

*Addendum to the Final Draft Northern Territory Constitution***OPTIONS FOR DEALING WITH RIGHTS****1. Introduction**

The draft Constitution to which this Addendum is attached contains a limited number of specific proposals See Item 5 below, which summarises the rights already contained in the draft Northern Territory Constitution.

that are relevant to matters that could be included in a "Bill of Rights" (or similar document, however called) if one was to be inserted into that draft Constitution.

The Committee has not, however, recommended the inclusion of a comprehensive set of "rights" in that draft Northern Territory Constitution.

As to any remaining "rights"-type matters not so included in the draft Constitution, the Committee felt that it was sufficient to bring this subject to the attention of Honourable members of the Legislative Assembly and other readers, in the manner contained in this Addendum, listing the options. For this purpose, this Addendum is to be read in conjunction with the Committee's Discussion Paper No. 8 entitled "A Northern Territory Bill of Rights" of March 1995.

The Committee notes that there are several alternate views as to how these remaining matters could be addressed. Traditionally these matters have often been incorporated in constitutional provisions at the national level, setting out the rights in question. A second method can be through incorporation in ordinary national legislation rather than in legal provisions (constitutional or otherwise) at a State or Territory level. A third alternative is by ordinary State or Territory legislation. The options are listed more fully below. It does not necessarily follow that these matters must be dealt with in the State or territory constitutions or even in organic laws (if any) of a State or territory.

The Sessional Committee does not have a unanimous view on whether all or any of these remaining matters should be included in the draft Northern Territory Constitution.

The purpose of this Addendum is to set out in summary form those rights dealt with in the Commonwealth Constitution, those rights already dealt with in national legislation and in international treaties and conventions to which Australia is a party and which have been implemented by national legislation, those rights already included in the Committee's draft Northern Territory Constitution, and then to list the options for dealing with any remaining rights. This approach reflects the fact that the Northern Territory is a part of the Australian constitutional system (even though not yet a State) and that it and its citizens have (or at least will have upon any grant of Statehood), the benefit of certain guarantees in the Commonwealth Constitution, as well as relevant protections provided by national legislation and by treaties and conventions (to the extent that they are implemented in Australian law).

2. Relevant Rights Provisions already in the Commonwealth Constitution**(i) Express Rights-**

These are of a fairly limited nature in the Commonwealth Constitution, as that Constitution does not contain a comprehensive "Bill of Rights". They include:

(a) no compulsory acquisition of property otherwise than on just terms; Section 51(xxxi) of the Commonwealth Constitution prevents the passing of valid laws by the Commonwealth Parliament for the

acquisition of property from any State or person unless the acquisition is on just terms. This only applies to a compulsory acquisition under Commonwealth law, not under State law nor a self-governing territory law. The guarantee may not apply in territories at all.

A similar statutory guarantee in section 50(1) of the Northern Territory (Self-Government) Act 1978, preventing the Legislative Assembly of the Northern Territory from legislating for the acquisition of property otherwise than on just terms, will presumably disappear if that Act is repealed and replaced by the draft Northern Territory Constitution.

See however, the proposal in section 3.1(3) of the draft Northern Territory Constitution to incorporate a similar provision to that in section 50(1).

(b) trial by jury for indictable offences; Section 80 of the Commonwealth Constitution provides that the trial of indictable offences against a law of the Commonwealth shall be by jury in the State where the offence was committed. This does not apply to non-indictable offences, nor to any offences under State and self-governing territory law. The section may not operate in territories at all.

(c) absolute freedom of movement between States; Section 92 of the Commonwealth Constitution guarantees absolute freedom of intercourse between States. It has no application to movement occurring solely within a State or within a Territory, nor to movement between a State and a Territory. It does, however, prevent the Commonwealth or a State from infringing the right of free movement between States except on clearly justifiable grounds.

A similar statutory guarantee to section 92 found in section 49 of the Northern Territory (Self-Government) Act 1978, applicable between the Northern Territory and a State, will presumably disappear if that Act is repealed and replaced by the draft Northern Territory Constitution. Section 92 of the Commonwealth Constitution would fill that gap if the Northern Territory became a new State contemporaneously with the commencement of that new Northern Territory Constitution, but otherwise there would be a gap which may have to be filled by Commonwealth legislation.

(d) freedom of religion; Section 116 of the Commonwealth Constitution prevents the Commonwealth Parliament from legislating to establish a religion, to impose any religious observance and to prohibit the free exercise of religion, and the Commonwealth cannot require a religious test for any office or public trust under the Commonwealth. However, the section does not control the actions of States and State Parliaments and possibly not Territories and self-governing Territory legislatures. The section has so far been interpreted narrowly by the High Court. There is no general legal right of religious freedom in Australia, even though such freedom is widely accepted in practice.

See, however, the proposal in section 8.1 (1) (c) of the draft Northern Territory Constitution to prevent the unreasonable denial in the Northern Territory of the right to manifest a person's religion or belief in worship, ceremony, observance, practice or teaching.

(e) protection against disability or discrimination based on State residence; Section 117 of the Commonwealth Constitution provides that a resident in one State is not to be subject in any other State to any disability or discrimination not equally applicable to that person if he or she was a resident in that other State. The section imposes a limit on both the Commonwealth and on States, but it must be a disability or discrimination between States and referable to State residence. It may not apply in territories at all. It would apply to the Northern Territory if it became a new State under its new Constitution.

(f) certain democratic rights; The Commonwealth Constitution contains some provisions designed to guarantee the democratic nature of the national Parliamentary system of government. Thus both Houses of the national Parliament must be directly chosen by the Australian people (sections 7 and 24), with each elector having one vote in elections for each House (sections 8 and 30) and a guarantee of regular elections (sections 13 and 28). The House of Representatives electoral divisions for each of the States must be based on a population quota (section 24). Persons having the right to vote in State elections are guaranteed the right to vote in national elections (section 41), although the High Court has given this a narrow interpretation.

These democratic guarantees form the basis of the system of representative government, but only apply at the national level, not at the State and Territory levels in respect of their legislatures. However, see below as to implied constitutional rights and see also the provisions of the draft Northern Territory Constitution establishing the democratic, representative nature of the new Northern Territory Parliament.

(g) an independent federal judiciary; The Commonwealth Constitution in Chapter III deals with the federal judiciary, comprising the High Court of Australia and other courts established by the national Parliament (section 71). It guarantees the tenure of judges of those federal courts up to 70 years of age, such that they can only be removed from office before that age by an address in both Houses of national Parliament on the grounds of proved misbehaviour or incapacity. Their remuneration is also guaranteed (section 72).

The Constitution now establishes the High Court as the final court of appeal for Australia from State and other federal courts (sections 73 and 74) and also guarantees some of the most important aspects of the original jurisdiction of the High Court (section 75).

On the basis of these provisions, the High Court has adopted a doctrine of separation of powers at the federal level, requiring a constitutional division between federal judicial power and non-judicial power. This has not so far been extended to the State level.

However the Constitution does not establish the independence of State and Territory courts and their judges.

See, however, the proposals in Part 6 of the draft Northern Territory Constitution, designed to establish the Northern Territory Supreme Court and to give to its judges a similar measure of judicial independence. The full doctrine of separation of judicial power, if applicable, would be qualified by section 6.3 of the draft Constitution.

(h) provisions designed to maintain the Australian federal system. The Commonwealth of Australia Constitution Act recites that the people of Australia "... have agreed to unite in one indissoluble Federal Commonwealth ...". The Commonwealth Constitution itself establishes that federal system, comprising the Commonwealth and the States, original and new, and entrenches that federal system in a variety of ways. This has been further reinforced by the Australia Act 1986, giving the States direct links with the Crown in England. Section 51 of the Constitution contains a federal division of legislative power between the Commonwealth Parliament and the State Parliament, with the residue of legislative power to the States. Where a Commonwealth law is within constitutional power, it will prevail over an inconsistent State law (section 109), but otherwise State law prevails. State constitutions are protected (section 106).

There has been much debate about whether the federal system has been eroded by broad High Court

interpretations of section 51 of the Constitution, giving very wide scope to Commonwealth legislative power and thereby eroding residual State legislative power. This has been particularly the case under the external affairs power (section 51 (xxix)). Once the Commonwealth executive Government has entered into an international agreement on any subject, the Commonwealth Parliament has the constitutional capacity under this head of power to legislate to implement that agreement in Australian law, thereby over-riding inconsistent State law. From a State perspective the Commonwealth law cannot be altered and has the force of a constitutional limitation on State power.

The federal system has no direct applications to territories, including the Northern Territory under Self-government. The Commonwealth Parliament has an almost unlimited legislative power over Territories under section 122 of the Constitution. This would change if the Northern Territory became a new State within the federal system, putting the new State in much the same position as existing States (unless restricted by valid Commonwealth imposed terms and conditions on the new State under section 121 of the Constitution).

The draft Northern Territory Constitution has been prepared on the basis that the Northern Territory will, either contemporaneously with the coming into effect of that new Constitution, or at some later point in time, be granted Statehood within the Australian federal system on the basis of that new Constitution. See in particular the last Preamble to that draft Northern Territory Constitution and the reference to the Commonwealth Constitution and the Australia Acts in section 2.2 (a) of that draft Constitution.

Additional Note

If a national "Bill of Rights" was to be adopted, whether in the Commonwealth Constitution or in Commonwealth legislation, this would almost certainly have the effect of either extending, limiting or otherwise varying any Northern Territory constitutional rights provisions. Such a national "Bill of Rights" could be expected to directly impinge on the Northern Territory in some way.

In addition, it is of course possible that the Commonwealth could seek to impose other human rights provisions on the Northern Territory as a condition of its further constitutional advancement, including by way of a term or condition under section 121 of the Commonwealth Constitution upon any grant of Statehood.

(ii) Implied Constitutional Protections

The evolution of implied constitutional protections is a subject of some controversy as a result of some recent High Court decisions. The scope of these protections has yet to be fully enunciated by the Court. In reality there are very few identified constitution protections that have been implied in this manner.

The main implied constitutional right clearly enunciated by a majority of the High Court to date is the implied freedom of communication in political matters. This right arose out of a decision of the High Court in 1992, involving a challenge to the validity of Commonwealth legislation seeking to restrict political election advertising in the lead up to Commonwealth, State and Territory elections, with certain limited free time being required to be given to political parties on the electronic media. The Australian Capital Television case, High Court, 1992.

The majority of the High Court took the view that in a representative democracy such as Australia under its Constitution. See Item 2(i)(f) above.

the people must have a constitutional right to freedom of communication in political matters, otherwise it would not be possible for those democratic ideals to be put into practice. This, the High Court said, was necessarily implied in the Commonwealth Constitution, even though not expressly stated in that

document. This comes close to a guarantee of freedom of speech based on the views of some of the Justices of the High Court. It apparently applies at both Commonwealth and State levels and may also apply in and to territories.

The High Court has yet to fully explore whether there are other implied constitutional rights relating to the legal system and due process, based on the separation of powers doctrine or on some doctrine of equality before or under the law, or the equal protection of the law. To date, other than as referred to in (g) above, the implied constitutional protections of this nature recognised in the Court's decisions have been limited.

There is a well established implied federal principle that the Commonwealth may not act in a manner that prejudices the continued existence of the States nor discriminates against any of them.

3. Relevant Commonwealth Legislation

There are a number of Commonwealth Acts which contain human rights provisions and which, from a State or Territory perspective, have a constitutionally entrenched force which cannot be altered by State or Territory laws. These include:

(a) Human Rights and Equal Opportunity Commission Act 1986

The Act schedules the International Covenant on Civil and Political Rights 1966 (which contains comprehensive individual human rights provisions) plus several other international human rights instruments. The UN Declaration on the Elimination of all Forms of Intolerance and Discrimination based on Religion or Belief and the Convention on the Rights of the Child have since been added to these international instruments by declaration under section 47 of this Act. The Act contains a complicated process whereby people who consider their rights have been infringed under any of these international instruments may lodge a complaint with the relevant national body. That body then investigates the matter, may arrange for mediation and then a report may be made. If the matter cannot be resolved by agreement between the parties, recommendations are made that can only be enforced through Federal Court orders.

However, it is not possible for the person aggrieved to directly enforce any of these international instruments by court action taken in the Australian courts without first complying with this complicated mechanism in the Act.

The Human Rights & Equal Opportunity Commission Act is expressed to bind the Commonwealth and hence its instrumentalities and employees, but not the States and the Northern Territory. An exception to this is in relation to equal opportunity in employment under Part II Division 4, which does bind the States and the Northern Territory. Other than this the States and the Northern Territory cannot be subject to enforcement action under the Act except in limited circumstances where they are involved in a joint project with the Commonwealth.

It is to be noted that under the Optional Protocol to the International Covenant, to which Australia is a party, complainants in Australia have a remedy of last resort to the Human Rights Committee in Geneva for any alleged breach of the Covenant's provisions.

It is also to be noted that a number of matters dealt with in the International Covenant are also dealt with under other Commonwealth legislation; for example, race discrimination is dealt with in the Racial Discrimination Act in a manner binding on the States and Northern Territory.

(b) Racial Discrimination Act 1975 and Racial Hatred Act 1995

These Acts outlaw a variety of conduct of a racial nature. The Acts are binding on the Commonwealth, States and Territories and allow for Federal Court orders for enforcement.

(c) Sex Discrimination Act 1984 and the Affirmative Action (Equal Opportunity for Women) Act 1986.

The Sex Discrimination Act outlaws a variety of conduct involving discrimination on the basis of sex, and allows for enforcement by Federal Court orders. The Act is primarily directed at discrimination based on sex by the Commonwealth, its instrumentalities and employees, but extends to discrimination by non-government persons and bodies to the extent of Commonwealth constitutional power (including in the case of discrimination against women under the Sex Discrimination Convention and discrimination by foreign, financial and trading corporations), and in limited circumstances by the Self-governing Northern Territory, for example in the course of trade and commerce or as part of a Commonwealth program. The provisions as to the application of the Act are complicated.

The Affirmative Action (Equal Employment Opportunity for Women) Act is primarily directed at private employers to the extent that is within Commonwealth constitutional power.

(d) Other statutes such as the Freedom of Information Act 1982, the Privacy Act 1988 and the Disability Discrimination Act 1992.

The Freedom of Information Act and the Privacy Act both are directed at the Commonwealth and its instrumentalities, not the States and the Northern Territory.

The Disability Discrimination Act utilises the Commonwealth's constitutional power to prevent government and non-government persons and bodies from discriminating against others on the basis of disability in various fields. It is expressed to bind the States and Northern Territory and applies to them to the extent of the constitutional power of the Commonwealth, with some additional application to the Northern Territory, for example, in the course of trade and commerce. The provisions as to the application of this Act are complicated.

(e) Various Commonwealth Acts on Aboriginal rights, including the Aboriginal Land Rights (Northern Territory) Act 1976, See Section 7.1 of the draft Northern Territory Constitution, facilitating the patriation of the Aboriginal Land Rights (Northern Territory) Act to the Northern Territory as a Northern Territory law, subject to constitutional guarantees of Aboriginal title to land.

the Native Title Act 1993 and the Aboriginal & Torres Strait Islander Heritage Act 1984.

Note that the first of these Acts only applies to the Northern Territory, whereas the last two of these Acts apply Australia wide. From the point of view of the Northern Territory, they have superior force to Northern Territory law and hence can be seen to have a constitutionally entrenched status.

(f) The Human Rights (Sexual Conduct) Act 1994, which protects sexual conduct between consenting adults in private from any invasion of privacy that is otherwise applicable by the effect of any Australian law. The Human Rights (Sexual Conduct) Act followed on from the decision of the Human Rights Committee in Geneva in the Toonen Case, in which the view was expressed that certain Tasmanian criminal laws on homosexuality were in breach of the privacy provisions of the International Covenant on Civil and Political Rights, to which Australia is a party. The Act is designed to override those Tasmanian laws, relying on the external affairs power in section 51(xxix) of the Constitution.**4. Relevant Treaties and Conventions to which Australia is a Party**

The traditional legal rule inherited from England is that, generally speaking, international agreements creating international legal obligations on the part of nation-states that are parties to those agreements have no effect in their domestic law until implemented by domestic legislation. It is clear that the Commonwealth Parliament has the necessary constitutional power to implement such agreements to which Australia is a party under the external affairs power (section 51(xxix) of the Commonwealth Constitution). It has already so legislated to a limited extent. Reference should be made back to the Commonwealth Acts listed in Item 3 of this Addendum in this regard.

This leaves the question of the extent to which such international agreements can have some effect in domestic Australian law even without statutory implementation. In *Teoh's case, Minister for Immigration and Ethnic Affairs v Teoh* (1995).

a majority of the High Court held that ratification of such an agreement by Australia was a positive statement that Australia and its agencies will act in conformity with it, and that this can create a legitimate expectation which must be addressed by Australian decision makers and brought to the affected person's notice before the decision. It is to be noted that Government statements have been made both in the Commonwealth Parliament and in the Northern Territory Legislative Assembly, refuting the existence of any legitimate expectation of the kind mentioned in *Teoh*. The Commonwealth also proposes to legislate on the matter.

The rule in *Teoh's case* is in addition to the rule of interpretation that where the domestic law is ambiguous or uncertain, the courts will favour an interpretation that accords with Australia's international obligations under any international agreement.

In principle it is possible in Australian law for an Australian parliament (including a State or self-governing Territory parliament), by sufficiently clear words, and including the Commonwealth Parliament under the external affairs power, to legislate inconsistently with the provisions of an international agreement to which Australia is a party. In the absence of legislation, consistent or otherwise, those international agreements have no effect in domestic Australian law. Thus the domestic human rights protections afforded by international agreements, even where Australia is a party, are fragile. In the absence of Australian legislation implementing these agreements, their value largely rests on international opinion and action (including in some instances the opinion of an international tribunal in Geneva deciding the international rights of the case).

5. Rights Already Contained in the Draft Northern Territory Constitution

The Sessional Committee's draft Northern Territory Constitution already contains provisions of relevance, intended to be entrenched in that Constitution and directly enforceable in the courts by any person adversely affected. The provisions of relevance are:

(a) elements of representative democracy, such as direct elections to the new Parliament, equality of Territory electorates, secret ballot, wide qualifications of electors and candidates, regular general elections, etc. These are to a large extent now covered by the Northern Territory (Self-Government) Act, but this Act is proposed for repeal. The draft Constitution incorporates all of these;

(b) any constitutionally implied rights, if they also already apply in the Northern Territory, See Item 2(ii) of this Addendum above.

may, if the new Northern Territory Constitution is implemented, continue to apply in the Northern Territory and may even be enhanced by the provisions of that Constitution;

(c) provisions as to the independence of the Northern Territory Supreme Court Judges. See section 6.2 of the draft new Northern Territory Constitution.

These provisions are not already covered by the Commonwealth Constitution or by other Commonwealth protections;

(d) Aboriginal rights in respect of land under the Aboriginal Land Rights (Northern Territory) Act 1976 if it is patriated to the Northern Territory, Aboriginal sacred sites, Aboriginal self-determination, and recognition of Aboriginal customary law as a source of law in the Northern Territory. See sections 2.1.1, 7.1, 7.2, 7.3 and 11.2 of the draft new Northern Territory Constitution.

All of these provisions have elements which would go beyond existing Commonwealth protections of Aboriginal rights and also of the common law;

(e) rights in respect of language, social, cultural and religious matters; See Part 8 of the draft new Northern Territory Constitution which deals with these matters, and applicable to all people in the Northern Territory.

(f) in addition, the Committee has more recently agreed to provide in the draft new Northern Territory Constitution that the power of the new Northern Territory Parliament in relation to the making of laws does not extend to the making of laws with respect of the acquisition of property otherwise than on just terms. See section 3.1(3) of the draft new Northern Territory Constitution. Compare section 51(xxix) of the Commonwealth Constitution and section 50(1) of the Northern Territory (Self-Government) Act 1978, discussed in Item 2(i)(a) of this Addendum.

6. Options for Dealing with Residual Rights not already Protected

There are a number of rights that are not already dealt with in the abovementioned Commonwealth provisions or in the draft Northern Territory Constitution at all, or are dealt with in a different manner to that if there was a Bill of Rights, and which the Sessional Committee has identified in its Discussion Paper No. 8 See the Committee's Discussion Paper No. 8, "A Northern Territory Bill of Rights", March 1995.

as potentially capable of being incorporated in the new Northern Territory Constitution. Whether they should be so incorporated is of course quite another matter, upon which the views of members of the Committee differ. These are set out in the Committee's Discussion Paper No. 8. Ibid, Item F, pp 28-46. The arguments for and against entrenching these additional rights in the Northern Territory Constitution are also set out in that Discussion Paper. Ibid, Item E, pp 21-27.

It will be obvious from reading this Addendum that, to some extent at least, entrenchment of many of these additional rights in a new Northern Territory Constitution would result in some degree of overlap with the existing protections listed above.

The Sessional Committee wishes to point out again that there are other options that can be considered for dealing with these additional rights rather than entrenching them in a new Northern Territory Constitution in some form of an enforceable Bill of Rights. Options for consideration are set out in Discussion Paper No. 8. Ibid, Item G, pp 50-52. They include:

(a) reliance on national constitutional or legislative provisions supplementing the common law only, rather than on any additional Northern Territory legislation;

(b) the incorporation of these additional rights in ordinary Northern Territory legislation;

(c) the incorporation of these additional rights in the new category of organic laws;

(d) reference to these additional rights in an expanded Preamble to the new Northern Territory Constitution;

(e) the incorporation of these rights in the new Northern Territory Constitution, but not in a form that makes them directly enforceable; rather, in a form that is relevant to matters of statutory interpretation and public administration only;

(f) some form of reference to these rights for the purposes only of Parliamentary scrutiny of new proposals for Northern Territory legislation, and/or for the purposes of investigation by the Northern Territory Ombudsman into complaints as to Northern Territory administrative actions.

If none of these options are considered acceptable, there is always the option of maintaining the present status quo, reliance being placed on the existing protections mentioned above as well as on the common law and the capacity of the new Territory Parliament to legislate in the future where there is a perceived need.

The Sessional Committee makes no specific recommendation as to any of these options.