draft, is the inclusion of a new preamble and new expressed provisions recognising the diverse backgrounds and cultures of the people who reside in the Northern Territory in not unreasonably denying them the right -

- to use, speak and understand their own language; and

- to observe and practice their own social and cultural customs and traditions, beliefs, ceremonies or religion.

The Committee in proposing certain expressed constitutional rights, has recognised the special multicultural nature of the Northern Territory and the harmonious relationships among its people. The Committee has been acutely conscious of the importance in maintaining and improving this relationship for the common benefit of all Territorians and their descendants into the future.

The new preamble also reflects the recognition of the Aboriginal people of the Northern Territory to be self-determining in exercising control over all facets of their daily lives. In giving strength to this preamble a new expressed provision headed 'Aboriginal self-determination' is now included under Part 7 of the Exposure Draft Constitution. This provision recognises the special place that Aboriginal people have in the Northern Territory and it provides a mechanism for Parliament through enactment to enhance the activity of Aboriginal people in exercising control over their daily affairs in order to safeguard, strengthen and develop their language, social and cultural customs and traditions, religion or beliefs, economies and identities.

In considering the special place of Aboriginal people of the Northern Territory, the Committee was conscious of the need to reflect this recognition not only in the Preamble acknowledging Aboriginal occupation of this Country prior to European settlement, but also through expressed enforceable provisions within the Constitution that addressed land rights, the protection of sacred sites, the recognition of Aboriginal customary law and Aboriginal self-determination.

Nowhere in any Australian jurisdiction has the above additional provisions been included in any constitutional document to this extent. The Committee has considered these issues long and hard, and it has resolved that they should be included in a Northern Territory constitution under a framework of a united, harmonious and tolerant society.

Mr Speaker, the Committee has also considered the inclusion in the Exposure Draft, the constitutional recognition of the system of local government. As with all State Constitutions in Australia local government is now recognised as the third sphere of government. The Committee considered the various submissions and State Constitutions as

to what would effectively apply within the Northern Territory. Apart from mainstream local government, the Committee also took into account those local governing bodies established within Aboriginal communities.

This additional provision on local government provides for a measure of autonomy and the important elements that Parliament shall take into account when legislating in respect of local governing bodies. These are -

- the general competency powers and functions in respect to their -

  i. objectives, powers, functions and responsibilities;

  ii. rating and any other forms of revenue, expenditure and fiscal accountability;

  iii. membership;

  iv. boundaries; and

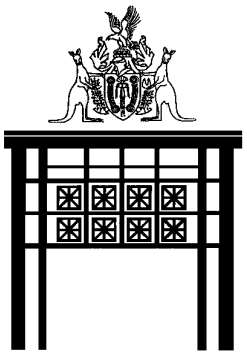
- protection from dismissal without having a public enquiry as to the reasons for its dismissal.

Mr Speaker, in closing, the Exposure Draft and the additional provisions are based on the premise that the Northern Territory is to be placed on an equal footing with existing States as a pre-condition to any grant of Statehood. They serve not only as a notification to all Australians the intent of the Northern Territory to be an equal partner with the States, within the Australian federation, but they also reflect the developing constitutional issues that could be addressed and developed as a model that other Australian jurisdictions could follow.

The Northern Territory has taken on the challenge to develop a constitution that reflects all aspects of modern day Northern Territory society and its values. Only through the process of collaboration and consultation with the citizens of the Northern Territory, the Commonwealth and the States, can Statehood for the Northern Territory become a reality.

Let us work towards that end.

Mr Speaker, I commend the additional provisions to the Exposure Draft Constitution for the Northern Territory to Honourable Members.



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Sessional Committee on Constitutional Development

Additional Provisions to the Exposure Draft on A New Constitution for the Northern Territory

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November 1995

NORTHERN TERRITORY OF AUSTRALIA

EXPOSURE DRAFT CONSTITUTION

[ADDITIONAL PROVISIONS]

Please Note: Only those subject matters that are in **[bold type]** are canvassed in this document. Please refer to the Exposure Draft tabled in the Legislative Assembly on 22 June, 1995 in respect of those subject matters not canvassed in this document.

PREAMBLE

Preamble 15 (new addition)

PART 1 - THE NORTHERN TERRITORY

1. ESTABLISHMENT OF BODY POLITIC

PART 2 - THE LEGAL SYSTEM OF THE NORTHERN TERRITORY

Division 1 - Laws of the Northern Territory

2.1 THE LAWS

2.2 CONSTRUCTION OF LAWS

2.3 ORGANIC LAWS

Division 2 - Altering the Constitution and Organic Laws (new addition)

PART 3 - THE PARLIAMENT OF THE NORTHERN TERRITORY

Division 1 - Legislative Power

3.1 LEGISLATIVE POWER OF NORTHERN TERRITORY

3.2 ASSENT TO PROPOSED LAWS

3.3 PROPOSAL OF MONEY VOTES

3.4 APPROPRIATION AND TAXATION LAWS NOT TO DEAL WITH SUBJECTS OTHER THAN THOSE FOR WHICH APPROPRIATION MADE OR TAXATION IMPOSED

PREAMBLE

Please Note: The original Preamble 15 in the Exposure Draft will be renumbered to Preamble 16

15. The people of the Northern Territory are concerned to preserve a harmonious and tolerant and united multicultural society, and to this end, it is desirable that no person should be unreasonably denied the right to use his or her own language in communicating with others speaking or understanding the same language, to observe and practice his or her own social and cultural customs and traditions in common with others of the same tradition, and to manifest his or her own religion or belief in worship, ceremony, observance, practice or teaching, and that within the framework of such a society, the people of the Northern Territory recognise that the Aboriginal people of the Northern Territory are entitled, under and in accordance with this Constitution and the laws of the Northern Territory, to self-determination in the control of their daily affairs.

Purpose of the Clause: Preamble 15

Provides for the recognition of the diverse backgrounds and cultures of the people who reside in the Northern Territory and for the preservation of a harmonious, tolerant and united multicultural society, recognises that no person be unreasonably denied the right -

- to use, speak and understand the languages with which they are familiar; and
- to practice their own social and cultural customs, traditions, religion or beliefs.

The preamble also recognises the special position that Aboriginal people have in the Northern Territory and that they are entitled, under and in accordance with this Constitution and the laws of the Northern Territory, to self-determination in the control of their daily affairs.

Variations:

(a) Republic: No Change.

(b) Pre—Statehood: No Change.

Reference to Discussion and Information Papers: See definition of 'Aboriginal self-determination' in this document and see also *Discussion Paper on A Proposed New State Constitution for the Northern Territory,* 1987: (Part T), Discussion Paper No. 4, *Recognition of Aboriginal Customary Law,* 1992: p.43, and Discussion Paper No. 8, *A Northern Territory Bill of Rights*?: p51

Division 2 - Amendment of the Constitution and Organic Laws

2.4 CONSTITUTIONAL AMENDMENT

(1) This Constitution may only be amended in accordance with the provisions of this section, and not otherwise.

(2) Subject to section 2.6(4) an amendment to this Constitution shall not take effect unless a Bill for an Act of Parliament has first been enacted by the Parliament, setting out the precise terms of the proposed amendment and providing for the question of its adoption to be submitted to a referendum of electors of the Northern Territory on that proposed amendment. That Bill shall not be taken to have been enacted unless:-

(a) there was a period of at least two calendar months between voting on its second reading and voting on its third reading;

(b) if the Bill was amended in Committee other than by way of minor drafting or consequential amendments, there was a period of at least two calendar months between voting on the last amendment to the Bill and voting on its third reading as amended; and

(c) there was an opportunity in its second reading for debate on its merits.

(3) The Speaker shall present to the Governor for assent a Bill passed in accordance with this section, and on so doing must certify to the Governor whether the requirements of subsection (2) have been complied with.

(4) A certificate referred to in subsection (3) shall state the date on which the votes on the second and third readings of the Bill were taken, the date of voting on the last amendment of the Bill (if any) in Committee and the date or dates upon which opportunity for debate on the merits of the Bill in its second reading occurred, and is, in the absence of proof to the contrary, conclusive evidence of the matters so stated.

(5) Upon assent by the Governor to the Bill, the question of the adoption of the proposed amendment shall, not earlier than three calendar months after that date of assent and not later than 12 calendar months after that date, be submitted to a referendum of electors of the Northern Territory qualified to vote at an election of the members of the Parliament.

(6) Except where otherwise provided in this Constitution a referendum question must be carried at the referendum to which it is put by valid affirmative votes equal to or more than 50% of the total number of valid votes cast at the referendum.

(7) The Speaker shall present to the Governor a certificate as to the results of a referendum held in accordance with this section, and on doing so must certify to the Governor whether the requirements of this section as to the referendum have been complied with.

(8) The certificate referred to in subsection (7) shall state:-

(a) the date or dates on or over which the referendum was held;

(b) the number of valid votes cast at the referendum; and

(c) the numbers of valid affirmative votes cast at the referendum;

and is, in the absence of proof to the contrary, conclusive evidence of the matters so stated.

(9) Upon the referendum question being carried in accordance with this section, the amendment shall be effective on the date that the Speaker presents the certificate to the Governor under subsection (7), or on such other date as is specified in the amendment.

Purpose of the Clause: 2.4 Constitutional Amendment

This clause is a new insertion into the Exposure Draft and it continues on from Clause 2.3. It provides for an amendment procedure to this Constitution. Although somewhat detailed the salient points are:

- The amendment procedure provides for a Bill for an Act of the Parliament to amend this Constitution and it shall not be enacted unless there has been a period of least two (2) calendar months between voting on its second reading and voting on its third reading.
- Before the Bill proceeds to the third reading, it shall be submitted to a Standing Committee established by this Constitution — see Clause 2.6 — to consider and report on the proposed amendment to the Parliament.
- Subsequent to the third reading, the Speaker shall certify to the Governor, prior to his or her assent to the Bill, that the procedures have been complied with in accordance with this Constitution.
- Upon the assent of the Governor, the adoption of the propose amendment shall be put to a referendum of electors of the Northern Territory qualified to vote at an election of the members of the Parliament.
- The referendum to adopt the proposed amendment must be held no earlier than three (3) months and no later than twelve months after assent has been given by the Governor.
- Except where it is provided in this Constitution, a referendum question must be carried at the referendum to which it is put, by valid affirmative votes equal to or more than 50% of the total number of valid votes cast at the referendum.

Variations:
(a) Republic: No Change.

(b) Pre—Statehood: No Change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New State Constitution for the Northern Territory,* 1987: (Part E: pp 36-37).

2.5 AMENDMENT OF ORGANIC LAWS

(1) An Organic Law may only be amended either by an amendment of this Constitution under section 2.4 or by a Bill enacted in accordance with the provisions of this section, and not otherwise.

(2) Subject to sections 2.3(6) and 2.6(4), a Bill for an Act of Parliament for the amendment, in whole or part, of an existing Organic Law, and whether by way of an amendment of a provision of that Organic Law or by the insertion of a new provision in that Organic Law, shall not take effect as an amendment of that Organic Law unless it is enacted by the Parliament in the same manner as required by section 2.3 for the enactment of an Act of the Parliament which itself expressly states that it is an Organic Law and which would, upon assent, be an Organic Law.

Purpose of the Clause: 2.5 Amendment of Organic Laws

This clause is a new insertion into the Exposure Draft and it provides for an amendment procedure to the Organic laws that have been declared by this Constitution to be an Organic law or to an Act of Parliament which expressly states that it is an Organic law — see Clause 2.3. The amendment procedures follow closely to those procedures required to amend this Constitution, however, any amendment(s) or insertion(s) to an Organic law do not require that they be put to a referendum for adoption.

Variations:

(a) Republic: No Change.

(b) Pre—Statehood: No Change.

The use of Organic laws was raised in Discussion Paper No. 6, *Aboriginal Rights and Issues - Options for Entrenchment,* 1993: for Aboriginal Land Rights: pp 15-16; for a possible Bill of Rights in Discussion Paper No. 8, *A Northern Territory Bill of Rights?,* 1995: p.51; and for local government in Discussion Paper No. 9, *Constitutional Recognition of Local Government,* 1995.

2.6 STANDING COMMITTEE ON THE CONSTITUTION AND ORGANIC LAWS

(1) The Parliament shall appoint a Standing Committee to be known as the Standing Committee on the Constitution and Organic Laws.

(2) The powers, functions, privileges and procedures of the Committee shall be as provided in the Standing Rules and Orders of the Parliament.

(3) The Committee shall be composed of such members of the Parliament and other persons, holding office on such terms and conditions, as are specified in the Standing Rules and Orders of the Parliament.

(4) A Bill for an Act to amend this Constitution or to amend an Organic Law shall not proceed to a second reading in the Parliament unless the proposal contained in the Bill has first been considered by the Committee and the Committee has reported on the proposal to the Parliament.

(5) The Committee may receive and consider a petition from persons from the Northern Territory requesting an amendment of this Constitution or of an Organic Law, and the Committee may report to the Parliament thereon.

(6) The Committee shall consider a reference from the Parliament by way of a resolution of Parliament, following the introduction of the Bill into the Parliament proposing an amendment of this Constitution or of an Organic Law or on any other matter, and the Committee shall report to the Parliament thereon as soon as practicable thereafter.

(7) The Committee shall receive and consider a petition from persons from the Northern Territory if the petition is signed by at least ten (10) per cent of the numbers of electors qualified to vote at an election of members of the Parliament and on the roll for such an election at the time the petition is presented to the Committee, the petition requesting an amendment of this Constitution or of an Organic Law, and the Committee shall report to the Parliament on any such petition as soon as practicable thereafter.

(8) The Committee shall not be restricted to the subject matter of any petition or any resolution in making its report to the Parliament, but may consider any other options and all matters incidental to or consequential upon that subject matter or those options.

(9) Where the Committee, in its report, makes recommendations to the Parliament for the amendment of the Constitution, and the recommended amendment deals with 2 or more separate and distinct subject matters, then the Committee shall also recommend that the question of the adoption of the proposed amendment at a

subsequent referendum shall be dealt with by way of separate questions for each such separate and distinct subject matter.

(10) The reports of the Committee shall be tabled in the Parliament.

Purpose of the Clause: 2.6 Standing Committee on the Constitution and Organic Laws

Provides for the establishment of a Standing Constitutional Committee for the purpose of considering and reporting to the Parliament on proposals to amend this Constitution or an Organic law. The Committee's powers and functions are provided by the Standing Orders of the Parliament and its membership is comprised of members of Parliament and such other persons as specified in the Standing Orders. This clause also provides for a procedure in receiving petitions from persons in the Northern Territory requesting an amendment of this Constitution or an Organic law. For the Standing Committee to be required to consider a request by petition, the petition requires that it be signed by ten (10) per cent of the electors qualified to vote at the election of the members of the Parliament.

Variations:

(a) Republic: No Change.

(b) Pre—Statehood: No Change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New State Constitution for the Northern Territory,* 1987: (Parts E and P).and also Discussion Paper No. 3 *Citizens' Initiated Referendums, 1991 (Parts E and F).*

PART 7 - ABORIGINAL RIGHTS

7.3 ABORIGINAL SELF-DETERMINATION.

Subject to this Constitution, an Act of the Parliament may provide for the grant of Aboriginal self-determination and for all matters incidental thereto.

Purpose of the Clause: 7.3 Aboriginal self-determination

Provides a positive mechanism for Parliament through enactment in recognising the special place that Aboriginal people have in the Northern Territory which could take effect through a wide variety of processes that would formally recognise and enhance the control over their daily lives in order to safeguard, strengthen and develop their language, social and cultural customs and traditions, religion or beliefs, economies and identities.

Variations:

(a) Republic: No Change.

(b) Pre—Statehood: No Change.

Reference to Discussion and Information Papers: See Discussion Paper No 6, *Aboriginal Rights and Issues - Options for Entrenchment,* 1993: in particular Part F. See also Parts 2 and 7 of the *Exposure Draft Constitution* , *A new Constitution for the Northern Territory,* 1995, and the new provisions relating to Aboriginal matters and language, social, cultural and religious matters in this document.

PART 8 - RIGHTS IN RESPECT OF LANGUAGE, SOCIAL, CULTURAL AND RELIGIOUS MATTERS

8.1 LANGUAGE, SOCIAL, CULTURAL AND RELIGIOUS MATTERS

(1) Notwithstanding anything in the laws of the Northern Territory other than as provided in sub-sections (2) and (3), a person shall not be denied the right —

(a) to use his or her own language in his or her communications with other people speaking or understanding the same language;

(b) to observe and practice his or her own social and cultural customs and traditions in his or her relations with other people of the same tradition; and

(c) to manifest his or her religion or belief in worship, ceremony, observance, practice or teaching.

(2) The rights in paragraphs (a), (b) and (c) of subsection (1) shall be subject to this Constitution, any Organic law and any reasonable regulation imposed by an Act of the Parliament in the public interest.

(3) The rights in paragraphs (b) and (c) of subsection (1) shall only operate to the extent that they are not repugnant to the general principles of humanity as contained in any international agreement to which Australia is a party.

Purpose of the Clause: 8.1 Language, social, cultural and religious matters

Provides an expressed provision in the Constitution recognising that the people of the Northern Territory come from very diverse backgrounds and cultures and that they should not be unreasonably denied the right to use and speak and understand their own language and to observe and practice their own social and cultural customs and traditions, beliefs, ceremonies or religion.

Variations:

(a) Republic: No Change.

(b) Pre—Statehood: No Change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New State Constitution for the Northern Territory,* 1987: (Part T). See also Discussion Paper No. 4, *Recognition of Aboriginal Customary Law,* 1992: p.43, Discussion Paper No. 8, *A Northern Territory Bill of Rights*:? p51. See also previous comments under **Preamble 1**.

PART 9 LOCAL GOVERNING BODIES

9.1 LOCAL GOVERNMENT

(1) Subject to this Constitution, an Organic law or an Act of the Parliament there shall continue to be a system of local government in the Northern Territory under which local governing bodies are constituted with such powers as the Parliament considers necessary for the peace, order and good government of those areas of the Northern Territory that are from time to time subject to that system of local government;

(2) The manner in which local governing bodies are constituted, and the nature and extent of their powers, functions, duties and responsibilities and all matters incidental thereto, shall be determined by or under this Constitution, or an Organic law or Acts of the Parliament from time to time in force;

(3) Notwithstanding subsection (2) the Parliament shall, when enacting legislation in respect of local governing bodies, provide for -

(a) general competency powers and functions in respect to their -

(i) objectives, powers, functions and responsibilities;

(ii) rating and any other forms of revenue, expenditure and fiscal accountability;

(iii) membership;

(iv) boundaries; and

(b) protection from dismissal of a local governing body without public enquiry.

Purpose of the Clause: 9.1 Local Government

Provides for the constitutional recognition of the local government system in the Northern Territory and that the responsibilities, powers and functions are determined by this Constitution, an Organic law or by an Act of the Parliament. It also provides for a measure of autonomy within this framework when Parliament enacts legislation in respect of these bodies, that it shall take into account:

- the general competency powers and functions in respect to their -
  - (i) objectives, powers, functions and responsibilities;
  - (ii) rating and any other forms of revenue, expenditure and fiscal accountability;
  - (iii) membership;
  - (iv) boundaries; and
- to protect a local governing body from dismissal without having a public enquiry as to the reasons for its dismissal.

Variations:

(a) Republic: No Change.

(b) Pre—Statehood: No Change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New State Constitution for the Northern Territory,* 1987: (Parts R & S) See also Discussion Paper No. 6, *Aboriginal Rights and Issues - Options for Entrenchment,* 1993: pp 34-35, and also Discussion Paper No. 9 *Constitutional recognition of Local Government, 1995: pp 11-15.*

PART [number to be determined] DEFINITIONS

"Aboriginal self-determination"

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

Purpose of the Definition: "Aboriginal self-determination"

This definition is a statement of what Aboriginal self-determination means in respect of the provisions that relate to Aboriginal matters under this Constitution. It provides for clarification of the special place that Aboriginal people have in the Northern Territory particularly relating to the exercise of control over their daily lives, in order to safeguard, strengthen and develop their language, social and cultural customs and traditions, religion or beliefs, economies and identities. It also acts as a linkage between the various mechanisms that reflect the processes relating to Aboriginal self-determination in the Northern Territory that operate within the framework of this Constitution.

Variations:

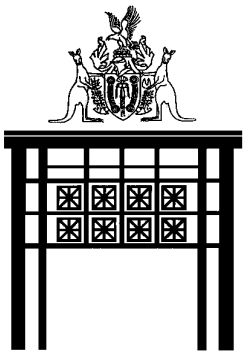
(a) Republic: No Change.

(b) Pre—Statehood: No Change.

Reference to Discussion and Information Papers: See Discussion Paper No. 4, *Recognition of Aboriginal Customary Law,* 1992, Discussion Paper No 6, *Aboriginal Rights and Issues - Options for Entrenchment,* 1993: in particular Part F. See also Parts 2 and 7 of the *Exposure Draft Constitution* , *A new Constitution for the Northern Territory,* 1995, and the new provisions relating to Aboriginal matters and language, social, cultural and religious matters in this document.

CHAPTER 1

Additional provisions to the Exposure Draft on a new Constitution for the Northern Territory



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Sessional Committee on Constitutional Development

Additional provisions to the Exposure Draft on a new Constitution for the Northern Territory

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Presented and Ordered to be printed by the Legislative Assembly of the Northern Territory on 30 November 1995

November 1995

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Sessional Committee on Constitutional Development

Additional provisions to the Exposure Draft on a new Constitution for the Northern Territory

November 1995

A document incorporating additional provisions to the Exposure Draft Constitution for the Northern Territory tabled in the Legislative Assembly on 22 June, 1995, prepared by the Sessional Committee on Constitutional Development.

Exposure Draft Northern Territory Constitution
Additional Provisions

Exposure Draft Northern Territory Constitution
Additional Provisions

MEMBERSHIP OF THE COMMITTEE

The Hon. S P Hatton, MLA (Chairman)

Mrs M A Hickey, MLA (Deputy Chairperson)

Mr J L Ah Kit, MLA

Mr J D Bailey, MLA

Mr T D Baldwin, MLA

Mr P A Mitchell, MLA

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Mr Rick Gray (Secretary)

Mr Graham Nicholson (Legal Advisor)

Ms Raelene Webb (Legal Advisor)

Mrs Yoga Harichandran (Administrative Assistant)

Exposure Draft Northern Territory Constitution
Additional Provisions

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INTRODUCTION

The Northern Territory Legislative Assembly Sessional Committee on Constitutional Development, formerly a Select Committee, in responses to its terms of reference, has been working for some years on matters that could be dealt with in a new constitution for the Northern Territory.

The Committee has been proceeding with the preparation of a draft constitution in the light of the various submissions and comments made to it.

On 22 June an *Exposure Draft on Parts 1 to 7 on a new Constitution for the Northern Territory* was tabled in the Legislative Assembly. That Exposure Draft encapsulated the main elements of a proposed constitution for the Northern Territory.

Since that time, the Committee has proceeded in formulating additional provisions to that Exposure Draft and this document now includes some of the essential elements not canvassed in the earlier document. The additional provisions include the following:

- the amendment procedures to the Constitution and Organic laws;
- the establishment of a Standing Committee on the Constitution and Organic Laws;
- the constitutional recognition of the diverse peoples that make up the Northern Territory in respect of their language, social, cultural and religious matters; including
- the recognition of Aboriginal people of the Northern Territory to be self-determining in exercising control over all facets of their daily lives; and
- the constitutional recognition of the system of local government, including its role and function as a local governing body.

This document does not include provisions relating to the transitional arrangements and definitions, apart from defining 'Aboriginal self-determination'. Other matters may yet be included.

The format of the additional provisions follows that of the earlier document, that is, they are annotated with an explanation of each clause, with variations that would be required in the event that a republican system of government was to be adopted, and if the constitution was to be brought into operation before any grant of Statehood to the Territory. Cross references to the Committee's issued papers are also included for ease of reference.

The additional provisions canvassed in this document do not represent the final views of the Committee, however, the document is issued for the purpose of receiving public comment and submissions before the Committee settles the draft constitution and finally reports to the Legislative Assembly.

Following final report to the Legislative Assembly, the further procedure for adoption of the Constitution previously, outlined in the Committee's issued papers are envisaged. These include a Territory Constitutional Convention and Territory referendum.

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 and on 27 June 1994, 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 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 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 and Australian populations."

DISCUSSION AND INFORMATION PAPERS AND REPORTS

The Committee has prepared and issued a number of papers and an interim report arising from its 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, *Citizens' Initiated Referendums.*
* Discussion Paper No. 4, *Recognition of Aboriginal Customary Law*.
* Discussion Paper No. 5, *The Merits or Otherwise of Bringing an NT Constitution into Force Before Statehood*.
* Discussion Paper No. 6, *Aboriginal Rights and Issues - Options for Entrenchment.*
* Discussion Paper No. 7, *An Australian Republic? Implications for the Northern Territory*.
* Discussion Paper No. 8, *A Northern Territory Bill of Rights?*
* Discussion Paper No. 9, *Constitutional Recognition of Local Government.*
* Information Paper No. 1, *Options for a Grant of Statehood*.
* Information Paper No. 2, *Entrenchment of a New State Constitution*.
* Interim Report No. 1, *A Northern Territory Constitutional Convention*.
* *Exposure Draft - Parts 1 to 7: A new Constitution for the Northern Territory and Tabling Statement.*

TABLING STATEMENT

delivered in the Northern Territory Legislative Assembly
on 30 November 1995
by the
Hon. Steve Hatton, MLA
Chairman, Sessional Committee on Constitutional Development

Mr Speaker, I lay on the table a Paper entitled 'Additional Provisions to the Exposure Draft on a new Constitution for the Northern Territory'.

Mr Speaker, I move that the Paper be printed.

Mr Speaker, I move that the Assembly note the Paper.

Mr Speaker, on 22 June 1995, I laid on the table the 'Exposure Draft Parts 1 to 7: A new Constitution for the Northern Territory'. That document was the culmination of almost ten years of hard work and co-operation from both sides of the House that are represented on this Committee.

That Exposure Draft encapsulated the main elements of a proposed constitution for the Northern Territory and for the first time in Australia's constitutional history recognised the major role of Aboriginal people in the foundation of this Country and to the contribution that they have made as an integral and valued part of the Territory community.

The additional provisions to the Exposure Draft is also the culmination of the strong bipartisan effort in making a draft constitution for the Northern Territory a reality.

Mr Speaker, I would like to place on public record the contribution of past and present members of this House, in particular, the former Member for Arnhem, whose important contribution to the process of constitution-making in the Northern Territory and his striving for reconciliation between Aboriginal and non-Aboriginal people will not be forgotten.

The former Member for Arnhem's ideals, intentions and vision for a united, harmonious and tolerant Northern Territory run through the pages of this document and the Exposure

Draft. I believe that there is no more fitting way than to uphold his vision for his people than through what is expressed in these documents.

Mr Speaker, the Committee has been proceeding with the preparation of a draft constitution, and on 22 June 1995, an Exposure Draft Constitution was tabled. During those sittings, I informed the House that there would be additional clauses to be released for public comment as they were completed. Since that time, the Committee has proceeded to formulate additional provisions to that Exposure Draft and this document includes some of the essential elements that were not canvassed in the earlier document.

Mr Speaker, I wish to speak on the additional provisions. Firstly, the amendment procedures to the Constitution and Organic laws. Any amendment to the Constitution and Organic laws will require a special procedure in order to effect any change. These special measures are:

- an enactment of a Bill to amend the Constitution or an Organic law. The procedure for the passage of the Bill through the House will require it to sit for a period of at least two calendar months between voting on its second and third readings;

- during the intervening period the Bill will be submitted to a Standing Committee on the Constitution and Organic Laws which will consider and report on the proposed amendment; and

- once the Bill proposing the amendment to the Constitution has passed through the House, and upon the assent by the Governor, it shall be put to a referendum of electors of the Northern Territory qualified to vote at an election of the members of the Parliament. A referendum question must be carried at the referendum to which it is put, by valid affirmative votes equal to, or more than 50% of the total number of valid votes cast at the referendum.

It is important to note that a referendum is required, only in respect of amending the Constitution. Any amendment to an Organic law will not require it to go through the referendum stage, however, all of the other elements that are in place to amend the Constitution would apply.

Mr Speaker, I mentioned earlier the Standing Committee on the Constitution and Organic Laws and I would like to elaborate briefly in respect of its establishment. The Committee considered a number of alternatives regarding citizens' initiated referendums which ranged from constitutional change, legislative change or veto, changes in government policy, and

to the recall of elected and appointed officials. In considering these issues the Committee accepted that there is some merit in the various alternatives, but it was not convinced that the advantages outweighed the disadvantages.

However, the Committee did see merit in a system which facilitates at reasonable intervals, public involvement and debate for constitutional review, providing that the final decision as to whether any proposals for constitutional change that is to be put to a referendum, is left with the new State Parliament.

The new provision in the Constitution reflects this position through the establishment of the Standing Committee. Its powers and functions would be provided by the Standing Orders of the Parliament and its membership would comprise of Members of Parliament and such other persons as specified in the Standing Orders.

The new provision also provides for a procedure in receiving petitions from persons in the Northern Territory requesting an amendment to this Constitution or an Organic law. For the Standing Committee to consider a request by petition, the petition requires that it be signed by ten (10) per cent of the electors qualified to vote at the election of the members of the Parliament.

Mr Speaker, another important addition to the Exposure Draft, is the inclusion of a new preamble and new expressed provisions recognising the diverse backgrounds and cultures of the people who reside in the Northern Territory in not unreasonably denying them the right -

- to use, speak and understand their own language; and
- to observe and practice their own social and cultural customs and traditions, beliefs, ceremonies or religion.

The Committee in proposing certain expressed constitutional rights, has recognised the special multicultural nature of the Northern Territory and the harmonious relationships among its people. The Committee has been acutely conscious of the importance in maintaining and improving this relationship for the common benefit of all Territorians and their descendants into the future.

The new preamble also reflects the recognition of the Aboriginal people of the Northern Territory to be self-determining in exercising control over all facets of their daily lives. In giving strength to this preamble a new expressed provision headed 'Aboriginal

self-determination' is now included under Part 7 of the Exposure Draft Constitution. This provision recognises the special place that Aboriginal people have in the Northern Territory and it provides a mechanism for Parliament through enactment to enhance the activity of Aboriginal people in exercising control over their daily affairs in order to safeguard, strengthen and develop their language, social and cultural customs and traditions, religion or beliefs, economies and identities.

In considering the special place of Aboriginal people of the Northern Territory, the Committee was conscious of the need to reflect this recognition not only in the Preamble acknowledging Aboriginal occupation of this Country prior to European settlement, but also through expressed enforceable provisions within the Constitution that addressed land rights, the protection of sacred sites, the recognition of Aboriginal customary law and Aboriginal self-determination.

Nowhere in any Australian jurisdiction has the above additional provisions been included in any constitutional document to this extent. The Committee has considered these issues long and hard, and it has resolved that they should be included in a Northern Territory constitution under a framework of a united, harmonious and tolerant society.

Mr Speaker, the Committee has also considered the inclusion in the Exposure Draft, the constitutional recognition of the system of local government. As with all State Constitutions in Australia local government is now recognised as the third sphere of government. The Committee considered the various submissions and State Constitutions as to what would effectively apply within the Northern Territory. Apart from mainstream local government, the Committee also took into account those local governing bodies established within Aboriginal communities.

This additional provision on local government provides for a measure of autonomy and the important elements that Parliament shall take into account when legislating in respect of local governing bodies. These are -

- the general competency powers and functions in respect to their -

    i. objectives, powers, functions and responsibilities;

    ii. rating and any other forms of revenue, expenditure and fiscal accountability;

    iii. membership;

    iv. boundaries; and

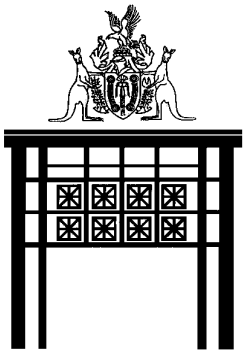
- protection from dismissal without having a public enquiry as to the reasons for its dismissal.

Mr Speaker, in closing, the Exposure Draft and the additional provisions are based on the premise that the Northern Territory is to be placed on an equal footing with existing States as a pre-condition to any grant of Statehood. They serve not only as a notification to all Australians the intent of the Northern Territory to be an equal partner with the States, within the Australian federation, but they also reflect the developing constitutional issues that could be addressed and developed as a model that other Australian jurisdictions could follow.

The Northern Territory has taken on the challenge to develop a constitution that reflects all aspects of modern day Northern Territory society and its values. Only through the process of collaboration and consultation with the citizens of the Northern Territory, the Commonwealth and the States, can Statehood for the Northern Territory become a reality.

Let us work towards that end.

Mr Speaker, I commend the additional provisions to the Exposure Draft Constitution for the Northern Territory to Honourable Members.



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Sessional Committee on Constitutional Development

Additional Provisions to the Exposure Draft on A New Constitution for the Northern Territory

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November 1995

NORTHERN TERRITORY OF AUSTRALIA

EXPOSURE DRAFT CONSTITUTION

[ADDITIONAL PROVISIONS]

Please Note: Only those subject matters that are in **[bold type]** are canvassed in this document. Please refer to the Exposure Draft tabled in the Legislative Assembly on 22 June, 1995 in respect of those subject matters not canvassed in this document.

PREAMBLE

Preamble 15 (new addition)

PART 1 - THE NORTHERN TERRITORY

1. ESTABLISHMENT OF BODY POLITIC

PART 2 - THE LEGAL SYSTEM OF THE NORTHERN TERRITORY

Division 1 - Laws of the Northern Territory

2.1 THE LAWS

2.2 CONSTRUCTION OF LAWS

2.3 ORGANIC LAWS

Division 2 - Altering the Constitution and Organic Laws (new addition)

PART 3 - THE PARLIAMENT OF THE NORTHERN TERRITORY

Division 1 - Legislative Power

3.1 LEGISLATIVE POWER OF NORTHERN TERRITORY

3.2 ASSENT TO PROPOSED LAWS

3.3 PROPOSAL OF MONEY VOTES

3.4 APPROPRIATION AND TAXATION LAWS NOT TO DEAL WITH SUBJECTS OTHER THAN THOSE FOR WHICH APPROPRIATION MADE OR TAXATION IMPOSED

3.5 POWERS, PRIVILEGES AND IMMUNITIES OF PARLIAMENT

Division 2 - Constitution and Membership of Parliament

PREAMBLE

Please Note: The original Preamble 15 in the Exposure Draft will be renumbered to Preamble 16

15. The people of the Northern Territory are concerned to preserve a harmonious and tolerant and united multicultural society, and to this end, it is desirable that no person should be unreasonably denied the right to use his or her own language in communicating with others speaking or understanding the same language, to observe and practice his or her own social and cultural customs and traditions in common with others of the same tradition, and to manifest his or her own religion or belief in worship, ceremony, observance, practice or teaching, and that within the framework of such a society, the people of the Northern Territory recognise that the Aboriginal people of the Northern Territory are entitled, under and in accordance with this Constitution and the laws of the Northern Territory, to self-determination in the control of their daily affairs.

Purpose of the Clause: Preamble 15

Provides for the recognition of the diverse backgrounds and cultures of the people who reside in the Northern Territory and for the preservation of a harmonious, tolerant and united multicultural society, recognises that no person be unreasonably denied the right -

- to use, speak and understand the languages with which they are familiar; and
- to practice their own social and cultural customs, traditions, religion or beliefs.

The preamble also recognises the special position that Aboriginal people have in the Northern Territory and that they are entitled, under and in accordance with this Constitution and the laws of the Northern Territory, to self-determination in the control of their daily affairs.

Variations:

(a) Republic: No Change.

(b) Pre—Statehood: No Change.

Reference to Discussion and Information Papers: See definition of 'Aboriginal self-determination' in this document and see also *Discussion Paper on A Proposed New State Constitution for the Northern Territory,* 1987: (Part T), Discussion Paper No. 4, *Recognition of Aboriginal Customary Law,* 1992: p.43, and Discussion Paper No. 8, *A Northern Territory Bill of Rights*?: p51

Division 2 - Amendment of the Constitution and Organic Laws

2.4 CONSTITUTIONAL AMENDMENT

(1) This Constitution may only be amended in accordance with the provisions of this section, and not otherwise.

(2) Subject to section 2.6(4) an amendment to this Constitution shall not take effect unless a Bill for an Act of Parliament has first been enacted by the Parliament, setting out the precise terms of the proposed amendment and providing for the question of its adoption to be submitted to a referendum of electors of the Northern Territory on that proposed amendment. That Bill shall not be taken to have been enacted unless:-

(a) there was a period of at least two calendar months between voting on its second reading and voting on its third reading;

(b) if the Bill was amended in Committee other than by way of minor drafting or consequential amendments, there was a period of at least two calendar months between voting on the last amendment to the Bill and voting on its third reading as amended; and

(c) there was an opportunity in its second reading for debate on its merits.

(3) The Speaker shall present to the Governor for assent a Bill passed in accordance with this section, and on so doing must certify to the Governor whether the requirements of subsection (2) have been complied with.

(4) A certificate referred to in subsection (3) shall state the date on which the votes on the second and third readings of the Bill were taken, the date of voting on the last amendment of the Bill (if any) in Committee and the date or dates upon which opportunity for debate on the merits of the Bill in its second reading occurred, and is, in the absence of proof to the contrary, conclusive evidence of the matters so stated.

(5) Upon assent by the Governor to the Bill, the question of the adoption of the proposed amendment shall, not earlier than three calendar months after that date of assent and not later than 12 calendar months after that date, be submitted to a referendum of electors of the Northern Territory qualified to vote at an election of the members of the Parliament.

(6) Except where otherwise provided in this Constitution a referendum question must be carried at the referendum to which it is put by valid affirmative votes equal to or more than 50% of the total number of valid votes cast at the referendum.

(7) The Speaker shall present to the Governor a certificate as to the results of a referendum held in accordance with this section, and on doing so must certify to the Governor whether the requirements of this section as to the referendum have been complied with.

(8) The certificate referred to in subsection (7) shall state:-

(a) the date or dates on or over which the referendum was held;

(b) the number of valid votes cast at the referendum; and

(c) the numbers of valid affirmative votes cast at the referendum;

and is, in the absence of proof to the contrary, conclusive evidence of the matters so stated.

(9) Upon the referendum question being carried in accordance with this section, the amendment shall be effective on the date that the Speaker presents the certificate to the Governor under subsection (7), or on such other date as is specified in the amendment.

Purpose of the Clause: 2.4 Constitutional Amendment

This clause is a new insertion into the Exposure Draft and it continues on from Clause 2.3. It provides for an amendment procedure to this Constitution. Although somewhat detailed the salient points are:

- The amendment procedure provides for a Bill for an Act of the Parliament to amend this Constitution and it shall not be enacted unless there has been a period of least two (2) calendar months between voting on its second reading and voting on its third reading.
- Before the Bill proceeds to the third reading, it shall be submitted to a Standing Committee established by this Constitution — see Clause 2.6 — to consider and report on the proposed amendment to the Parliament.
- Subsequent to the third reading, the Speaker shall certify to the Governor, prior to his or her assent to the Bill, that the procedures have been complied with in accordance with this Constitution.
- Upon the assent of the Governor, the adoption of the propose amendment shall be put to a referendum of electors of the Northern Territory qualified to vote at an election of the members of the Parliament.
- The referendum to adopt the proposed amendment must be held no earlier than three (3) months and no later than twelve months after assent has been given by the Governor.
- Except where it is provided in this Constitution, a referendum question must be carried at the referendum to which it is put, by valid affirmative votes equal to or more than 50% of the total number of valid votes cast at the referendum.

Variations:

(a) Republic: No Change.

(b) Pre—Statehood: No Change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New State Constitution for the Northern Territory,* 1987: (Part E: pp 36-37).

2.5 AMENDMENT OF ORGANIC LAWS

(1) An Organic Law may only be amended either by an amendment of this Constitution under section 2.4 or by a Bill enacted in accordance with the provisions of this section, and not otherwise.

(2) Subject to sections 2.3(6) and 2.6(4), a Bill for an Act of Parliament for the amendment, in whole or part, of an existing Organic Law, and whether by way of an amendment of a provision of that Organic Law or by the insertion of a new provision in that Organic Law, shall not take effect as an amendment of that

Organic Law unless it is enacted by the Parliament in the same manner as required by section 2.3 for the enactment of an Act of the Parliament which itself expressly states that it is an Organic Law and which would, upon assent, be an Organic Law.

Purpose of the Clause: 2.5 Amendment of Organic Laws

This clause is a new insertion into the Exposure Draft and it provides for an amendment procedure to the Organic laws that have been declared by this Constitution to be an Organic law or to an Act of Parliament which expressly states that it is an Organic law — see Clause 2.3. The amendment procedures follow closely to those procedures required to amend this Constitution, however, any amendment(s) or insertion(s) to an Organic law do not require that they be put to a referendum for adoption.

Variations:

(a) Republic: No Change.

(b) Pre—Statehood: No Change.

The use of Organic laws was raised in Discussion Paper No. 6, *Aboriginal Rights and Issues - Options for Entrenchment,* 1993: for Aboriginal Land Rights: pp 15-16; for a possible Bill of Rights in Discussion Paper No. 8, *A Northern Territory Bill of Rights?,* 1995: p.51; and for local government in Discussion Paper No. 9, *Constitutional Recognition of Local Government,* 1995.

2.6 STANDING COMMITTEE ON THE CONSTITUTION AND ORGANIC LAWS

(1) The Parliament shall appoint a Standing Committee to be known as the Standing Committee on the Constitution and Organic Laws.

(2) The powers, functions, privileges and procedures of the Committee shall be as provided in the Standing Rules and Orders of the Parliament.

(3) The Committee shall be composed of such members of the Parliament and other persons, holding office on such terms and conditions, as are specified in the Standing Rules and Orders of the Parliament.

(4) A Bill for an Act to amend this Constitution or to amend an Organic Law shall not proceed to a second reading in the Parliament unless the proposal contained in the Bill has first been considered by the Committee and the Committee has reported on the proposal to the Parliament.

(5) The Committee may receive and consider a petition from persons from the Northern Territory requesting an amendment of this Constitution or of an Organic Law, and the Committee may report to the Parliament thereon.

(6) The Committee shall consider a reference from the Parliament by way of a resolution of Parliament, following the introduction of the Bill into the Parliament proposing an amendment of this Constitution or of an Organic Law or on any

other matter, and the Committee shall report to the Parliament thereon as soon as practicable thereafter.

(7) The Committee shall receive and consider a petition from persons from the Northern Territory if the petition is signed by at least ten (10) per cent of the numbers of electors qualified to vote at an election of members of the Parliament and on the roll for such an election at the time the petition is presented to the Committee, the petition requesting an amendment of this Constitution or of an Organic Law, and the Committee shall report to the Parliament on any such petition as soon as practicable thereafter.

(8) The Committee shall not be restricted to the subject matter of any petition or any resolution in making its report to the Parliament, but may consider any other options and all matters incidental to or consequential upon that subject matter or those options.

(9) Where the Committee, in its report, makes recommendations to the Parliament for the amendment of the Constitution, and the recommended amendment deals with 2 or more separate and distinct subject matters, then the Committee shall also recommend that the question of the adoption of the proposed amendment at a subsequent referendum shall be dealt with by way of separate questions for each such separate and distinct subject matter.

(10) The reports of the Committee shall be tabled in the Parliament.

Purpose of the Clause: 2.6 Standing Committee on the Constitution and Organic Laws

Provides for the establishment of a Standing Constitutional Committee for the purpose of considering and reporting to the Parliament on proposals to amend this Constitution or an Organic law. The Committee's powers and functions are provided by the Standing Orders of the Parliament and its membership is comprised of members of Parliament and such other persons as specified in the Standing Orders. This clause also provides for a procedure in receiving petitions from persons in the Northern Territory requesting an amendment of this Constitution or an Organic law. For the Standing Committee to be required to consider a request by petition, the petition requires that it be signed by ten (10) per cent of the electors qualified to vote at the election of the members of the Parliament.

Variations:

(a) Republic: No Change.

(b) Pre—Statehood: No Change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New State Constitution for the Northern Territory,* 1987: (Parts E and P).and also Discussion Paper No. 3 *Citizens' Initiated Referendums, 1991 (Parts E and F).*

PART 7 - ABORIGINAL RIGHTS

7.3 ABORIGINAL SELF-DETERMINATION.

Subject to this Constitution, an Act of the Parliament may provide for the grant of Aboriginal self-determination and for all matters incidental thereto.

Purpose of the Clause: 7.3 Aboriginal self-determination

Provides a positive mechanism for Parliament through enactment in recognising the special place that Aboriginal people have in the Northern Territory which could take effect through a wide variety of processes that would formally recognise and enhance the control over their daily lives in order to safeguard, strengthen and develop their language, social and cultural customs and traditions, religion or beliefs, economies and identities.

Variations:

(a) Republic: No Change.

(b) Pre—Statehood: No Change.

Reference to Discussion and Information Papers: See Discussion Paper No 6, *Aboriginal Rights and Issues - Options for Entrenchment,* 1993: in particular Part F. See also Parts 2 and 7 of the *Exposure Draft Constitution* , *A new Constitution for the Northern Territory,* 1995, and the new provisions relating to Aboriginal matters and language, social, cultural and religious matters in this document.

PART 8 - RIGHTS IN RESPECT OF LANGUAGE, SOCIAL, CULTURAL AND RELIGIOUS MATTERS

8.1 LANGUAGE, SOCIAL, CULTURAL AND RELIGIOUS MATTERS

(1) Notwithstanding anything in the laws of the Northern Territory other than as provided in sub-sections (2) and (3), a person shall not be denied the right —

(a) to use his or her own language in his or her communications with other people speaking or understanding the same language;

(b) to observe and practice his or her own social and cultural customs and traditions in his or her relations with other people of the same tradition; and

(c) to manifest his or her religion or belief in worship, ceremony, observance, practice or teaching.

(2) The rights in paragraphs (a), (b) and (c) of subsection (1) shall be subject to this Constitution, any Organic law and any reasonable regulation imposed by an Act of the Parliament in the public interest.

(3) The rights in paragraphs (b) and (c) of subsection (1) shall only operate to the extent that they are not repugnant to the general principles of humanity as contained in any international agreement to which Australia is a party.

Purpose of the Clause: 8.1 Language, social, cultural and religious matters

Provides an expressed provision in the Constitution recognising that the people of the Northern Territory come from very diverse backgrounds and cultures and that they should not be unreasonably denied the right to use and speak and understand their own language and to observe and practice their own social and cultural customs and traditions, beliefs, ceremonies or religion.

Variations:

(a) Republic: No Change.

(b) Pre—Statehood: No Change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New State Constitution for the Northern Territory,* 1987: (Part T). See also Discussion Paper No. 4, *Recognition of Aboriginal Customary Law,* 1992: p.43, Discussion Paper No. 8, *A Northern Territory Bill of Rights*:? p51. See also previous comments under **Preamble 1**.

PART 9 LOCAL GOVERNING BODIES

9.1 LOCAL GOVERNMENT

(1) Subject to this Constitution, an Organic law or an Act of the Parliament there shall continue to be a system of local government in the Northern Territory under which local governing bodies are constituted with such powers as the Parliament considers necessary for the peace, order and good government of those areas of the Northern Territory that are from time to time subject to that system of local government;

(2) The manner in which local governing bodies are constituted, and the nature and extent of their powers, functions, duties and responsibilities and all matters incidental thereto, shall be determined by or under this Constitution, or an Organic law or Acts of the Parliament from time to time in force;

(3) Notwithstanding subsection (2) the Parliament shall, when enacting legislation in respect of local governing bodies, provide for -

(a) general competency powers and functions in respect to their -

(i) objectives, powers, functions and responsibilities;

(ii) rating and any other forms of revenue, expenditure and fiscal accountability;

(iii) membership;

(iv) boundaries; and

(b) protection from dismissal of a local governing body without public enquiry.

Purpose of the Clause: 9.1 Local Government

Provides for the constitutional recognition of the local government system in the Northern Territory and that the responsibilities, powers and functions are determined by this Constitution, an Organic law or by an Act of the Parliament. It also provides for a measure of autonomy within this framework when Parliament enacts legislation in respect of these bodies, that it shall take into account:

- the general competency powers and functions in respect to their -
  - (i) objectives, powers, functions and responsibilities;
  - (ii) rating and any other forms of revenue, expenditure and fiscal accountability;
  - (iii) membership;
  - (iv) boundaries; and
- to protect a local governing body from dismissal without having a public enquiry as to the reasons for its dismissal.

Variations:

(a) Republic: No Change.

(b) Pre—Statehood: No Change.

Reference to Discussion and Information Papers: See *Discussion Paper on A Proposed New State Constitution for the Northern Territory,* 1987: (Parts R & S) See also Discussion Paper No. 6, *Aboriginal Rights and Issues - Options for Entrenchment,* 1993: pp 34-35, and also Discussion Paper No. 9 *Constitutional recognition of Local Government, 1995: pp 11-15.*

PART [number to be determined] DEFINITIONS

"Aboriginal self-determination"

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

Purpose of the Definition: "Aboriginal self-determination"

This definition is a statement of what Aboriginal self-determination means in respect of the provisions that relate to Aboriginal matters under this Constitution. It provides for clarification of the special place that Aboriginal people have in the Northern Territory particularly relating to the exercise of control over their daily lives, in order to safeguard, strengthen and develop their language, social and cultural customs and traditions, religion or beliefs, economies and identities. It also acts as a linkage between the various mechanisms that reflect the processes relating to Aboriginal self-determination in the Northern Territory that operate within the framework of this Constitution.

Variations:

(a) Republic: No Change.

(b) Pre—Statehood: No Change.

Reference to Discussion and Information Papers: See Discussion Paper No. 4, *Recognition of Aboriginal Customary Law,* 1992, Discussion Paper No 6, *Aboriginal Rights and Issues - Options for Entrenchment,* 1993: in particular Part F. See also Parts 2 and 7 of the *Exposure Draft Constitution* , *A new Constitution for the Northern Territory,* 1995, and the new provisions relating to Aboriginal matters and language, social, cultural and religious matters in this document.