

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Sessional Committee on Constitutional Development

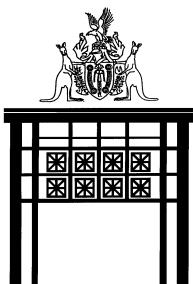
Foundations for a Common Future:

**The Report
on Paragraph 1(a) of the Committee's
Terms of Reference
on a
Final Draft Constitution
for the Northern Territory**

Volume 2 - Part A — Published Papers

November 1996

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Volume 2 - Part A — Published Papers

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PLEASE NOTE:

- This Volume has been reformatted for purposes of consistency.
- References that are specified within the body, Appendices and the footnotes, refer to the original papers published by the Sessional Committee.

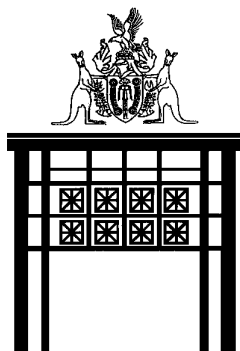
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Chapter 1

**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**

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

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SUMMARY OF SELECT COMMITTEE RECOMMENDATIONS AND ENDORSEMENTS

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

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

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. (Part B. para 1(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. (Part B. para 1(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. (Part B. para 1(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. (Part B. para 1(i)).

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. (Part C. para 1(c)).
9. The Select Committee proposes that the new State Parliament should consist of one House only. (Part C. para 2(f)).

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10. The Select Committee recommends that the number of members of the new State Parliament continue to be included in ordinary legislation. (Part C. 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. (Part C. 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 (Part C. para 4(c)).
 13. The Select Committee endorses [the] different treatment between [qualifications for] voting and nomination in the case of prisoners. (Part C. 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. (Part C. 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. (Part C. 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 ... (Part C. para 4(g)).
 17. The Select Committee recommends retention of the existing term [4 years, for a new State Parliament.] (Part C. 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. (Part C. 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. (Part C. para 5(i)).

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. (Part D. 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. (Part D. para 2(a)).
22. "The Select Committee" is divided as to its 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. (Part D. 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. (Part D. 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. (Part D. 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. (Part D. 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. (Part D. para 4(c)).

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. (Part E. 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. (Part E. 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. (Part E. para 3(c)).
 30. Generally speaking, the Select Committee favours some degree of entrenchment of the whole of the new State constitution. (Part E. para 3(d)).

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." (Part G. 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. Part G. (para 3).
33. The Select Committee considers that there should be some constitutional guarantee of the Governor's remuneration (Part G. para 5).

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 (Part H. 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 (Part H 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. (Part H. 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. (Part H. 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 (Part H. 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 (Part H. 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. (Part H. para 14).

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 (Part I. 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 (Part I. 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 (Part I. 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. (Part I. 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. (Part I. 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 (Part I. para 7).
47. The Select Committee believes that the remuneration and other entitlements of Ministers should be left to new State legislation. (Part I. 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. (Part I. para 9).

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 ... (Part J. 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 (Part J. para 3).
51. The Select Committee sees no need to give express constitutional recognition to the institution of Cabinet ... (Part J. para 4).

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. (Part K. 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 (Part K. para 5).

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." (Part N. 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." (Part N. para 4(e)).
56. The Select Committee does not consider that any provision concerning court administration should be included in the new State constitution. (Part N. 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. (Part N. 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. (Part N. para 7(g)).

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. (Part O. para 2).

60. The Select Committee believes, however, that only fundamental principles should be entrenched, and not matters of detail. (Part O. 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 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 that new State. (Part O. 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. (Part O. para 5).

LOCAL GOVERNMENT

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

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. (Part S. 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. (Part S. 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

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

¹ See Appendix 5 for current terms of reference.

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

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

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.

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

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

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 of 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 21(1) 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.

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- (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);

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- (ii) Qualifications of electors (S.14);
 - (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.

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- (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.

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- (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.

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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).

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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);

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- (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 Appendix 2.

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 Appendix 3.

2. State Provisions

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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.

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- (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.

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- (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 or 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 Appendix 2).
- (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

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)

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 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;

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- (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.

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- (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 of 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

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- (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 Alteration (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) 1977, 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."

"121. 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.(1) 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.(1) 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

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- . 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);

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- . 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 17); 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.

7. 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 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 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 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) 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;

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- (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. (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 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 (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 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 Rioli⁵;

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

-
- (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;

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- (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

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 the 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 the 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

DISCUSSION PAPER NO. 3

CITIZENS' INITIATED REFERENDUMS

AUGUST 1991

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

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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 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. *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 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.

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- (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 XIII A). 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.

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- (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 19th 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.

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- (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.

7. 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.

8. 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.

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 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.

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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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PART C, 5(iii) - Information Paper No. 2: "Options for a Grant of Statehood"

"(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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PART B (d) and (f) Discussion Paper: "Proposed New State Constitution for the Northern Territory"

- "(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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PART P (d) and (e) - Discussion Paper: "Proposed new State Constitution for the Northern Territory"

- "(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

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

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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.

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- (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".
- (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 its 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.

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- (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.

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- (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 normally conceive 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.

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- (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 led 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 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 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 7(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, A P 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 G J Hawkins and R L 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.

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- (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 H C 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

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- 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)).

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- (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 of traditional law and authority.
 - (ii) In some communities Aboriginal customary law may be the most appropriate vehicle for the maintenance of law and order.

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- (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.

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- (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 adaptation 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 dealt 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 why 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 Article I, 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 Article 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 recent 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.

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- (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 led 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. It 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 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 lose 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*

i. **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 Portuguese, 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 Sabah 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.

ii. 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 at 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:

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- (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
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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.

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- (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) There 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.

APPENDIX 1

**Extract from the Discussion Paper on a Proposed
New State Constitution for the Northern Territory
dated October 1987 [Second Edition - July 1995]**

Part S - Aboriginal Rights

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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 [Second Edition - July 1995].

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.
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.

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

APPENDIX 2

List of Submissions to the Committee

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List of written submissions to the Committee.

<u>Submission No.</u>	<u>Name</u>	<u>Organisation</u>
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.

<u>Name</u>	<u>Place</u>	<u>Date</u>
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)

<u>Name</u>	<u>Place</u>	<u>Date</u>
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**

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

referendum for its approval. The Paper noted that the ability to legally adopt a new State constitution was dependant upon a specific grant of powers by the Commonwealth.

- (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(d) 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.
- (d) 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", [Second Edition]). 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.
- (e) 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.
- (f) 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.
- (g) 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.

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- (h) If it is decided that the new Territory constitution should be brought into operation before any grant of Statehood, the Committee does not support any change in the procedures within the Territory to adopt that new constitution (see Information Paper No. 1, referred to in Item B(e) above).

2. *Merits*

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

-
- (ix) It would smooth the path to Statehood by enabling Territorians to evaluate how the new constitution operated in practice before they decided whether to move to Statehood, and by giving the Territory a functioning constitution upon which a grant of Statehood could be based;
- (x) It is possible that Statehood may never occur, or if it does, it may not occur for a long time, particularly in view of the difficulties associated with federal Parliamentary representation. This should not be allowed to hold up the development of a new constitution for the Territory.
- (c) Some of the disadvantages of bringing a Northern Territory constitution into force before any grant of Statehood may include -
- (i) It would tend to divorce the question of whether the Territory should have a new constitution from the question of whether the Territory should be a new State, whereas it can be argued that the two questions are, or should be, connected and occur simultaneously;
- (ii) It would involve difficult negotiations with the Commonwealth Government on two separate occasions, firstly on the issue of bringing into effect a new Territory constitution, and secondly at a later time on the issue of a grant of Statehood;
- (iii) It is not necessary to repeal the **Northern Territory (Self- Government) Act** and regulations prior to Statehood as it may be perceived that they have worked reasonably well in the past;
- (iv) The public development of a new Territory constitution could be used as an excuse for confrontation and lead to a deterioration of race relations rather than result in reconciliation and greater harmony;
- (v) Any new Territory constitution would not have the protection of the Commonwealth **Constitution** until a grant of Statehood (see Item B(h) above);
- (vi) Any failure in the development of a new Territory constitution could set back the cause of Statehood;
- (vii) The development of a new Territory constitution might be seen as adding an unnecessary complication to proposals for the further transfer of State-type powers as part of Self- government; and
- (viii) The development of a new constitution arguably should only be undertaken in conjunction with a grant of Statehood as the priority goal (assuming Statehood to be the desired goal).
- (d) The Committee would welcome comments and suggestions from the public on this matter generally to enable it to form a view in its report to the Legislative Assembly.

APPENDIX I
EXTRACT FROM DISCUSSION PAPER :
"Proposed New State Constitution for the Northern Territory":
October 1987 [Second Edition - July 1995]
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 [Second Edition - July 1995]

- "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 Appendix 5). 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

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

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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:

- (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 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:

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- * 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. 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. An extract from that Paper 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.

- (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", 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

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- 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.

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- (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"). 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.

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- (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 unfinished 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.

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- 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
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comment and suggestions. The question of the degree of entrenchment is further dealt with in Item H below.

2.2 *Patriation of Aboriginal Land Rights (Northern Territory) Act 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.

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- (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 (xxxix) 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.

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- (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.

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- (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.

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- (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
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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

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- 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" (Second Edition - July 1995), 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.

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- (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 :
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- . *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."*
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- (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

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- 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 led 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.

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- (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.

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- (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.

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- (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" (Second Edition - July 1995) 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 2.1.(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.

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- (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).

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- (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.

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- (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.

APPENDIX 1

**Part S - Aboriginal Rights:
Extract from the Discussion Paper on a
"Proposed New State Constitution for the Northern Territory"
dated October 1987 [Second Edition - July 1995].**

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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 [Second Edition - July 1995]**

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.
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 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.

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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 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?

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- (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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Proposals for Reconciliation and Self-determination: Extract from the Discussion Paper No.4 "Recognition of Aboriginal Customary Law" - dated August 1992

- (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 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 led 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.

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- (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

Functions	Lajamanu	Angurugu	Milakapati	Pirlangimpi	Mataranka
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
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

Functions	Lajamanu	Angurugu	Milakapati	Pirlangimpi	Mataranka
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
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

Functions	Lajamanu	Angurugu	Milakapati	Pirlangimpi	Mataranka
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
32. The Establishment and operation of a licensed Abattoir under the <i>Abattoir & Slaughtering Act</i> .	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	Naiyu 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

Functions	Elliott	Wallace Rockhole	Yugul Mangi	Naiyu Nambiyui	Dagaragu
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
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

Functions	Elliott	Wallace Rockhole	Yugul Mangi	Naiyu Nambiyui	Dagaragu
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
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

Functions	Elliott	Wallace Rockhole	Yugul Mangi	Naiyu Nambiyui	Dagaragu
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
32. The Establishment and operation of a licensed Abattoir under the <i>Abattoir & Slaughtering Act</i> .	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

Functions	Numbulwar Numburindi	Coomalie	Belyuen	Yulara	Timber Creek
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 page 6-71	Yes
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

Functions	Numbulwar Numburindi	Coomalie	Belyuen	Yulara	Timber Creek
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 Page 6-71	Yes
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 Page 6-71	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

Functions	Numbulwar Numburindi	Coomalie	Belyuen	Yulara	Timber Creek
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
32. The Establishment and operation of a licensed Abattoir under the <i>Abattoir & Slaughtering Act</i> .	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

Functions	Barunga- Wugularr	Nguiu	Borroloola	Pine Creek	Anmatjere
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
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

Functions	Barunga-Wugularr	Nguiu	Borroloola	Pine Creek	Anmatjere
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
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 artefacts 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

Functions	Barunga-Wugularr	Nguiu	Borroloola	Pine Creek	Anmatjere
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	Yes
31. The production and distribution of Publications relating to the functions of the Council.	No	No	No	No	No
32. The Establishment and operation of a licensed Abattoir under the <i>Abattoir & Slaughtering Act</i> .	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"

APPENDIX 5

List of Incorporated Aboriginal Associations Established in the Northern Territory under Commonwealth Legislation As At 18 December 1992

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Abbott Aboriginal Corporation	2-Sep-89
Aboriginal Broadcasting Organisation Media Aboriginal Corporation)	2-Jun-85
Aboriginal Bush Broadcasting Association Aboriginal Corporation	19-Oct-89
Aboriginal Corporation for Sacred Sites	17-May-89
Aboriginal Rabbit Control Programme Aboriginal Corporation	22-Oct-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-Irenge 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-Oct-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
Gulgulwanja Aboriginal Corporation	29-May-90
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Gulunurru Aboriginal Corporation	12-May-83
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Hermannsburg Trading Aboriginal Corporation	6-Jul-85
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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
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Karnte Aboriginal Corporation	7-Nov-83
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Lawi Gurindji Community Services Aboriginal Corporation	22-Jun-89
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Mirrena Aboriginal Corporation	3-Aug-81
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Mparntwe Sacred Site Aboriginal Corporation	29-May-90
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Mungkarta Community and Outstation Aboriginal Corporation	6-Feb-89
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Nuralindji Aboriginal Corporation	2-Aug-91
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Purturru Aboriginal Corporation	13-Feb-91
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Sandover Farm Aboriginal Corporation	17-Nov-88
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Stingray Heads Fishing Aboriginal Corporation	8-Aug-90
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The Arrernte Council of Central Australia Aboriginal Corporation	26-Jan-86
The Gap Youth Centre Aboriginal Corporation	12-Nov-86
The Wulain Homelands Council Aboriginal Corporation	11-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
Ulperte 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	1-Feb-79
Uringke Aboriginal Corporation	28-Oct-88
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Utopia Land Aboriginal Corporation	16-Aug-79
Utugulun, Aboriginal Corporation	1-Jul-81
Wadjigan Aboriginal Corporation	30-Aug-90
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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
Wirmalyanya Aboriginal Corporation	3-Aug-85
Witjintitja Aboriginal Corporation	28-Feb-91
Wogayala Aboriginal Corporation	1-Jul-81
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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

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Northern Territory Aboriginal Programmes and Initiatives
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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.

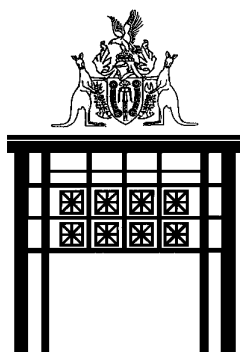
The costs to the Territory Government of meeting the needs of its Aboriginal citizens are high. There are special disability factors which have been documented to, and accepted by, the Commonwealth Grants Commission.

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

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

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A. EXECUTIVE SUMMARY

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

B. INTRODUCTION**1. Primary Terms of Reference**

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

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

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

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

2. *Specific Terms of Reference*

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

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

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

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

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

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

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

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

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

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

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

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

3. Discussion and Information Papers

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

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

4. Purpose of this Paper

- (a) The Committee has resolved to issue this Discussion Paper in response to its new terms of reference and also to satisfy the desire that Territorians be informed of, and have the opportunity to comment on, the implications for the Northern Territory, both as a self-governing Territory and as a new State, of any future establishment of an

Australian Republic. The Committee felt that the most effective way to afford the opportunity for the public to so comment was to issue this Discussion Paper and invite comments and submissions on it.

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

5. *Relevant Issues Raised in Previous Committee Papers*

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

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:

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

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.

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.

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- (b) The Committee was of the view that under s7 of the Australia Act, it is implicit that any such Governor of the new State must be appointed and such appointment may be terminated by the Monarch following receipt of advice from the new State Premier. It was also of the view, that under present national constitutional arrangements, direct links must be established between the new State Governor and the Monarch, at least in relation to the appointment and termination of appointment by the Monarch of the new State Governor. It felt that those links should not be established and maintained through the Commonwealth.⁵
- (c) It has been argued by others that the present national constitutional arrangements, leaving aside any specific entrenched provisions on State constitutions, do not entrench the role of Monarch in the Australian States with the Queen as head of state. Thus, the *RAC Report* considered that it was a strong argument that s7 of the Australia Act assumes, but does not bring about or require, the existence of a Monarch with certain powers and functions in a State.⁶
- (d) Further, it has also been argued by Professor Winterton that the present national constitutional arrangements do not entrench the position of a State Governor⁷ — again, leaving aside any entrenched provisions in State constitutions. It is said that s7 of the Australia Act does not provide that there must be a State governor, and that by definition in s16(1), the term "Governor" includes a person for the time being administering the government of a State — see also s110 of the Commonwealth Constitution. The fact is, however, that all existing States are formally monarchical in nature with a Governor appointed by the Queen.
- (e) The present constitutional arrangements applying in the Northern Territory are also expressed to be monarchical in nature. Under the Northern Territory (Self-Government) Act 1978, the Northern Territory of Australia is established as a separate body politic under the Crown (s5⁸ and note s51), with an Administrator appointed — and his appointment is terminated — by the Governor-General and with power to exercise the prerogatives of the Crown in the Northern Territory (ss 31⁹ and 32¹⁰).

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.

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.

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- (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?

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.

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.

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- (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

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).

because the so-called "minimalist" position was embodied in that Committee's terms of reference.

- (i) This Committee is not similarly restrained by its terms of reference. Accordingly, it invites comment on whether it would be appropriate to alter any of its previous tentative suggestions for the Northern Territory in a new constitution as a consequence of Australia becoming a Republic.
- (j) Any advocacy of a move away from responsible government should take into account other relevant views expressed in this Paper and other Committee papers and also should have regard to the special circumstances of the Territory. These factors include:
- The proposal for a unicameral Territory legislature with partially fixed terms of office.
 - The proposals for a Territory head of state who would generally be required to act on the advice of his/her Ministers, except in limited and defined circumstances.
 - The desirability of having Ministers as members of the Territory legislature, as one means of ensuring a degree of accountability by government.
 - The possible need for other forms of checks and balances over government if there was greater separation between the legislature and the executive government.
 - The small population of the Territory over a vast area, and the limited skills and resources available as a result.
 - The complex ethnic mix of the peoples of the Territory.
 - The federal structure within which a Northern Territory constitution must operate.
- (k) There is no inherent reason why the Northern Territory should move away from a system of responsible government in a future Australian Republic, although it is not uncommon for republican systems to have a greater degree of separation between the legislature and the executive government. It is merely a question of the most appropriate form of government to suit the needs of the Territory.
- (l) One view is that some form of responsible government is best suited to the needs of the Territory, whether or not it is republican in nature. It can be argued that the legislature performs a most important function in overseeing government, a function facilitated by its ability to challenge Ministers on the floor of the House and ultimately, in extreme circumstances, to cause their dismissal if they lose the confidence of the House. This does not necessarily mean that the checks and balances provided by responsible government provide in themselves an adequate system of government accountability, but they are still a valuable part of the system of accountability in a

democracy. It is the system to which Australians have become used to and are familiar with. Concerns may be raised that if a system of responsible government was to be replaced by a presidential system without equally effective methods of accountability, a future republican government in the Territory could potentially assume greater discretionary powers at the expense of the legislature. The issues of accountability will be addressed in subsequent Committee papers.

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

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

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- 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.

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

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- (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:
- 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.

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

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

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- (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. There may be good arguments for preserving at least some reserve powers in the particular circumstances of a small jurisdiction like the Northern Territory to avoid the risk of serious political confrontation, without having to rely on judicial methods of resolution having regard to the traditional independence of Parliament from judicial intervention and judicial reluctance to get involved in partisan political issues. This general issue is discussed further in Item D below.
- (o) The Committee is strongly opposed to any suggestion of a provision to deal with any crisis by way of some reserve power vested in the Governor-General or in any other such officer external to the Northern Territory under its new constitution.
- (p) The arguments in favour of not dispensing with a separate head of state in the Northern Territory include:
- The absence of such a head of state would deprive the Territory of a "constitutional umpire", discussed in the preceding paragraphs.
 - The symbolic and unifying influence of a separate head of state, if he/she is a person who is above politics.

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

[This latter reason could be even more important in the Northern Territory, particularly if the separate head of state is a person who is knowledgeable and is seen as a person of some capacity and wisdom, capable of attracting support from both Aboriginal and non-Aboriginal interests.]

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- 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.

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- (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 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

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

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.

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- (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 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.

(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.

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- (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

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

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

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- (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.

- (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.

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

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

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

campaigns. If the Territory head of state was merely a figurehead, it may be unlikely to attract many high quality candidates at an election.

- (j) The final option raised above is appointment by some form of electoral college or constitutional convention. Such a body could be wholly or partly elected or nominated. Whether this is a viable option in the particular context of the Northern Territory is a matter for consideration. It might be considered too unwieldy and expensive, and could be challenged by certain sections of the community, depending on its composition.
- (k) The question of removal from office raises somewhat different considerations. Presumably the grounds for removal, short of any fixed term of office, would need to be specified. The traditional formula for removal is "proven misbehaviour or incapacity".
- (l) The method of removal would in part at least be dependant upon the method of appointment. Thus, if appointment was to be by the political head of government of the Territory, presumably there would be no objection to removal by the same method. If appointment was to be by Parliament, then presumably removal would be by the same method, perhaps requiring a special majority, and possibly after some form of inquiry and report. If the Territory head of state was to be elected by Territory electors, the options include removal by a Territory referendum or by a special majority of the Parliament.
- (m) The Committee does not wish to make any firm recommendations as to the method of appointment and removal at this stage, but invites comment on the most appropriate method for the Northern Territory in a new constitution.

D. POWERS OF A HEAD OF STATE - OPTIONS

1. Present Position

- (a) At present in the Northern Territory, the Administrator, performs, pursuant to section 32(2) of the Northern Territory (Self-Government) Act, dual functions, which come together in his/her "duty of administering the government of the Territory".²⁵ This duality derives its source from section 35²⁶ of that Act and the Regulations relating to the transfer of functions from the Commonwealth to the executive authority of Territory Ministers. The latter Regulations contain a long list of state-type matters so transferred. They constitute the areas of responsibility of the Northern Territory Government.

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

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

- (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

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.

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- (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.
- (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

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 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.

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 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

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:

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, 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

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.

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.
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

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

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

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 implementing 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.

