Constitutional Paths to Statehood

Northern Territory Statehood Steering Committee Community Discussion Paper

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This document is available in PDF format on the Statehood Steering Committee website.

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Constitutional Paths to Statehood - Making a Submission

Contacts

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Submissions may be as brief or as detailed as you like.

All submissions will be made public on the Statehood Website unless otherwise specified by the author.

In the interests of accessibility, the Committee welcomes submissions in a range of formats including written, audio, video or other means. If an interpreter or translator is required please contact the Committee Office.

Submission Checklist

You may wish to make a submission on all or only on some parts of this paper.

When making a submission, please identify the issue you wish to make comment upon by noting the topic heading (using the contents page headings) and the relevant page number/s.

If a topic has not been covered in this paper which you feel is relevant to constitutional development and Statehood, please forward your comments by stating the issue you wish to consider and why it is relevant to constitutional development as well as how it should be considered by the Statehood Steering Committee.

This paper deals with constitutional development and does not deal with the Commonwealth's Terms and Conditions of Northern Territory Statehood in any great detail. These matters will be considered in detail at a later time.

Definitions

This paper necessarily uses technical and legal terms. All efforts have been made to keep the use of jargon to a minimum and adopt plain English for ease of communication.

Dictionary definitions should suffice with understanding unfamiliar terms. Any terms or words that create uncertainty should be brought to the attention of the Executive Officer, Office of the Chairman, Statehood Steering Committee.

It is recognised this paper may not be accessible for all Territorians. Efforts are being made to develop the conceptual issues covered in the paper into other formats for distribution using illustrations, fact sheets and pamphlet style materials. These complimentary publications should be available by mid 2007.

For more information please contact the Office of the Chairman, Statehood Steering Committee.

Part One

Developing a Constitution

The Concept

- *This paper is for community discussion. Comments are sought until 31 December 2007.*
- *This paper is forward-looking, designed to move toward Statehood.*
- *Statehood is forever. We need to determine in this process what is best for our children and their children.*
- *This is a process for people to consider what the new State should do and what the Commonwealth should do.*
- *Under the Westminster system (our system) the parliament is supreme. Constitution making enables the people to set the boundaries of the powers of the parliament.*
- *This process is not up to the Government; it is up to you. This is the best opportunity for you to influence how we do things into the future.*

Introduction

The Northern Territory Statehood Steering Committee[1] is seeking public comment on the form and content of a future Northern Territory Constitution to be in place for an eventual grant of Statehood.

The Statehood Steering Committee is established by the Northern Territory Legislative Assembly to provide advice and assistance to the Legislative Assembly Standing Committee on Legal and Constitutional Affairs on matters concerning constitutional development that may lead to Statehood. The Committee's Terms of Reference contain a full description of the aims and purpose of the Committee as well as its structure and establishment by the Assembly. The Terms of Reference form Annexure 1 of this paper.

The Statehood Steering Committee, since its members first met in April 2005, has developed and commenced an extensive education and information campaign about Northern Territory Statehood. The Statehood Steering Committee sees the path to Statehood as occurring through three distinct courses of action. The first is to provide the information and education; the second is to develop a draft Constitution in consultation with Territorians and facilitate a constitutional convention to finalise that Constitution; and the third aspect which should occur concurrently with the first and second is the Northern Territory Government taking the lead in discussions with the Commonwealth Government concerning the future terms and conditions of Northern Territory Statehood.

The Committee aims to educate how our current system of government works and how the Northern Territory is a body politic established by and subservient to the Commonwealth, whereas a State in our federal system has its own constitutional rights and guarantees.[2]

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1 At the time of publication, membership of the Statehood Steering Committee is: Barbara McCarthy MLA Chair, Sue Bradley AM Co-Chair, Daniel Bourchier, Loraine Braham MLA, Kathleen Chong-Fong, Wayne Connop, Pete Davies, Brain Martin AO MBE, Jenny Medwell OAM, Terry Mills MLA, Irene Nangala, Harry Nelson, Kezia Purick, Jamey Robertson, Maurie Ryan, Margaret Vigants and Ray Wooldridge.

2 See www.statehood.nt.gov.au for a complete range of educational materials published by the Committee.

With the publication of this paper, the Committee is consulting broadly[3] as to how the Northern Territory may operate if we are to become the only State admitted since federation in 1901.

A new State Constitution for the Northern Territory is an essential feature of moving towards Statehood. This paper contemplates the features of such a document and how we may develop it. It asks all Territorians to take part in this important process by commenting on constitutional development issues as well as the options outlined in this paper.

Where to Begin?

The first fundamental question is: *how do we develop a Constitution for all of us?*

Much has been written about constitutional law and the tension between politics expressed by the majority and any constitutionally entrenched restraints on parliament. This is sometimes called the counter-majoritarian dilemma.[4]

Contemporary Australian writers have also been discussing the constraints of the Australian Constitution and its relevance in modern Australia for some years.[5]

Whether one sees these restraints[6] as impediments or empowerments to democracy, the consideration of how we frame our Constitution in the Northern Territory is a vital starting point.

What legacy would we leave our children? And will they be asking why the constitutional framework ratified two or three centuries prior still has binding power over their lives?

So long as Territorians go into this process with an understanding that the basic function of a Constitution is to set the rules and structures to benefit a democratic process, then we will be sensitive to the outcomes of our approach. If we agree that democracy is government by public discussion, not simply the enforcement of the will of the majority[7] the outcome of our work should create and organise constitutional power that sustains democracy for generations to come.

Voters have been reluctant to change the Australian Constitution with only eight successful changes out of 44 attempts in the past 100 years. Whether or not this is a good thing is not at issue; it reminds us however that reluctance to change the structures we put in place today may apply to a new Northern Territory State Constitution.

The Northern Territory Statehood Steering Committee has produced this paper to examine a range of options and discussion topics for consideration in the constitutional development context. It is designed for in-depth and detailed community discussion. A summary version and fact sheet highlights will be published to assist in the discussion.

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3 The Committee acknowledges the submissions and contributions made to previous inquiries which resulted in the production of the 1996 *Final Draft Constitution* considered in detail in Part Two of this paper. The Committee seeks fresh input given the significant passage of time.

4 Laurence Tribe, American Constitutional Law Foundation Press 1978 p 9. See also a reference to this concept in a recent article by former Chief Justice Sir Anthony Mason on human rights where he notes: *…they (the UK, US, Canada and New Zealand) have found it necessary or desirable to temper the will of the majority by providing for additional protection for individual rights.* Mason: *Rights Bill a Matter for Judgment* The Age 29 March 2006.

5 Chris Hurford, *Chapter 5- A Republican Federation of Regions: Reforming Wastefully Governed Australia* in Restructuring Australia Wayne Hudson & A. J. Brown Eds Federation Press 2004 p 48.

6 Other counter-majoritarian measures may include the judiciary as a separate arm of government or an upper house for review of legislation or another moderating institution as discussed in Part Three of this paper.

7 AD Lindsay, The Essentials of Democracy, 2nd Edition Oxford University Press 1951.

The Statehood Steering Committee is seeking the views of all Territorians on the content of this paper. It is only after being informed by this discussion process that the Committee will feel confident about recommending that the Northern Territory Legislative Assembly and the Territory Government move toward convening a constitutional convention.

Background and Statehood Committee Terms of Reference

The seventh meeting of the Northern Territory Statehood Steering Committee resolved on 2 June 2006 to develop an options paper for consultation examining the process of constitutional development for the Northern Territory.

This paper is to examine previous work undertaken on this issue in the Northern Territory, suggest options for consideration as we move towards a constitutional convention, and examine other recent experiences including some historical context of Australia's various constitutions.

The Statehood Steering Committee's Terms of Reference state the Committee is to:

> *3(a) Provide advice to the Standing Committee (on Legal and Constitutional Affairs) in reviewing the process for Constitution-making in the Northern Territory to date, for the purpose of developing recommendations on a Constitution for the new State and the principles upon which it should be drawn 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.*[8]

The Terms of Reference also provide that the Committee may take into account the content of the *Final Draft Constitution* prepared by the former Parliamentary Committee on Constitutional Development tabled in the Legislative Assembly on 27 November 1996 as well as the proposed Constitution that was the outcome of the Statehood Convention held in Darwin in 1998. The Committee is also tasked to provide advice to the Standing Committee in developing strategies and programs to educate the Northern Territory community about Statehood and constitutional development.

The Committee is not *required* to take note of these prior documents. This paper however provides some analysis of these documents in terms of the options for constitutional development in the context of 2007 and beyond.

The Committee has already formally acknowledged the documents coming from the previous Select and Sessional Committees on Constitutional Development as useful source documents for this Committee's work into constitutional development for the Northern Territory.[9]

It is not within the Terms of Reference of the Statehood Steering Committee to examine reform of the federal system of Australia or undertake detailed examination of republicanism, regionalisation, or any other restructuring of the State/Commonwealth arrangements. Recent consideration has been given elsewhere to these issues by a number of Australian commentators and writers.[10]

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8 *Terms of Reference Northern Territory Statehood Steering Committee* 17 August 2004 (as amended 24 March 2005, further amended 30 November 2006) p 2.

9 Minutes of Meeting No 4, 16 September 2005.

10 See generally Restructuring Australia editors Wayne Hudson & AJ Brown, Federation Press 2004.

The Committee does however need to take into account the possibility of Australia becoming a republic at some stage and any implications it has for a new State. The Committee is more immediately required to take into account the status of the new State under the Crown, including any connection between the Crown and the head of the government of the new State. Under the *Australia Acts (1986)* existing State Premiers have a direct role in advising the Crown.[11]

As noted briefly above, the Committee has a role distinct from the Territory and Commonwealth Government roles in facilitating Northern Territory Statehood. As far back as 1987 the negotiation and conclusion of a Memorandum of Agreement between the Territory and Commonwealth Governments was seen as an essential part of the process. This requirement has not changed.[12]

It is the position of the Statehood Steering Committee that the development of a Constitution must be a wholly Territorian endeavour and not be interfered with by the Commonwealth, however it must be noted the Commonwealth must pass the necessary legislation to give effect to a grant of Statehood and may be unlikely to agree to content in a Constitution with which it has any strong objection.[13]

There are likely to be discussions between the Northern Territory and Commonwealth governments about the content of the Constitution at a later time. Hopefully this will be with the benefit of a draft Constitution that has been ratified by a constitutional convention.

In the meantime, however, the Northern Territory Government has the task of ensuring the Commonwealth engages in discussion and policy-making with regard to the State-like powers that have been reserved to the Commonwealth under the *Northern Territory (Self-Government) Act (1978)*.

Any agreement between the Territory and the Commonwealth on terms and conditions of Statehood should be framed in terms of the Northern Territory being in the same constitutional position as existing States and the content of the Constitution of the new State must not become entangled within that process.

As to the method of creation, the view of the Northern Territory Statehood Steering Committee does not differ from that developed by the previous Select Committee on Constitutional Development which noted a new State can be created in two ways, either by an act of Parliament under section 121 of the *Australian Constitution* or by national referendum under section 128.

The Select Committee took the view that section 121 was the preferred method. The Statehood Steering Committee agrees this is the preferred method. It is, however, to be noted that this method requires the goodwill and co-operation of the Commonwealth Government and the Commonwealth Parliament to ensure Statehood for the Northern Territory is achieved properly.[14]

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11 *Australia Act 1986* s.7(5). This is not a day to day role, rather it is to avoid a Governor having to recommend he/she be terminated or re-appointed and to remove the role of the British Government as an intermediary. For a detailed analysis of the current legal relationship between the States and the Crown see Anne Twomey, The Chameleon Crown: The Queen and Her Australian Governors Federation Press 2006.

12 Legislative Assembly of the Northern Territory Select Committee on Constitutional Development: *Information Paper Number 1: Options for a Grant of Statehood*. September 1987, p 3.

13 Australian Constitution s.*121. The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.*

14 Select Committee on Constitutional Development Op Cit p 2.

It is the view of the Statehood Steering Committee that the appointment of a Northern Territory Minister for Statehood on Friday 8 September 2006, and the subsequent creation of a shadow portfolio within the opposition party, will provide a focal point for policy development and advancement of negotiations at a government-to-government level.

Foundations and Principles

In the Australian experience, constitutions are concerned with descriptions of the major institutions: executive; legislative; and judicial. Generally they arrange the relationships between these and set out the structure leaving other aspects of government up to the legislature.

Whether a new State constitution does or does not place limits on the power of the legislature or the executive, or prescribe the relationships between the major institutions will be a matter for Territorians to decide.

The process for constitution making has been the subject of papers previously published by the Select Committee on Constitutional Development and then the Sessional Committee on Constitutional Development as well as the Standing Committee on Legal and Constitutional Affairs.[15] All were, or are committees under the auspices of the Northern Territory Legislative Assembly.

The Statehood Steering Committee is informed by the three stages recommended in 1987 and again in 1995. The three steps were: preparation of a draft constitution for presentation to the Legislative Assembly; a constitutional convention for consideration of that Constitution; and the final stage, the Constitution is submitted to a referendum of the Northern Territory electorate for approval.

The three stage process was endorsed by the Select Committee at its meeting of 3 November 1986.[16] The three stages of constitutional development are therefore different from the three stages of Statehood outlined above. Indeed, they form a subset of the second broad phase for Statehood.

This distinction between a constitutional development process and the overall Statehood process is vitally important when considering the 1998 Statehood Convention and subsequent Statehood referendum.

The Statehood Steering Committee, giving consideration to a process for constitutional development, sees the development of basic constitutional foundations and principles as a starting point for discussion on a Constitution with the Northern Territory community.

At its eighth meeting on 15 September 2006, the Committee resolved to develop basic principles to be considered in the context of constitutional development. The Committee sought comment from Territorians about the basic constitutional development process. Some initial matters considered are:

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15 See generally the 1995 Discussion Paper on *A Proposed New State Constitution for the Northern Territory* and the 1999 *Report into Appropriate Measures to Facilitate Statehood* published by the Legislative Assembly of the Northern Territory.

16 The fact the 1998 Convention was officially called *Statehood: The Convention*, indicates the distinction between constitutional development and Statehood itself may have become blurred by 1998.

1. *Legislative power*
2. *Executive power*
3. *Judicial power*
4. *Method of constitutional development (such as discussion paper, consultation, constitutional convention)*
5. *Expression of intention - Democracy*
6. *Expression of intention - Peace, order and good government*

In order to assist in the development of this paper, the Committee also forwarded a letter of invitation to a number of individuals and key interest groups throughout the Northern Territory seeking their views on which principles should be included for consideration.

Input included:

- *A call for the protection of universal human rights and freedoms;*[17]
- *A view that a Constitution must be unambiguous and has no need to include a Bill of Rights;*[18]
- *Another view advocating strongly for a Bill of Rights and citizen's initiated referenda;*[19]
- *A request that a future Constitution express trust in 'almighty God' and consideration of an Upper House of the Territory Parliament;*[20]
- *A request for a Constitution that clearly embodies various rights and principles to improve the health and well being of the citizens of the Northern Territory;*[21]
- *The view that the aspirations of Aboriginal people should be included as a fundamental theme of this paper;*[22]
- *An outline of a proposed process for Constitutional development;*[23]
- *The inclusion of an expression of intention for democracy, equal legislative power to the existing States and equal Senate representation.*[24]

This paper invites further suggestions by Territorians as to the relevant structures and principles upon which to found a Constitution for the Northern Territory. These will eventually inform any drafts considered at a future Constitutional Convention.

Legislative Power - the previous Select and Sessional Committees took the view the new State parliament should have the same rights, powers and privileges as existing State parliaments.[25] The Statehood Steering Committee adopts the same position. The

17 The Salvation Army, Northern Territory Region advocated a process of accountability and transparency with participation by the people as well as protection of rights under recognised international standards. Letter received from Major Ritchie M Watson 13 December 2006.
18 Professor David Carment. Email received 1 November 2006.
19 Mr Stephen Barnes. Letter received 29 November 2006.
20 Reverend Dr Lloyd Kent. Email received 27 November 2007.
21 Ms Stephanie Bell on behalf of Central Australian Aboriginal Congress Inc. Letter received 8 December 2006.
22 Mr Norman Fry on behalf of the Northern Land Council, Letter received 23 November 2006.
23 Mr Ted Dunstan. Email received 29 November 2006.
24 Mr Creed Lovegrove. Letter received 8 December 2006.
25 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.

only limitations on the power of the legislature would be those powers limiting State governments in the *Australian Constitution* and the *Australia Act 1986* and any limitations contained in the new Constitution itself.

Consideration of issues such as the future role of a Governor will be matters for deliberation in the context of consultation on this paper and a future constitutional convention. Some of the options outlined in this paper also canvass the role of a Governor.

The *Australian Constitution* mentions some form of identifiable senior officeholder in the new State in section 110.[26] Would this be a Governor? Constitutional lawyer Professor Cheryl Saunders has noted there would be a number of institutional differences between old and new State governing systems. Saunders takes the view it would be unlikely for a new State to have a Governor representing the Queen appointed and removable by the Queen even on the advice of the Premier.[27] This issue will be discussed in further detail in Part Three of this paper.

The division of legislative power and whether the Northern Territory should remain unicameral or become a bicameral jurisdiction is another issue to be canvassed and, once again, more consideration may be given to this issue in the context of discussing this paper and possibly at a later constitutional convention.[28]

The Executive - The nature and role of the Executive is an important consideration. Unlike the United States, where the Executive in the office of the President is often more removed from the legislative process,[29] under the Westminster system the Executive finds expression in the form of an Executive Council comprised of the Head of State (or representative) and key ministers who are also members of Parliament.

The Judiciary - the independence of the judiciary is a key principle. The system of appointment and selection of judges may be a matter for consideration in the context of this paper. Whether or not the fundamental principles of the independence of the judiciary should be entrenched in a new State Constitution are matters for consideration. The Statehood Steering Committee notes the July 1995 discussion paper recommends entrenchment of underlying principles but not matters of detail.[30]

Democracy - a future Constitution must be founded on the basis that the Northern Territory is a representative democracy. Representative democracy may mean all adult Territorians have a franchise to vote and the consequences of that vote cannot be arbitrarily overturned or changed by any outside individual or institution.

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26 *110: The provisions of this Constitution relating to the Governor of a State extend and apply to the Governor for the time being of the State, or other chief executive officer or administrator of the government of the State.*

27 Cheryl Saunders AO: *The Constitutional Framework for a Regional Australia,* Chapter 6 in Hudson and Brown (eds) Op Cit pp 63-78.

28 The Statehood Convention conducted during the period 26 March 1998 to 9 April 1998 resulted in a Report dated 29 April 1998 to the Speaker of the Legislative Assembly containing; information on delegates, a summary of resolutions, and a number of appendices including the Draft Constitution and the Rules of the Convention. By direction of the then Chief Minister, four questions alone were to be determined: 1 - Whether the Northern Territory should become a State; 2 - The form of a Constitution for the State of the Northern Territory: 3 - The name of the new State; 4 - When should the Northern Territory become a State? It is apparent that question 2 gave the Convention much scope to consider a range of issues.

29 Laws passed by Congress are subject to presidential veto or assent. Bills may also originate in the Office of the President.

30 1995 Discussion Paper Op Cit p 53.

The High Court has consistently ruled out any inherent constitutional requirement of one-vote-one-value in Australia. In the Australian context, there is a requirement for a legislative body comprised of representatives of the people. In the Commonwealth context these representatives are required to be directly chosen by the people. This does not necessarily apply at the existing State level. Should it apply for a new State? What do Territorians expect in terms of the value of their vote in the Northern Territory as a State?

Peace, Order and Good Government - this principle arises from the power granted to a parliament by a higher authority such as by an Imperial statute[31] giving the newer parliament all the same powers as the original ruler.

In the Northern Territory the wording of section 6 of the *Northern Territory (Self-Government) Act* (1978) states:

> *Subject to this Act, the Legislative Assembly has power, with the assent of the Administrator or the Governor-General, as provided by this Act, to make laws for the peace, order and good government of the Territory.*

It is also found in the *Australian Constitution,* which in Part V at section 51 States:

> *the Parliament shall, subject to the Commonwealth Constitution, have the power to make laws for the peace, order, and good government of the Commonwealth*

with respect to a list of enumerated heads of power.

The traditional judicial interpretation of a grant to make laws for the peace, order and good government is that it constitutes a plenary[32] grant of legislative power for the jurisdiction in question. It is not a delegated power, and is virtually unlimited as to subject matter except as expressed or implied in relevant constitutional documents.

It is important to note that the Commonwealth Parliament has a plenary grant of power on a list of matters but all other legislative power falls to the States. A new State would appear to inherit this situation subject to any imposed terms and conditions of Statehood.

31 For a discussion of Peace, Order and Good Government see Greg Taylor The Constitution of Victoria Federation Press 2006 p 11.

32 Plenary power is a power that has been granted to a body in absolute terms, with no limitations on how that body may use the power.

Part Two

Options for a New State Consitution Models for Consideration

OPTION 1 Adoption of the *Northern Territory (Self-Government) Act* as the Model Constitution

The *Northern Territory (Self-Government) Act 1978* (Commonwealth) has been examined and used previously in the Northern Territory as a basis or starting point for developing model constitutions.

The 6th meeting of the Statehood Steering Committee noted:

> *The past assumption has been that the NT will develop a new constitution as a basis for Statehood. However there are no guarantees that the Commonwealth would adopt any constitution or even that Statehood would eventuate after such an expensive and possibly divisive process.*
>
> *The suggestion is that the Self-Government Act which appears to have worked well in the past, be the original constitution for the new State. Original States were established on a given constitution. We would be following that model. This gives a known constitution to the people. This would stop some issues people want to see in place as a result of Statehood getting confused with the Statehood process which is technically difficult itself. Future establishment of an elected convention after Statehood to review the original constitution could be guaranteed via the terms and conditions process.*

This option examines a simple re-working of the existing Northern Territory *Self-Government Act* (NTSGA) and is similar to some previous models examined by the Sessional Committee during that Committee's existence. It is, however, worth noting the Select Committee on Constitutional Development, the predecessor to the Sessional Committee on Constitutional Development, took the view that the *Self-Government Act* could not serve as a new State Constitution without substantial modification.[33]

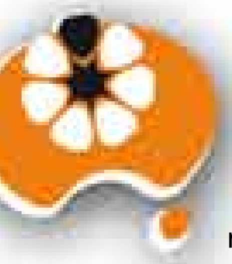
The substantial modification to which the Committee referred revolves around the framing of the new State Constitution consistent with the principle of constitutional equality, and the principles of the new State Constitution being prepared by Territorians and not imposed from elsewhere.

The Statehood Steering Committee concurs with the view that a new State Constitution must be owned by Territorians. This, however, would not preclude the use of the current *Self-Government Act* as a template, so long as the concept and the final realisation were not imposed upon the Territory by outside influences.

This option considers the potential of the NTSGA model as either a permanent or an interim Constitution and, if interim, how a process may work to replace it post-Statehood, taking into account the rigidity and entrenchment issues related to a State-based constitutions.

Under this option, consideration could be given to a timeframe for implementation of a different constitution using the NTSGA template as an interim measure. After a nominated period of time a Constitutional Convention could be undertaken post-Statehood. The

33 Select Committee on Constitutional Development: *Discussion Paper on a Proposed New State Constitution for the Northern Territory* July 1995 Second Edition, p 11.



rationale for this model suggests the Constitutional Convention be separated from the event of Statehood itself in order to avoid the political controversies surrounding the Statehood Convention in 1998 and the subsequent referendum on Statehood. The contra argument is the Convention is already a separate entity before, rather than after, the Statehood referendum.

This possible process begs the question: would Territorians agree to a situation where they put in place an interim Constitution and would they trust a constitutionally entrenched or stated 'guarantee' of a post-Statehood Constitutional Convention to replace it? How would such a 'guarantee' work in practice? Would Territorians feel it is a missed opportunity, or consider it a more stable process as it would not mean immediate change?

The NTSGA has provided an effective platform for stable and democratic government within the Northern Territory. Given the Act itself, however, is an ordinary Act of the Commonwealth Parliament, it is subject to change at the whim of that Parliament.

The Act also enumerates the powers given to the Northern Territory Legislative Assembly, reserving a number of normal State-like powers to the Commonwealth.

The Act is structured into seven parts: Preliminary; Northern Territory; Legislative Assembly; Administration; Finance; Miscellaneous; & Transitional Provisions. The Act is attached to this paper at Annexure 2. The Supreme Court was originally dealt with in Territory legislation separate from the *Self-Government Act*. As the new Constitution will be a creature of the Territory, it would be appropriate for the Court and associated matters to be dealt with in that document.

When examining the draft Constitutions prepared by the Sessional Committee on Constitutional Development and later by the 1998 Statehood Convention, it is apparent the *Self-Government Act* provided a basis upon which those documents were built.

The Statehood Steering Committee has examined the bare necessities for a Constitution providing a basic version which establishes a parliament and the process of forming government as well as the executive and the judiciary. The draft constitution document arising from this exercise is attached to this paper (see Annexure 3). The document provides the basic structures of legal institutions under which a state would function. A reading of Annexure 3 will demonstrate the core qualities of the current structures and how they have been adapted to the proposed model.

For this model to become the favoured option, it is envisaged it would be agreed to and adopted by representatives at a Constitutional Convention and put to the Legislative Assembly and then the Commonwealth as the Constitution preferred by the Northern Territory once a referendum were held. It should not be left to the Commonwealth to merely amend the *Self-Government Act* in line with these proposals.

The ability of the parliament, judiciary and the executive functioning to serve the community with a level of certainty could be achieved with this minimal approach. Provisions in a Constitution that are novel and which invite extensive legal argument may lead to uncertainty, cost and delay. This paper provides an opportunity to comment on the risks involved in a Constitution trying to be all things to all people and other mechanisms that may be available to meet the aspirations of Territorians.

The views of Territorians are invited on this possible model.

OPTION 2 **The 1996 Final Draft Constitution as the Model Constitution**

This option considers the document entitled *Final Draft Constitution for the Northern Territory* which was published in December 1996.[34]

The document was drafted as a result of a great deal of research and discussion undertaken by the former Sessional Committee between 1986 and 1996.

The bulk of the community visit and consultation work was conducted in 1988 and 1989 with some follow up visits in 1995. Written submissions were received by the former Committee from 1988 to 1995.

If this document is to be considered afresh, there are a number of considerations.

The Statehood Steering Committee has its own brief to work toward constitutional development. As indicated previously, it may, according to its Terms of Reference, take into account previous drafts such as this one, but ultimately it must be satisfied itself what provisions should form a draft Constitution.

Should there be any further consultation undertaken on the content of the 1996 document? A substantial re-examination may be required if this document is to be the source document. This would include looking anew at structural provisions such as the Head of State and any other positions on some of the matters that are considered by the original document.

For example, the options outlined in the document include consideration of Aboriginal customary law. The document provides for two alternatives which provide for the recognition of customary law as a source of law in the Northern Territory.

Aboriginal customary law is a term sometimes also applied to a range of behaviours that are not necessarily part of customary law and customary beliefs. This issue has become a very hotly debated topic in recent years.

This document also considers issues that require further discussion and consideration such as single member electorates, a mix of multimember and single-member electorates, and equal multi-member electorates.

All of these and other issues would have to be investigated and positions taken to be put to either the Standing Committee on Legal and Constitutional affairs or the public as part of a consultation process.

If this document is the basis for a new Northern Territory Constitution, the question also arises as to whether it can be added to or subtracted from by the Statehood Steering Committee, and if so, by how much and on what basis?

The *1996 Final Draft Constitution* is structured into 11 parts: The Northern Territory; Legal System; Parliament; Executive; Finance; Judiciary; Aboriginal Rights; Rights in Respect of Language, Social, Cultural and Religious Matters; Local Governing Bodies; Transitional Provisions; Interpretation.

The 1996 Final Draft Constitution is attached as Annexure 4.

34 The December 1996 version incorporates the *Final Draft Constitution* tabled in the Legislative Assembly on 22 August 1996 as well as the Schedule of Amendments tabled in the Legislative Assembly on 9 October 1996 and explanatory notes.

The *1996 Final Draft Constitution* contains a preamble which recognises:

> *Since time immemorial all or most of the geographical area of Australia that now constitutes the Northern Territory was occupied by various groups of Aboriginal people under an orderly and mutually recognised system of governance and laws.*

The preamble continues to document the various landmark dates in the colonial history of the Northern Territory in terms of its governance since 1788.

Clause 13 of the document anticipates the Legislative Assembly of the Northern Territory enacting a Constitutional Convention Act in order to establish the constitutional convention, to receive and consider the draft document, and to ratify a draft constitution to be put to a referendum of electors of the Northern Territory.

History tells us there was no Constitutional Convention Act, rather, the Chief Minister formally established the Northern Territory Statehood Convention in accordance with his Ministerial Statement to the Northern Territory Legislative Assembly on 4 December 1997.

The Chief Minister exercised the authority to establish the Statehood Convention on the basis of advice from the Hon Alex Somylay MP, then Minister for Territories, who wrote to the Chief Minister on 25 March 1998 to confirm the proposed Convention would come within the concept of an 'inquiry' under regulation 4(1) of the *Northern Territory Self-Government Regulations.*

The preamble at clause 15 also seeks to preserve a harmonious, tolerant and united multicultural society protecting religion, ceremony and language, particularly noting the Aboriginal people of the Northern Territory are entitled to self-determination in the control of their daily lives.

The document clearly states the purpose of the preamble is to provide for the first time in Australia some constitutional recognition of the Aboriginal people's system of governance and laws and their relationship to land and with their natural and spiritual environment. Victoria in 2004 adopted a clause in their constitutional preamble recognising prior Aboriginal inhabitancy. The role of a preamble is discussed in Part Three of this paper.

Part One of the *1996 Final Draft Constitution* establishes the body politic of the Northern Territory.

Part Two outlines the legal system of the Northern Territory including organic laws and the recognition of Aboriginal customary law by way of one of two alternatives. The purpose of this clause is to recognise current Aboriginal customary law as a source of law for its continued implementation and enforcement amongst Aboriginal persons themselves by traditional Aboriginal methods and also pursuant to court decisions to the extent that it is already part of the common law or existing court practice.

The first alternative omits any reference to the enforceability of Aboriginal customary law as between Aboriginal people themselves. It is instead left to the courts or legislation to determine the extent of the effect of this source of law. The second alternative includes reference to enforceability of Aboriginal customary law as between Aboriginal people.

The issue of recognition of Aboriginal customary law is significant in terms of current debate on the topic.

The Commonwealth Government recently passed legislation to prevent courts from considering customary law and cultural practices as a mitigating factor in sentencing in response to the problems of family violence and child abuse as identified in recent reports focusing on certain Indigenous communities. The Commonwealth legislation applies to crimes committed under that legislation and not to criminal acts prosecuted under Territory laws. Naturally, so long as the Territory retains the status of a territory the Commonwealth will have the power to override the Northern Territory's criminal laws to enforce its political will upon the Northern Territory. At this stage it is not known whether the Commonwealth will act to override the Northern Territory law on this matter.

This issue is also relevant in terms of discussions with the Commonwealth on the terms and conditions of Statehood. If the Commonwealth has a policy platform which prevents consideration of Aboriginal customary law at sentencing, it may be unlikely the Commonwealth would approve a new Northern Territory State Constitution giving blanket recognition to customary law. This is not to say a future draft Constitution should not consider the issue, just to note the issue is one that is vexed in the current political climate.

The *1996 Final Draft Constitution* goes on to outline the construction of laws providing the new Constitution as the priority document for law making in the Northern Territory with organic laws secondary, and acts of Parliament a third force followed by subordinate legislation, and other sources of Northern Territory law (including customary law).

The inclusion of organic laws remains the only attempted expression of this concept in the Australian experience. Organic laws have a superior constitutional status to ordinary laws but a lesser status than the Constitution itself or its parts. An organic law requires a specific process to amend it once enacted. Any proposed changes must first be referred to a Standing Constitutional Committee of the new parliament and a special majority of the total number of members of the Parliament at the time is required with timeframes between voting on second and third readings of the Bill.

It should be noted in the context of the Northern Territory Legislative Assembly in 2007, with the Government holding a majority of 19 seats from a total of 25, an organic law requiring a two thirds or three quarters majority of the total number of members of Parliament to vote to change the law would be likely to pass on party lines.

If Statehood provided different methods of representation (such as the Hare Clark system in Tasmania or a mixed member proportional system like New Zealand or another system instead of single member electorates) organic laws may be considered either more or less desirable depending on the individual's view of the law involved.

Division Two of Part Two of the *1996 Final Draft Constitution* outlines the process for altering the Constitution and organic laws. Alteration to the Constitution requires a referendum and organic law change requires either constitutional amendment or adoption of a specific formula. The Constitution contemplates the creation of a Legislative Assembly Standing Committee on the Constitution and Organic Laws which would have the role of overseeing any proposal to amend the Constitution or to amend an organic law requiring the Committee to report to the Parliament prior to the second reading of the proposed law.

Part three of the *1996 Final Draft Constitution* examined the Parliament itself. Division One states the legislative power of the Northern Territory is vested in the Parliament. The principles of peace, order and good government of the Northern Territory are enshrined

in 3.1(2) and the power of the Parliament is restricted with regard to the making of laws with respect to the acquisition of property unless done on just terms.

The mechanics of assent to proposed laws, voting, resolutions or questions on revenues, loans or other moneys received by or on behalf of Northern Territory used within this Division provide that when Parliament deals with such a proposed law, the proposed law can only deal with the money matter and no other matter.

Qualifications of electors voting at elections and writs for elections as well as the terms of office of members and election procedures are also outlined in this Part of the *1996 Final Draft Constitution* which contemplates options with regard to the election procedures and terms of office.

Option 1 allows for no fixed term so long as a general election of the Parliament shall be within four years of the previous general election. The second option proposes a three-year partial fixed term allowing the period from the date of the general election to be four years; however the Governor may dissolve the Parliament after a period of three years. Option 3 allows for a fixed four-year term.

The filling of casual vacancies upon the resignation of a Member of Parliament provides for three options. This depends upon the model of the future Parliament under a State Constitution. Option 1 allows for single-member electoral division vacancies, Option 2 examines single/multimember electorates and vacancies, whilst Option 3 examines a situation under equal multi-member electorates.

Australian citizenship and attaining majority (18 years) are requirements for Parliamentary office. A list of disqualifications is outlined at 3.15. The list includes members of the Commonwealth or other State parliaments, judges, public servants, convicted criminals, and undischarged bankrupts.

Division Three of this part (3.16) outlines the procedure of the Parliament including when sessions of the Parliament are held, the required quorum and manner of conducting the Parliament. The role and function of the Speaker of the Parliament, the voting procedures within the Parliament, validation of the acts of Parliament, and minutes of proceedings also feature.

Part Four outlines The Executive and the extent of executive power. 4.1 states:

> *The duties powers functions and authorities of the Governor, the Executive Council and the Ministers of the Northern Territory imposed or conferred by or under this part extend to the execution and maintenance of this Constitution and the laws of the Northern Territory and to the exercise of the prerogatives of the Crown so far as they relate to those duties, powers, functions and authorities.*

Interestingly, 4.2 envisages the appointment of a Governor appointed by the Queen on the advice of the Premier holding office during her Majesty's pleasure. This *1996 Final Draft Constitution* does not contemplate any other model. As indicated above, constitutional expert Cheryl Saunders takes a view that a new State would be unlikely to have a Governor representing the Queen. Whilst there may be procedures for a position akin to that of Governor, according to her, different procedures would be required for appointment and removal.

In contemplating this *1996 Final Draft Constitution*, interested Territorians may wish

to comment on the role, function and concept of a Governor of the Northern Territory as appointed by her Majesty the Queen on the advice of a Premier. The Statehood Steering Committee is interested in views on other models. Could and should the new State dispense with the current arrangements of a Head of State being appointed by the Crown on the advice of the Head of Government? The Option discussed next, the version coming out of the 1998 Statehood Convention, proposed the Premier, not the Crown appoints the Governor.

The model contemplated in the *1996 Final Draft Constitution* makes reference to replacing the Administrator with the role of Governor in accordance with the provisions of the *Australia Act 1986*. It elevates the convention that the Governor acts on the advice of his or her responsible Minister to a constitutional rule except for some limited circumstances. It should be noted that the *1996 Final Draft Constitution* gives consideration in the footnotes to variations such as the Constitution coming into force prior to Statehood and a Constitution coming into force if Australia is already a republic.

The appointment of the Premier and Ministers of the Northern Territory are outlined from 4.8. The mechanics of the tenure of office and the oath or affirmation to be taken by members of the executive Council and ministers follows on.

Part Five of the *1996 Final Draft Constitution* examines finance. This part provides for money received and expended to be regulated by legislation passed by the Parliament and specifies the moneys received will be available to defray the expenditure of the Northern Territory.

Part Six provides for the establishment of the Northern Territory judiciary and judicial power. Judicial power is vested in the Supreme Court of the Northern Territory being a continuation of the court as it existed prior to Statehood. Appointment, removal and remuneration of judges is contemplated at 6.2. Interestingly, the Chief Justice shall be appointed in accordance with the advice of the Executive Council after consultation by the Attorney-General with the Leader of the Opposition and named bodies representing the legal profession in the Northern Territory whom the Minister may feel fit to consult.

The retirement age for judges is 70 years, however an Act of Parliament may prescribe a different age.

The doctrine of separation of powers is considered where the Parliament is permitted by legislation to also confer judicial power on a person or body outside the judiciary or provide for the establishment of various tribunals outside the judiciary.

Part Seven of the *1996 Final Draft Constitution* pays particular attention to Aboriginal rights.

The *1996 Final Draft Constitution* specifies at 7.1 that the Parliament shall enact an organic law entitled the *Aboriginal Land Rights Northern Territory Act* which shall contain provisions based on those contained in the Commonwealth *Aboriginal Land Rights (Northern Territory) Act 1976*. This clause is designed to provide that the existing Commonwealth law is picked up and wholly adopted by the Northern Territory Legislature and protected by this Constitution.

After patriation, the Act can only be amended by a further organic law passed in accordance with the restrictive procedures in the new Constitution. This requires a special majority using either one of two alternatives (as previously discussed) being the two-thirds of members of the Parliament model or three-quarters of those members.

Even then, specific features of Aboriginal land rights are to be entrenched in the Constitution beyond amendment by organic law. These constitutional guarantees will prevent any disposal of freehold Aboriginal land once granted without prior independent inquiry by a Supreme Court judge to make sure that all Aboriginal peoples with an interest are informed and that a majority of them have voluntarily consented, and that any such disposal is in the interests of the Aboriginal peoples concerned.

The decision of the Supreme Court judge would be subject to appeal in the normal manner. Compulsory acquisition of Aboriginal land is excluded by the *1996 Final Draft Constitution* except where the acquisition of interests less than freehold for a purpose benefiting the public will be permitted on just terms and conditions.

7.1 subclause (3) states that Aboriginal land shall not be capable of being sold, assigned, mortgaged, charged, surrendered, extinguished or otherwise disposed of unless a body established under an organic laws act is satisfied that all Aboriginal people having a stake or interest in the land have been adequately informed and have made the appropriate decision.

The *Final Draft Constitution 1996* provides for law that will provide for the protection and prevention of desecration of Aboriginal sacred sites[35] and will regulate and authorise the entry of persons on to those sites, also allowing for the right of Aboriginal persons to have access to those sites in accordance with tradition.

An Act may also provide for self-determination and for all matters incidental thereto. This clause is not prescriptive and merely provides for the capacity of the Parliament to examine a variety of processes that would formally recognise an enhanced process for control by Aboriginal people over their daily lives in order to safeguard, strengthen and develop their language, social and cultural customs, traditions, religion or beliefs, economies and identities. The definition of Aboriginal self-determination is outlined at clause 11.1.

Part Eight of the *1996 Final Draft Constitution* examines rights in respect of language, social, cultural and religious matters.

This is where the Draft Constitution for the first time addresses individual rights. The Constitution provides a person shall not be denied the right to use his or her own language in his or her communications with other people speaking or understanding the same language and furthermore, a person is entitled to observe and practise his or her own social and cultural customs and traditions in his or her relations with other people of the same tradition and to manifest his or her religion or belief in worship, ceremony, observance, practice or teaching. This concept is also visited later in this paper when we examine the elements of the *Indigenous Constitutional Strategy* document.

The proposal provides for an express provision in the Constitution to recognise that people of the Northern Territory come from very diverse backgrounds. The rights are described subject to any general principles of humanity contained in any international agreement to which Australia is party.

Local Government gains recognition under Part Nine of the Draft Constitution. The Constitution provides there shall be a system of local government in the Northern Territory under which local governing bodies are constituted which are given the powers Parliament considers necessary for peace, order and good government in those areas of

35 Currently administered by the Aboriginal Areas Protection Authority under the *Northern Territory Aboriginal Sacred Sites Act.*

the Northern Territory that are subject to the system of local government (as discussed later in this paper, this is intended to be the entire Northern Territory under current Northern Territory Government policy).

Constitutional recognition of the local government system does not necessarily restrain the Northern Territory Parliament from dealing with individual local government bodies so long as those dealings are consistent with the overarching principles of the Constitution. It is a requirement of the *1996 Final Draft Constitution* that the Parliament shall in any Act in respect of local governing bodies provide for matters relating to their objectives, powers, functions, duties and responsibilities, rating, forms of revenue, expenditure, accountability, membership and boundaries.

Part Ten deals with transitional provisions including former Ministers and former office bearers of the Legislative Assembly as it becomes a State Parliament. It also provides for continuance of laws, actions taken and decisions made under laws upon the commencement of the Constitution.

The Administrator is to continue in office as the first Governor for up to 12 months from the commencement of the new Constitution, the Legislative Assembly is to continue until the date of the first general election of members of Parliament after the commencement date and notwithstanding the repeal of the *Self-Government Act,* standing rules and orders of the former Legislative Assembly in force immediately before the commencement date continue in force as the standing orders of the Parliament that may be altered or repealed in accordance with this Constitution by the new Parliament.

The *1996 Final Draft Constitution* also outlines remuneration and allowances of members of the former Legislative Assembly continuing where required.

Proposed laws passed by the former Legislative Assembly but not commenced will be deemed to be a proposed law in order to allow for seamless continuity. Transfer of property, contracts on foot, legal proceedings, and all other rights, obligations, liabilities and duties will continue through a range of specific clauses and a catchall provision at clause 10.13.

As part of those transitional arrangements it is specifically stated the *Northern Territory Aboriginal Sacred Sites Act* will continue in force by this Constitution as an organic law.

Part Eleven examines the interpretation including mechanisms to assist the courts in the interpretation of the Constitution without limiting the generality of the section listing a range of materials a court may consider.

The eleven parts outlined here comprise the *1996 Final Draft Constitution* document published more than 10 years ago by the Northern Territory Legislative Assembly.

As discussed, the draft document was the result of a very thorough and detailed examination of legal institutions and structures and the work is acknowledged as such. Territorians are invited to examine the *1996 Final Draft Constitution* for the Northern Territory and to provide their views to the Statehood Steering Committee.

Interested parties may find aspects of the *1996 Final Draft Constitution* or the document in its entirety as suitable for consideration as the template for the new Northern Territory Constitution upon Statehood. Others may express a different view. All views are welcome.

OPTION 3 **The 1998 Statehood Convention Constitution**

A New State Constitution for the Northern Territory is the name of a document published out of the 1998 Statehood Convention. The Document amends the 1996 document and, in the eyes of some Territorians, is directly associated with the process that led to the failure of the Statehood referendum.

Like the 1996 document, this document is structured in 11 parts. The parts consist of: The Northern Territory; Legal System; Parliament; Executive; Finance; Judiciary; Aboriginal Rights; Rights in Respect of Language, Social, Cultural and Religious Matters; Local Governing Bodies; Transitional Provisions; and Interpretation.

A copy of the *1998, New State Constitution* document is attached to this paper as Annexure 5.

On 25 March 1998 the Northern Territory Government's lead delegate to the Statehood Convention, the Hon Denis Burke MLA, wrote to his fellow delegates proposing a model for a Constitution which he said '*echoed principles on which our Constitution should stand.*'[36]

Mr Burke stated that the model resulted from his belief that the Northern Territory Constitution must be in the interests of and language of 'we the people'. Mr Burke stated the language of the model he proposed made no reference to partisan causes or particular groups, and rested on three guiding principles and four supporting objectives.

The guiding principles are: workability; simplicity and inclusiveness. Similarly, Option One of this Paper examining the template of the *Northern Territory (Self-Government) Act* may be considered by some to be based upon these principles.

The four objectives the then Minister sought to achieve were:

- *Equality before the law;*
- *Maintenance of the Westminster system within a Federal Republic;*
- *Confirmation of the principle of separation of powers; and*
- *Continuation of the familiar where there is no good reason to change.*

Mr Burke's model was stated to be based on the essential elements of the *Federal Constitution*, the *Self-Government Act* and the *1996 Final Draft Constitution* prepared by the Sessional Committee.

Mr Burke put the notion that a successful Constitution is an unremarkable Constitution. In order to achieve simplicity, he took the view that special provisions relating to human rights and similar matters should be left to separate legislation. This was based on a notion that a Constitution could become subject to fads or trends and views that reflect the times. As outlined in the introduction to this paper, a Constitution today binds our children tomorrow. (Further discussion on constitutional interpretation is contained in Part Three of this paper.)

Inclusiveness, including recognition of our past was included in the proposed preamble. The draft also presumed that Australia would be a Federal Republic at the time of the Constitution being adopted.[37]

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36 Letter sent to all delegates at the Statehood Convention March 1998.

37 The question as to whether Australia should become a republic based upon a specific model failed at the November 1999 referendum just a year after the 1998 Commonwealth Election when the question of Statehood put to Northern Territorians voting at that same Commonwealth Election was also defeated.

Mr Burke's initial draft had eight parts rather than the final 11 emerging from the Statehood Convention. The emergence of an 11-part Constitution reflects the discussions, negotiations, and resulting resolutions leading to the production of the final document.

It is not the intention of the Statehood Steering Committee in this paper to provide an analysis of Mr Burke's initial Draft Constitution, particularly because it presupposes a Federal Republic at the time. Interested Territorians will find similarities between that paper and Option One in this paper, making a detailed analysis of Mr Burke's Draft Constitution possibly redundant. However, interested Territorians may contact the Office of the Statehood Steering Committee to obtain a copy.

The *No* vote at the 1998 Statehood referendum may be a hurdle in acceptance of the *1998 New State Constitution* document. Whilst there is nothing technically objectionable in the document, this paper leaves the issue of credibility and acceptability as a matter of judgment for Territorians.

The preamble in the *1996 Final Draft Constitution* of 1996 has been substantially deleted in this version. The *1998 New State Constitution* preamble reflects Resolution One of the Statehood Convention.

The preamble prefacing the *1998 New State Constitution* is a simpler statement containing four paragraphs recognising occupation by various groups of Aboriginal peoples, noting the colonisation of Australia in 1788 and recognising contributions by those who have arrived since that date. There is a brief reference to various stages of governance as Colony, State, and Territory of the Commonwealth followed by a proclamation that:

> *We the people of the Northern Territory, proudly calling ourselves Territorians, wishing to preserve a harmonious, tolerant, culturally diverse and united society, and affirming our intention that the life and liberty and property of all the people of the Territory should be protected and that all shall stand as equals before the law in enjoyment of that protection, declare this to be the Constitution of the state of the Northern Territory.*

Under Part Two, the description of the legal system of the Northern Territory has been amended to delete any reference to organic laws. This deletion reflects Resolution Seven, that the new Constitution make no provision for organic laws.

The *1998 New State Constitution* provides that Aboriginal customary law is recognised as a source of law to be enacted as a written law of the state within five years of the commencement date or such period as Parliament determines, as a result of negotiations and consultations between the State government and representatives of the traditional Aboriginal structures of law and governance. This procedure reflects Resolution Six of the Statehood Convention.

Contemporary reports in The *Alice Springs News* reflect on this aspect of the decision making when delegates were considering the two options from the 1996 *Final Draft Constitution* that contemplated inclusion of customary law; June Tuzewski wrote:

> *The surprise of the week, to outsiders, was the broad support given by delegates to recognising Aboriginal customary law as a source of law in the new State.*
>
> *During delegates' introductory speeches in the first week, Rev Dr Djiniyini Gondarra OAM (specially appointed delegate), spoke eloquently in relation to*

an understanding of Aboriginal customary law. He said that, to his knowledge Aboriginal clan nations across the country each have a very similar foundational principle of law, and that to him there are three important and main elements to any good law. 'First, the law must create a State of peace, harmony and tranquillity, with true justice for all citizens, for all people, for all Territorians. Secondly, the law must be perfectly consistent ... and thirdly with good law, it must be assented to by the citizens in ceremony that shows that they are all under the discipline, responsibility and protection of the law.' When addressing the topic of 'systems of laws', Aboriginal delegates took the opportunity to build on the remarks of Rev Dr Gondarra and to put forward the point that for Territory Aboriginals there are two sets of laws and young people particularly play off the two laws against each other.

Eileen Cummings, who is a member of the Stolen Generation, spoke of Grandmothers' Law and aspects of Aboriginal women's business in respect of that law. Denis Burke (CLP) spoke of the strong attachment to customary law and Julian Swinstead (a former editor of the NT News and a specially appointed delegate) pointed out that aspects of Aboriginal law are already incorporated into some Territory Acts of Parliament. It was certainly most moving to be present as delegates, with a few exceptions, rose to speak in support. However, as with other issues, the matter will face more formal voting procedures during the final stage of the convention.[38]

Clause 2.4 made a significant deletion to the original proposal about a constitutional amendment allowing for a bill amending the Constitution to be passed by Parliament to be approved by simple majority of electors at a referendum and dispensing with a more complex set of arrangements.

Part Three concerns the Parliament of the Northern Territory. The 1998 Convention dispensed with the notion that the Head of State could withhold assent to a proposed law. Rather, by Resolution 11, the Convention allowed for a Bill to be referred back to Parliament once only.

The Statehood Convention gave consideration to the composition of the Northern Territory Parliament and deleted alternatives two and three under Part 3.6 in the *1996 Final Draft Constitution*. This deletion meant that under the 1998 model, single member electorates as currently exist would continue. The Convention also deleted options two and three under Part 3.11 providing for no fixed parliamentary term provided the next general election is held within four years. The filling of casual vacancies would follow the single-member electorate model. Procedures of the Parliament followed the *1996 Final Draft Constitution* model.

Part Four considers The Executive. Resolution 21 of the Convention provided the Head of State be appointed by the Premier rather than the proposal in the *1996 Final Draft Constitution* that the Governor be appointed by Her Majesty on the advice of the Premier. Changes were also made with regard to the role of an Acting Governor and, interestingly, allowing for other members of the Parliament appointed by the Head of State to the Executive Council rather than solely the Premier and those holding ministerial office along with the Governor. The Convention also dispensed with the Governor allowing for a nominee to attend meetings of the Executive Council.

Part Five considers Finance and Part Six considers The Judiciary.

38 Alice Springs News 8 April 1998.

The Statehood Convention wanted the *1998 New State Constitution* to provide that in addition to the Chief Justice, there be a minimum of three other judges whereas the *1996 Final Draft Constitution* allowed for such other judges and officers as prescribed by an enactment. The Convention also deleted the option that the Supreme Court could be an advisory jurisdiction in matters arising under the Constitution.

The appointment, removal and remuneration of judges was changed so that the *1998 New State Constitution* provides for the Chief Justice and other judges to be appointed by the Head of State on the advice of the Executive Council but makes no provision about other consultation before appointment. This step ensures that absolute control of the appointment of judges rests with the Attorney-General and the Cabinet. From time to time, the issue of the appointment of judges is revisited in the media and the community. Comments are welcome from anyone who may wish to consider this issue.

The Convention, when examining the doctrine of the separation of powers, chose to delete the requirement that the Constitution prevents the passing by the Parliament of an Act conferring judicial power on a person or body outside the judiciary or providing for the establishment of other tribunals outside the judiciary. Instead, the Convention by Resolution 43 provided that subject to the supervisory and appellate jurisdiction of the Supreme Court, nothing could prevent the Parliament conferring judicial power on a person or body outside the judiciary or providing for the establishment of arbitral, conciliatory or other tribunals.

Part Seven concerning Aboriginal land rights in the *1996 Final Draft Constitution* was deleted in its entirety from the *1998 New State Constitution* by Resolution 50. This eliminated the reference to an organic law which would protect the *Aboriginal Land Rights (Northern Territory) Act* upon patriation to the Northern Territory.

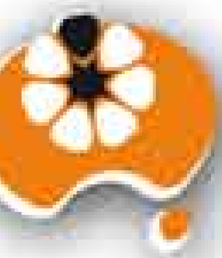
Part Eight from the *1996 Final Draft Constitution* with regard to rights in respect of language, social, cultural and religious matters was left intact except so far as it referred to any organic laws.

Part Nine concerning local governing bodies deleted reference to the manner in which local governing bodies are constituted, making no provision about constitutional powers, functions, duties and responsibilities of the bodies, merely providing that such bodies should exist.

Transitional provisions under Part 10 were left intact from the *1996 Final Draft Constitution* apart from options concerning partial fixed terms and fixed four-year terms reflecting the previous decision there be no fixed term for Northern Territory Parliaments. Part 10.15 regarding Northern Territory Aboriginal sacred sites was deleted.

Part 11 concerning interpretation deleted references to Aboriginal land and the principles of self-determination as well as organic laws as consistent with the prior resolutions. It also deleted definitions with regard to the Leader of the Opposition in the context of consultation on judicial appointments reflecting the decision judicial appointments are the sole prerogative of the government.

When it came to interpretation of this Constitution, Part 11.2 was deleted in its entirety, reflecting Resolution 59 that the new Constitution apart from where appropriate to define specific terms, make no provision regarding interpretation (see more on the issue of interpretation in Part Three of this paper below).



The *1998 New State Constitution for the Northern Territory* is a document that evolved out of substantial discussions at the 1998 Statehood Convention. Territorians may wish to reconsider aspects of the document in the context of how current discussions on constitutional development in the Northern Territory proceed.

The Statehood Steering Committee, whilst noting the document makes substantial deletions and changes to the original *1996 Final Draft Constitution* published in 1996, has not developed a philosophical preference of one over the other. This is a matter for Territorians to advise the Statehood Steering Committee.

OPTION 4 **A New Constitution Drafted by a Constitutional Convention**

The Northern Territory Government committed itself in 2003 to a further Constitutional Convention in the current Statehood process.[39] If there is to be another Constitutional Convention, the role of the membership may be to draft a Constitution from scratch.

This option could be considered in the context of the convention examining source documents outlined in this paper or a convention could commence with no specific precedents and a fresh perspective.

The previous Northern Territory convention experience began with not only a bound set of all the reports and evidence received and published by the Select and Sessional Committees in the Northern Territory previously looking at a Constitution over a 10 year period, but also with the new draft proposed by the Government representative as mentioned in Option Three above.

It is worth examining other experiences. The Alaskan experience contained a series of bound papers but intentionally did not have a draft Constitution ready for consideration.[40]

It would be very costly and time consuming for a constitutional convention to consider drafting from scratch.[41] The formation of working committees, hearings and a drafting process would take considerable time as well as time needed for delegates to learn about constitutions before getting to the substance. However, some Territorians may argue that it would be a process engaging democratic grass-roots thinking and reflect the broad views of Territorians if this approach were adopted.

Alternately, a convention may consider examining the options outlined in this paper, or these and further models, in order to be examined, discarded or embraced and built upon by participants at the convention.

Once a convention accepts and adopts the basics it would then have the capacity to undertake some far reaching consideration of additional matters for inclusion in a Constitution, such as how to change the Constitution and any other relevant matters.

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39 Hon. Clare Martin MLA, Chief Minister of the Northern Territory, address to the inaugural Charles Darwin University Symposium 21 May 2003 entitled: *This Time... Let's Get It Right*.

40 Alaska appropriated $300 000 (US) in 1955 for their convention with 55 delegates as well as a further $75 000 (US) for research work, indicating the seriousness attached to the process given the value of the amount in today's dollars. See Victor Fischer Alaska's Constitutional Convention University of Alaska Press 1975 pp 18-20.

41 Ibid p 45. It took 75 days in Alaska with delegates working 12-14 hour days.

The Alaskan process started with the following resolution: *It is the intent of this convention that the Constitution should be a document of fundamental principles of basic government and contain only the framework for state government.*[42]

The convention there was influenced by what they considered a range of irrelevant and trivial matters inserted in the constitutions of California and Louisiana requiring constant revisiting and amendment.

Our own experience gained from the 1998 Statehood Convention is informative. Criticism of a process where delegates were provided with papers with little or no time to read and prepare, informs us that a future convention should include lead up time with information sessions and papers available well in advance for all delegates.

Territorians are invited to provide their views on the desirability of a constitutional convention (see also Part Three of this paper) being established to undertake detailed investigation and drafting of a Constitution as well as settling the final document to be recommended to the Legislative Assembly and the Northern Territory people for adoption.

OPTION 5 **A New Draft Constitution Developed by the Statehood Steering Committee**

Using the resources of the Committees' Legal Advisor, Executive Officer and Committee Members as well as being informed by source documents and the outreach and consultation work of the Committee, this option would see the Committee developing a model for release as a discussion draft.

Option 1 of this paper (also see Annexure 3) represents a drafting exercise by the Statehood Steering Committee taking an existing precedent and adapting it for discussion purposes. The possible variations on this theme are limitless.

Rather than proceeding to develop a new Constitution in a vacuum, the Committee seeks the views of Territorians as to whether an exercise should be commenced in this manner. If such a process were to commence, detailed seminars, consultations and discussions would need to be considered as part of the process. Timeframes and cost would also be a factor.

OPTION 6 **A New Constitution incorporating some or all of the Elements of the Indigenous Constitutional Strategy Document**

A meeting at Batchelor in November and December 1998 involving the Northern Territory's Land Councils resulted in the publication of a document developed from the earlier Kalkaringi Statement with an additional 42 resolutions. This document, formulated by 120 delegates, is known as the *Indigenous Constitutional Strategy - Northern Territory*.

It is important to note the Kalkaringi Convention took place after the Statehood Convention in March/April 1998 but prior to the Statehood referendum in October 1998, and the subsequent Batchelor Convention, which developed the Strategy Document, was convened after the referendum.

42 Ibid p 67.

The full text of the *Indigenous Constitutional Strategy* document is attached to this paper as Annexure 6.[43]

In discussions with both the Central Land Council and the Northern Land Council, the Statehood Steering Committee has been advised the *Indigenous Constitutional Strategy* document arising from the Kalkaringi and Batchelor Conventions of 1998 is a living document.

The Statehood Steering Committee, through this paper, seeks the views of all Northern Territory land councils, Aboriginal Territorians and any other interested Territorians on the issues canvassed by the *Indigenous Strategy* document.

It is noted the document is called a s*trategy* document and, whilst the principles reflect a range of concerns and demands by Indigenous leaders at the time, a question arises as to whether many of the proposals fit within a constitutional document or whether they should be considered as a matter of policy or legislation by the government of the day.

The *Indigenous Strategy* document outlines a number of safeguards that would be designed to benefit all Territorians including Aboriginal people and curb the excesses of government.

Many Australian jurisdictions have a number of secondary or statutory safeguards such as auditors' general, administrative appeals tribunals, ombudsmen and freedom of information laws. These, however, remain at the mercy of the government in control of the legislature and can be dismantled at any time. The *Indigenous Strategy* document seeks to entrench these. In giving consideration to the status of such bodies the Clerk of the Senate in a recent paper provides the example of legislation by the former Kennett Government to disband the Victorian Audit Office.[44]

Records show that arising from Batchelor was the creation of an Indigenous Constitutional Convention Committee. It is understood this Committee has been dormant for a number of years, given that constitutional development as an issue in the Northern Territory has also been dormant.

The Statehood Steering Committee has discussed the prior existence of that Committee with both the Central and Northern Land Councils. Both executives have indicated that the Indigenous Constitutional Convention Committee may be re-established in its previous or a new form if the Land Councils see a need to do so. The Statehood Steering Committee would be looking to such an organisation, if it were to be re-formed or newly established, for a contemporary view of whether a Constitution is the appropriate place for any of or all of the issues raised in this section of this paper. Any other individual or organisation with views on the content of the document may also wish to approach the Statehood Steering Committee.

The Northern and Central Land Councils boycotted the 1998 Statehood Convention. Other indigenous representatives walked out in protest before final votes on the resolutions were passed. The *Indigenous Constitutional Strategy* document notes the Statehood Convention:

> *...rejected the carefully crafted Sessional Committee's proposed Constitution,*

43 Permission to republish the text of the *Indigenous Constitutional Strategy* Document was sought from the Northern and Central Land Councils. The Statehood Steering Committee acknowledges and thanks the Land Councils for granting permission.

44 Discussed further below in the context of bicameralism as outlined in a paper by Harry Evans, Clerk of the Senate: *The Case for Bicameralism* 21 April 2006 p 4.

> *adopting a new draft that was a deeply flawed. It did not guarantee accountable government, did not protect human rights, land rights and sacred sites, and did nothing to stop discrimination on grounds such as race, sex, language or religion.*[45]

The text of the *Indigenous Constitutional Strategy* document is arranged in general themes under the following headings: Introduction and General Principles; Aboriginal Law; Aboriginal Self-Determination and Self-Government; Aboriginal Land Rights and other Indigenous Rights; Human Rights including Essential Services and Infrastructure; Education; Justice Issues; Resources; Political Participation; Good Government; and Process.

The Introduction and General Principles outlines:

> *The Aboriginal Nations of the Northern Territory are governed by our own constitutions (being our systems of Aboriginal law and Aboriginal structures of law and governance, which have been in place since time immemorial). Our constitutions must be recognised on a basis of equality, co-existence and mutual respect with any Constitution of the Northern Territory.*

The Statehood Steering Committee seeks further information as to each element in these principles, and how they may be achieved. This issue may be addressed during detailed discussions with the Land Councils and the broader Northern Territory community in the context of discussion of this paper. A Constitutional Convention would probably have a role in considering these and other general principles.

Given the *Indigenous Constitutional Strategy* document is a position paper, it contains a number of requirements by its authors. These are demonstrated by the following:

1. *That we will withhold our consent until there are good faith negotiations between the Northern Territory Government and the freely chosen representatives of the Aboriginal peoples of the Northern Territory leading to a Constitution based upon equality, co-existence and mutual respect.*
2. *That the Northern Territory must provide adequate resources and negotiate in good faith a realistic timetable for such negotiations.*

Whilst the Northern Territory Statehood Steering Committee membership has Aboriginal representation, like any group, it cannot claim to speak for all Aboriginal Territorians.

The creation of the Statehood Steering Committee should assist with those good faith negotiations. The Statehood Steering Committee sees engagement on constitutional issues as their role rather than a role to be left to the Territory Government. This is based on the Statehood Steering Committee program being a creature of the Northern Territory Parliament rather than being driven by the Northern Territory Government.

An interesting discussion took place between a representative of the Central Land Council and Mr Dave Tollner MP, the Member for the Commonwealth Seat of Solomon at a Seminar held in Alice Springs on 14 November 2006 concerning the words ‘freely chosen’ in the *Constitutional Strategy* document. Mr Tollner indicated concern that the words did not say ‘freely elected’ reflecting an election or other democratic process. Ms Jayne Weepers on behalf of the Central Land Council indicated the words used were deliberate and an election may not be the preferred way of choosing the representatives,[46] explaining that democratic processes and traditional decision making are not the same thing.

45 Ibid p 5.

46 Hansard Transcript of Proceedings 14 November 2006 LCA 33. Available at: http://www.aph.gov.au/house/committee/laca/ntstatehood/program.htm

Aboriginal Territorians can be confident the Statehood Steering Committee and its diverse membership, being a function of the Northern Territory Legislative Assembly (rather than being driven by the Territory Government), is a direct consequence of the failure of the 1998 Statehood Convention to engage with Aboriginal people to their satisfaction.

The preamble to the Terms of Reference of the Statehood Steering Committee states:

> *A central principle for the Northern Territory to achieve Statehood is the respect for and proper recognition of the Indigenous people of the Territory and that the Indigenous people are to be involved in all stages of the process.*[47]

The Northern Territory Government has created the role of Minister for Statehood to focus upon developing Northern Territory Government policy arising from recommendations made by the Statehood Steering Committee to the Standing Committee on Legal and Constitutional Affairs and subsequently the Northern Territory Legislative Assembly. The Minister will also lead Territory negotiations with the Commonwealth on the terms and conditions for Statehood under the relevant Commonwealth constitutional arrangements.[48]

The proposal for a 'Framework Agreement' in the *Indigenous Strategy* document is not the same as discussions on constitutional development. The Statehood Steering Committee is interested in discussing the parameters of its own role in discussing constitutional development issues with Aboriginal peoples and what aspects of a Framework Agreement would then remain to be discussed with the Northern Territory Government, perhaps through the Minister for Statehood.

The **Aboriginal Law** section of the *Indigenous Strategy* document states:

1. *That a Northern Territory Constitution must recognise Aboriginal law through Aboriginal law makers, and Aboriginal structures of law and governance.*
2. *That Aboriginal law should be recognised as a source of law in the Constitution.*
3. *Further resolves to undertake research and discussion by the Aboriginal people of the Northern Territory regarding functional recognition that will reduce the impact of white law on Aboriginal people in such matters as the criminal justice system, social behaviour and family law.*

The Constitution shall establish a process involving effective representation of Aboriginal peoples to consider further issues that may arise from time to time involving problems identified by Aboriginal peoples in the interaction of Aboriginal and non-Aboriginal law and to enact solutions.

Recognition of Aboriginal law in the Northern Territory was considered by the Northern Territory Law Reform Committee Report into Customary Law published in 2003. Recommendation 11 of that Report recommended the Territory Government implement the resolution of the Statehood Convention relating to Aboriginal Law as a 'source of law'. This recommendation was referred by the Attorney-General to the Legislative Assembly Standing Committee on Legal and Constitutional Affairs in September 2004.

The Statehood Convention resolution to which the Law Reform Committee referred noted as follows:

> *That the new Constitution provide that Aboriginal customary law is recognised as a source of law in the State to be enacted as the written law of the State (within*

47 Legislative Assembly Standing Committee on Legal and Constitutional Affairs Op Cit p i.
48 Section 121 Australian Constitution.

five years of the commencement date or such further period as Parliament determines) by the Parliament passing laws in substantial accordance with the results of negotiations and consultations between the State government and the representatives of the traditional Aboriginal structures of law and governance of the Aboriginal peoples of the Northern Territory providing for the harmonisation of the customary law with other laws in force in the State (including the common law).

Without limiting the generality of the matters that shall be so negotiated and consulted upon, such an act or acts may provide for:

(a) recognition of traditional Aboriginal structures of law and governance;

(b) delegation of powers and functions to the appropriate bodies under these structures in relation to the administration and enforcement of law and order in accordance with customary law;

(c) cooperative arrangements between institutions and officers of the State (including judicial institutions and officers) and a traditional aboriginal structures of law and governance;

(d) such other arrangements including matters for aboriginal governance, as may be agreed between the negotiating parties.

At Paragraph 10.3 of its Report, the Law Reform Committee took the view that in the event of any legislative reform in this area, whether or not the Northern Territory becomes a State, the resolution of the Statehood Convention should be implemented.

The Law Reform Committee cites the *Aboriginal Land Rights (Northern Territory) Act 1976* as an example where traditional law is recognised as a source of law.[49]

The High Court has said when land becomes Aboriginal land, the use or occupation to which Aboriginal people are entitled according to Aboriginal tradition is guaranteed by Section 71 of the *Aboriginal Land Rights (Northern Territory) Act*, and the laws of the Northern Territory, including planning laws, are incapable of interfering with that use or occupation.[50]

Since the Government provided this reference to a lapsed Standing Committee (due to the 2005 Territory general election), until recently the Legislative Assembly Standing Committee on Legal and Constitutional Affairs has no current reference to consider this issue.

It is understood the Territory Government has so far responded to the Law Reform Committee Report in a number of ways. The responses may initiate further comment from the Land Councils. The Government's responses were:

Recommendation 1 : Cross-Cultural Training

Judges from Alice Springs and Darwin attended a program in May 2005 on cross cultural awareness. A plan for training court staff has also been developed. The Northern Territory Attorney-General advised the Committee by letter in April 2007 that Cross Cultural Training is now an agency wide function under the auspices of a specifically appointed coordinator.[51]

49 *Report of the Committee of Inquiry into Aboriginal Customary Law*. Northern Territory Law Reform Committee 2003 p 37 paragraph 10.5 Available at: http://kakadu.nt.gov.au/search/justice/search.php?zoom_query=customary+law

50 *R v. Kearney Ex Parte Northern Land Council* (1984) 158 CLR 365 at 392 (Brennan J).

51 Letter from the Hon Syd Stirling MLA, Minister for Justice and Attorney General received on 2 April 2007.

Recommendation 2 : Video Conferencing

Such systems are in place in Darwin Supreme Court, Darwin Magistrates Court, Alice Springs Court House, Tennant Creek Court House, Katherine Court House, Jabiru Court House, Nhulunbuy Court House, Alyangula Court House, Darwin Correctional Centre, Alice Springs Correctional Centre, and Don Dale Centre. Other locations at Community Corrections offices are: Nhulunbuy, Tennant Creek, Katherine, Casuarina, Alice Springs and Groote Eylandt.

Recommendation 3 : 'A Whole-of-Government Approach'

In 2005 the Northern Territory Government published *Agenda for Action – A Whole-of-Government Approach to Indigenous Affairs in the Northern Territory 2005-2009.* This document is available from the Office of Indigenous Policy in the Department of the Chief Minister and outlines a commitment to coordinating government agencies to improve outcomes, develop economies, skills and governance and is aimed at guiding the Government's ongoing policy decisions on Aboriginal issues.[52]

Recommendation 4 : Community Justice Plans

Daly River, Oenpelli, Ntaria and Yuendumu were chosen for implementation of law and justice plans based on the number of offences committed and the number of persons leaving prison who identified those communities as home and community requests. The Northern Territory Attorney General advises in 2007 there is a new focus on the development of local and regional alcohol management and community safety plans.

Recommendation 5 : Responding to promised marriages.

This recommendation was responded to by Government passing an amendment to the *Sentencing Act* in December 2004 requiring that in court cases, notice be given where parties are introducing submissions on sentence about customary law. Traditional marriages are recognised by *the Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003 No 1 of 2004* which removed any defences for sexual offences with children under the age of 16.

Recommendation 6 : Inquiry into 'payback'

The Law Reform Committee proposed a separate inquiry. The Government does not appear to have undertaken or pursued this proposed inquiry. It is understood that neither the Territory nor Commonwealth Governments support the sanction of 'payback'.

Recommendation 7 : Community Sentencing

Community Sentencing was launched in April 2005 with the first case in Darwin on 29 April. An Indigenous Court Liaison position was funded by prior Aboriginal and Torres Strait Islander Services funds. To date, approximately 80 cases have been heard in this manner. It is important to note that Community Sentencing is not customary law *per se*. The offences dealt with are against Territory law and the sentences imposed are the suite of sentences available under Territory law in the context of the offence.

Recommendation 8 : Law and Justice Plan Pilot Programs

Pilot projects need a sound policy framework to guide them. it is envisaged this recommendation will be implemented as part of the response to Recommendations 4 and 7. An update is being sought.

52 The *Agenda for Action* is available at: http://www.nt.gov.au/dcm/people/indigenous.html

Recommendation 9 : Increased participation of Aboriginal people in the Justice system

After the Deputy Director of Indigenous Programs in the Department of Justice, Mr Eddie Cubillo commenced employment in November 2004, an action plan to advance Aboriginal employment in the agency was undertaken. Aboriginal community corrections officers and an Elders Visitors Program are stated priorities for the Department of Justice. A recently announced restructure of the Department aims to improve Aboriginal community engagement.

Recommendation 10 : Law Reform Strategy

The Office of Indigenous Policy is working to provide guidelines for an Impact Analysis Statement so that all Cabinet submissions proposing legislative amendment consider possible discriminatory impact upon the exercise of Aboriginal customary law. This reflects the tenor of the *Agenda for Action* mentioned in response to Recommendation 3.

Recommendation 11 : Aboriginal Law as a 'Source of Law'

As mentioned previously, this recommendation was referred to the Standing Committee on Legal and Constitutional Affairs in September 2004. The reference lapsed at the 2005 election. No report was produced by the Committee of the Ninth Assembly in the timeframe leading up to the 2005 Territory election. The Attorney-General further referred this to the Standing Committee on 30 January 2007.

Recommendation 12 : Transfer to Aboriginal members

This recommendation relates to Aboriginal people being involved in an on-going manner with implementation of the recommendations. This task was a matter for the Department of Justice and other Government agencies.

Territorians may wish to comment on the status of the recommendations made by the Law Reform Committee in the context of commenting on this options paper.

The *Indigenous Constitutional Strategy* document next examined the issues of **Aboriginal Self-Determination and Self-Government**:

1. *That Aboriginal peoples, being the first peoples to own and govern this land, have the right to self-determination and that our inherent right of self-government must be recognised and protected in any Constitution of the Northern Territory.*
2. *That Aboriginal self-government shall be recognised as a fundamental right and a solution to the present disempowerment of the people of the Aboriginal nations of the NT*

The Legislative Assembly Standing Committee on Legal and Constitutional Affairs had a reference to examine Indigenous governance issues during the Ninth Assembly and in 2002 developed a Discussion Paper *An Examination of Structural Relationships in Indigenous Affairs and Indigenous Governance within the Northern Territory*.

The *Building Stronger Regions Stronger Futures* policy plan was launched by the Government in the same year.

In November 2003, a conference on Indigenous governance issues was held at Jabiru. Then Deputy Chairman (now Chairman) of the Northern Land Council presented a paper[53] during which he stated:

> *Aboriginal people have been clear we are not opposed to Statehood as such, but we would oppose any move to Statehood which did not take into account our unique position as the traditional owners of much of the Northern Territory, and recognise our continuing systems of law and governance.*[54]

Further developments concerning governance issues took place during 2006. On 11 October 2006 the Minister for Local Government announced far reaching reforms to local government structures. The Minister said:

> *These reforms focus on a system of regional shires and municipal councils operating across the Territory under an amended Local Government Act. Reforms will primarily focus on local governments in rural and remote areas. There is a need to establish a new framework for local government in the regions so they are secure and financially sustainable.*

The proposed local government reforms include:

- *A new framework for local government in the Northern Territory based on a system of municipal and regional shires operating across the whole of the Territory under an amended Local Government Act;*
- *An Advisory Board with wide ranging representation and an independent Chair;*
- *The target date for implementation of local government reform in the Territory is July 2008.*[55]

The initial response to the proposal was mixed. A report on Imparja Television news said:

> *Aboriginal people say they haven't been consulted about the changes, and some fear impoverished communities can't afford them.*
>
> *Maurie Ryan, President, Daguragu Community Council:*[56] *All Aboriginal communities are on CDEP and we're not going to afford to pay rates, like for water and that, you know, it's bad enough now paying (for) accommodation.*
>
> *Noel Hayes, Ali Curung Council: So we just like a normal community, just like a normal town, and there'd be no permit system and so you know, you're paying rates so you should act like a town, that's what I think it's all leading up to.*
>
> *LGANT President Kerry Moir:*[57] *We've got a complete duplication of resources in some of those communities, that's taking away the ability for a CEO to really be a manager of a community, because that's what a CEO is on a community day to day.*[58]

Other interest groups have also expressed views. The Cattlemen's Association[59]

53 John Daly: Paper presented to the Indigenous Governance Conference Jabiru 4-7 November 2003 *Northern Territory Statehood and Constitutional Protections: Issues and Implications for Future Aboriginal Governance*. Available at: www.nlc.org.au/html/files/GY_Indigenous_Governance_speech_1103.pdf

54 Ibid p 1.

55 *Local Government Blueprint for the Future Announced* Northern Territory Government Media Release Elliot McAdam, Minister for Local Government, 11 October 2006.

56 Mr Ryan is also a member of the Statehood Steering Committee.

57 LGANT (The Local Government Association of the Northern Territory) Vice President Mr Ray Wooldridge, is a member of the Statehood Steering Committee.

58 Imparja Television News Bulletin 11 October 2006.

59 The Cattlemen's Association Chief Executive Officer, Mr Stuart Kenny, is a member of the Statehood

responded by saying:

> *simple rating of the pastoral sector will certainly put an enormous cost on us and a cost burden that will see regional development and employment opportunities for many Territorians reduced.*[60]

The success or otherwise of the implementation of the Government's proposal will be a matter for all Territorians including Aboriginal peoples to consider and comment upon. The Statehood Steering Committee notes the July 1 2008 implementation date. Interested persons may wish to comment in the context of this paper.

The *Indigenous Constitutional Strategy* document expects:

3. *a Northern Territory Constitution must contain a commitment to negotiate with Aboriginal peoples a framework agreement, setting out processes for the mutual recognition of our respective governance structures, the sharing of power and the development of fiscal autonomies.*

Whilst the 2002 Discussion Paper mentioned these framework agreements[61], the 2006 announcement of the proposed changes to local government arrangements in the Northern Territory does not appear to contemplate them. Whilst government policy development sits outside the parameters of the Statehood Steering Committee, it is the purpose of this paper to canvass constitutional models and content, particularly where matters are included in any future Constitution requiring action by Government. How a framework agreement may work and be attached to the Constitution or indeed be enforceable may be an issue for submission by interested parties.

The *Indigenous Constitutional Strategy* document also states a position on financing Aboriginal communities stating:

4. *That there must be a direct Commonwealth funding of Aboriginal communities and organisations and a process of review in particular an investigation into NT handling of Commonwealth funds intended for the benefit of Aboriginal people.*
5. *That the Commonwealth establish an independent Commission of Inquiry to consider the experience of Aboriginal peoples under the Northern Territory (Self-Government) Act 1978, to review financial arrangements for the provision of services to Aboriginal communities and to make recommendations for future relationships between the Northern Territory Government and Aboriginal peoples.*

The issue of indigenous expenditure remains fertile political ground with a perception that both the Northern Territory and Commonwealth Governments often criticise each other for lack of funding or for confusion about funding of Aboriginal programs.

In September 2006 the Northern Territory Government published the *Indigenous Expenditure Review,*[62] a document aimed at providing some clarity about expenditure as it relates to Aboriginal policy and Indigenous people in the Northern Territory.

This publication acknowledges negative views about indigenous spending head on:

Steering Committee.

60 ABC Radio Darwin Richard Margetson interviewing Stuart Kenny 12 October 2006.

61 *An Examination of Structural Relationships in Indigenous Affairs and Indigenous Governance within the Northern Territory* Discussion Paper: Legislative Assembly Standing Committee on Legal and Constitutional Affairs 2002.

62 Northern Territory Treasury: www.nt.gov.au/ntt

It has been alleged that indigenous specific funds are not being used to improve socioeconomic outcomes for indigenous Territorians, but instead some of these funds are used to support programs and infrastructure that are primarily accessed by the non-indigenous population, particularly in Darwin. This in turn, it is argued, is perpetuating and exacerbating indigenous disadvantage.[63]

The stated aim of the report is to provide:

an objective and comprehensive analysis to measure the deficit or surplus in funding to the Territory associated with indigeneity (sic).

The document states an estimated 49.7% of Northern Territory Government expenditure is related to its Indigenous population with an estimated 43.2% of the Northern Territory Government's revenue related to its Indigenous population and Indigenous related expenditure exceeded the *per capita* share by 73% representing 2.44 times the *per capita* expenditure related to non-Indigenous persons in the Northern Territory.[64]

Some 80% of Territory money comes from Commonwealth government sources, representing the highest reliance of any jurisdiction on current federal funding arrangements. There is no doubt that the high proportion of Indigenous Territorians allows the Northern Territory to attract more funds from the Commonwealth since natural disabilities cost more *per capita* and Indigenous disadvantage contributes to the Northern Territory's overall disability level.[65]

Compared to its population, Indigenous expenditure on health, policing and justice are high because of the overall disadvantage of Indigenous Territorians and this in turn leads to an overall high level of Indigenous related expenditure. Housing is another major area where funding is constantly said to be inadequate to meet needs. For example, this year the Northern Territory received $25 million for the Aboriginal rental housing program but because of the Commonwealth Grants Commission formula, the Northern Territory actually receives $4 million from the specific purpose payments based on an assessment of need aggregated across Australia, leaving $21 million to be earmarked from GST revenue which would otherwise flow to the Northern Territory as untied money. As a result, this, leaves less available in the Territory's total GST allocation for discretionary Indigenous or other projects.

The Territory Government has outlined an agenda for action in recognition of the long-term socioeconomic disadvantages experienced by Indigenous Territorians.[66] The document cites the *Agenda for Action* as well as the *Overarching Agreement on Indigenous Affairs* signed between the Commonwealth and Northern Territory governments in 2005.

The ability of a Northern Territory Constitution to bind the Commonwealth is untested. Whilst nothing contained in a Northern Territory Constitution can affect the policy and financial decisions of the Commonwealth Government in its areas of responsibility, it is legally arguable that a Northern Territory Constitution, appropriately drafted and brought into force ahead of Statehood, so that it has the protections of Section 106 of the *Australian Constitution* and complies with the terms and conditions provisions of Section 121, could bind the Commonwealth. It remains a matter for conjecture as to whether the Commonwealth would agree to the Northern Territory becoming a State on terms and conditions that may bind the Commonwealth.

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63 Ibid. See *Introduction* p 7.
64 Ibid. See particularly the *Executive Summary* at p 3.
65 Ibid. See p 5.
66 Ibid. See p 41.

The scope and effect of Section 106 of the Constitution[67] is yet to be finally determined by the High Court of Australia. There is also a constitutional question as to whether an exercise of federal legislative power under Section 51 of the Constitution can override a State Constitution. There is judicial authority for the proposition that State legislation can bind the Commonwealth in some cases if appropriately expressed. There is no reason why this principle should not extend to new State legislation. A State Constitution may well have superior legal force than ordinary State legislation in any event.

Notwithstanding consideration of any capacity to bind the Commonwealth, the Statehood Steering Committee does not see a place for consideration of these funding issues within a constitutional development document; they are matters that may be taken up by memorandum of understanding (MOU), legislation or other means if policy itself was considered too unclear. The Committee, however, remains open to the views of Territorians and welcomes any contrary views as to constitutional inclusion.

The *Indigenous Constitutional Strategy* document next gives consideration to:

6. *That this Convention notes that there is a range of options from domestic and international jurisdictions that provide concrete expressions of the right of all peoples, including indigenous peoples, to freely determine their political status, and further notes that, as a form of self-determination, indigenous peoples have the right to self-government in relation to their own affairs. These include culture, religion, education, information, media, health, housing, employment, social security, economic activities, land, water and resources management, environment and entry by non-members.*
7. *The Convention considered a number of preferred options for self-government and resolves to delegate to its committee the task of investigating and reporting on the options for Aboriginal self-government in the Northern Territory in accordance with Aboriginal law. Those models may include: the models of tribal and band governments established under Indian treaties legislation in the United States of America and Canada; the emerging regional agreement models being developed in Australia; the Combined Aboriginal Nations of Central Australia; West Arnhem Regional Government model; Miwatj Regional Government model; the Torres Straight Regional Authority.*
8. *The Committee shall investigate all governance issues including: direct funding from the Commonwealth government; identification of effective service delivery and relationships with other agencies' such as essential services, health, police; and relationships with other tiers and sections of governments.*

The Statehood Steering Committee notes the Central Land Council's submission to the Senate Select Committee on the Administration of Indigenous Affairs in August 2004 focusing on the need for the development of a new and innovative model of Aboriginal governance and service delivery arrangements for the Northern Territory.

The Statehood Steering Committee further notes the recent partnership agreement which devolves funding from the Commonwealth to the Territory for certain expenditure.[68]

Targeted service delivery is a key intention of the planned reforms to Northern Territory local government structures. The preservation and guarantee of certain rights of

67 The provision that preserves the existing State Constitutions upon entry to the Federation.

68 On 6 April 2005 the Chief Minister signed *The Overarching Agreement on Indigenous Affairs* between the Commonwealth and the Northern Territory of Australia – a bilateral agreement arising from the June 2004 COAG meeting aimed at 'improving services to Indigenous Communities'. The Wadeye program was held out as a model for this agreement.

Indigenous Territorians is an issue that may generate individual or organisational submissions to this paper, particularly when considering this option. Interested parties are welcome to give consideration to the views put by the Indigenous Constitutional Strategy document to formulate different views on the issue of cultural rights. The *Indigenous Constitutional Strategy* considers **Aboriginal Land Rights and other Indigenous Rights** with the requirement:

1. *That the Aboriginal Land Rights (Northern Territory) Act 1976 must remain Commonwealth legislation administered by the Commonwealth.*

On 19 June 2006, the Statehood Steering Committee had the benefit of a briefing by the Central Land Council on precisely this issue.[69] The Land Council had undertaken detailed discussions with constitutional experts and considered the pros and cons of the *Aboriginal Land Rights (Northern Territory) Act* being patriated to the Northern Territory. A detailed consideration of this is outlined in Part Three of this Options Paper under the heading *Entrenchment.*

At the briefing, Land Council representatives reiterated this requirement. As a result of this, the Statehood Steering Committee has sought further technical legal advice. Land Councils and other interested parties are invited to consider the options for the *Aboriginal Land Rights (Northern Territory) Act* upon Statehood when commenting on this paper.

It is understood that should the Northern Territory become a State, it would need to enter into a specific arrangement with the Commonwealth for the *Land Rights Act* to remain with the Commonwealth.

Further exploring rights issues, the *Strategy* document states:

2. *That the common law and statutory rights of Aboriginal peoples in relation to land (including land subject to current or historical pastoral leases, reserves and national parks) must be respected and afforded effective Constitutional protection.*

The Statehood Steering Committee notes this is a matter for consideration in the context of constitutional development with the participation of Aboriginal people:

3. *That the rights of Aboriginal peoples as owners of land which is currently (or in future) national parks must be recognised by the implementation of cooperative management structures that give them effective control.*

The Statehood Steering Committee understands the Northern Territory Government has negotiated a range of agreements that have been signed by a number of Traditional Owners.

The *Ward High Court* decision[70] indicated that where native title rights and interests existed on land over which 49 Parks were declared between 1978 and 1998, these declarations miscarried. It is understood that Native Title is being addressed through Indigenous Land Use Agreements for each park:[71]

4. *Those arbitrary time limits on the capacity of Aboriginal land owners to assert their rights over land and waters must be removed.*

Amendments to the *Aboriginal Land Rights (Northern Territory) Act* in 2006 removed

69 Conducted by a consultant to the Land Council Mr Sean Brennan from the UNSW Faculty of Law and Land Council staff member Ms Siobhan McDonnell.

70 *Western Australia v. Ward* (2002) 213 CLR 1.

71 The *Parks and Reserves (Framework for the Future) (Revival) Act (Serial 278)* is the relevant Northern Territory legislation.

the capacity to pursue longstanding claims[72] The *Indigenous Strategy* document further seeks:

5. *That the free and informed consent of relevant Aboriginal peoples' according to Aboriginal laws be obtained prior to the approval of any project affecting their lands, territories, waters and other resources. Pursuant to such agreement, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social cultural or spiritual impact.*
6. *That, subject to Aboriginal law, effective constitutional protection be provided to protect the total environment of the lands, air, waters, flora and fauna and other resources which Aboriginal people traditionally own, occupy or use or have otherwise occupied or used.*
7. *That constitutional recognition be given to the full ownership, control and protection of Aboriginal cultural and intellectual property. This shall include Aboriginal rights to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.*
8. *Indigenous peoples have the constitutional right to revitalise, use, develop and transmit to future generations Aboriginal histories, languages, oral traditions, philosophies, writing systems and literatures and to designate and retain their own names and communities, places, persons, flora and fauna. The State shall make adequate resources available for the exercise of rights mentioned in this clause.*
9. *That any changes to a Northern Territory Constitution which concern Aboriginal rights must be approved not only by a majority of electors at a referendum, but also by a majority of people of the Aboriginal nations of the Northern Territory.*
10. *That there must also be recognition and protection of the rights of all indigenous peoples of Australia in the Commonwealth Constitution*

The 2006 changes to the *Aboriginal Land Rights (Northern Territory) Act* may have impacted on a number of the Convention's requirements as outlined above. Issues such as protection of intellectual property being entrenched in a Constitution may be considered by submission to the Statehood Steering Committee or at a later Constitutional Convention where all entrenchment issues would presumably be on the table.

11. *That a Northern Territory Constitution must provide for Aboriginal control in relation to, and the effective protection of, Aboriginal sacred sites and significant areas.*

The Statehood Steering Committee welcomes views on all of the proposals in the context of constitutional entrenchment, legislation, regulation, memoranda of understanding or recognition by other means.

The *Indigenous Constitutional Strategy* document next seeks for a future Northern Territory Constitution to guarantee the **human rights** embodied in the principal human rights instruments, including various United Nations instruments:

1. *Every person shall have the right to respect for and protection of his or her dignity.*
2. *That any Northern Territory Constitution must guarantee the human rights*

72 See the *Aboriginal Land Rights (Northern Territory) Amendment Act 2006* No 93.

embodied in the principal human rights instruments including the International Covenant on Political and Civil Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of all forms of Racial Discrimination, the Convention on the Rights of the Child, the Convention on the Elimination of all forms of Discrimination Against Women, the Convention against Torture and other forms of Cruel, Inhuman and Degrading Treatment and Punishment; the International Labor Organisation Convention 169 and the Draft Declaration on the Rights of Indigenous Peoples.

3. *There must be a particular prohibition of discrimination on any ground such as race, sex, language and religion.*
4. *That any NT Constitution must: (1) Guarantee the human rights embodied in the Convention on Genocide; and (2) draw particular attention to the history of the separation of Aboriginal people's from their families.*
5. *Effective mechanisms for the enforcement of human rights must be provided in the Constitution.*
6. *An ongoing process of negotiation over constitutional change and entrenchment of human rights must be instituted.*

The United Nations Declaration on the Rights of Indigenous People[73] was adopted by the United Nations Human Rights Council on 29 June 2006. The declaration addresses individual and collective rights, cultural rights and identity rights to education, health, employment, language and others. It outlaws discrimination against indigenous peoples and promotes their participation in all matters that concern them as well as ensuring their right to remain distinct and pursue their own visions of economic and cultural development.[74]

Media reports in late 2006 on this issue indicated consideration by the 61st General Assembly was anticipated,[75] however its adoption has since been deferred by the Third Committee of the General Assembly.

Integration of principles from United Nations instruments into a future Northern Territory Constitution leads to consideration of a Bill of Rights. The previous Sessional Committee on Constitutional Development considered this issue in March 1995.[76]

In 2007, Victoria commenced legislation implementing a charter of rights and responsibilities. Also during 2007 the Charles Darwin University symposia series will consider a Northern Territory Bill of Rights in the context of constitutional development. A question to be asked is whether a Bill of Rights has a place in a Constitution or whether it should stand alone.

The Statehood Steering Committee welcomes the views of Territorians on the role of a Bill of Rights in the context of constitutional development for the Northern Territory. Further consideration is given to this issue in Part Three of this paper.

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73 Information available online at http://www.un.org/esa/socdev/unpfii/en/declaration.html

74 Media Release: *UN System and NGOs Call for an Early Adoption on the United Nations Declaration of the Rights of Indigenous Peoples by the General Assembly.* Chairperson United Nations Permanent Forum on Indigenous Issues, 17 October 2006.

75 ABC Radio National Fran Kelly interview with Pat Dodson 18 October 2006.

76 Sessional Committee on Constitutional Development Discussion Paper No 8; *A Northern Territory Bill of Rights?* March 1995.

The *Indigenous Constitutional Strategy* document seeks to provide for **essential services and infrastructure** to be considered as rights:

1. *That a Northern Territory Constitution must recognise the right of all residents to equal access to essential services and infrastructure, including health, housing, clean water, roads, communications, education, training and employment. Special measures should operate in relation to people living in remote areas of the Northern Territory.*
2. *That there must be special measures for the immediate and continuing improvement of the economic and social conditions of Aboriginal people.*
3. *That Aboriginal peoples have the right to determine our own health, housing and other economic and social programs, and to deliver such programs through our own adequately resourced institutions.*

Territorians may wish to comment on these issues, particularly in the context of shared responsibility agreements and current policies towards provision of services to Aboriginal communities.

As indicated previously, nothing contained in a Northern Territory Constitution can affect the policy and financial decisions of the Commonwealth Government in its areas of responsibility. However, if the responsibility for the provision of these services no longer remains a matter for the Commonwealth and becomes an issue for the future State Governments, this aspect will be relevant.

The *Indigenous Constitutional Strategy* document next considers **education**:

1. *That there must be recognition of: (a) the right of Aboriginal children to all levels and forms of education of the State; (b) the right of Aboriginal communities to establish and control our own educational institutions, providing education in our own languages, in ways appropriate to our cultural methods of teaching and learning; (c) the right of children living outside their communities to have access to education in their own culture and language.*
2. *That there be culturally appropriate, compulsory components in the curriculum of Northern Territory schools in relation to the histories and cultures of Aboriginal peoples in the Territory.*
3. *All peoples have the right to appropriate and adequate education. The right to education shall be enshrined in the Constitution which includes bilingual education designed by self determining indigenous groups.*

Access to education in one's own culture and language within a community is an issue Territorians may wish to canvass further regarding details and how such a proposal would be administered and implemented, and how a binding constitutional requirement for this provision could be effected if that is the desired approach.

Justice issues are canvassed in some detail:

1. *That the Northern Territory Government must negotiate in good faith with Aboriginal communities regarding: (a) the administration and resourcing of community justice mechanisms; and (b) the effective participation of Aboriginal people in the justice mechanisms of the Northern Territory.*

This issue relates further to the discussion in Part Three below on Customary Law. Community Justice resourcing and representation has been noted. The level of satisfaction with the current government policy and implementation of resources on justice issues in Aboriginal communities and to Aboriginal people will presumably inform any further submissions on this issue.

2. *That a Northern Territory Constitution must recognise the right of Aboriginal people to understand and be understood in legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.*

It is understood programs have been developed by the office of the Director of Public Prosecutions and court administration. The level of entrenchment of existing programs and scope for new programs may be a matter for submissions to this paper.

The Aboriginal Interpreter Service provides significant assistance to communication within the Northern Territory between Aboriginal and other Territorians. The desirability of entrenching the provision of interpreter services in a Constitution would need careful consideration.

3. *That the Northern Territory mandatory sentencing legislation is contrary to Australia's obligations under the International Covenant on Civil and Political Rights and other international human rights instruments, and must be repealed.*

Mandatory sentencing for property offences was repealed in October 2001.

Exercising rights under a constitution requires resources. The *Indigenous Strategy* document seeks guaranteed adequate government resources to exercise those rights. Allowing for and encouraging a cycle of litigation may be a consequence of such a measure. Questions of ‘adequacy’ could lead to ongoing dispute.

Political Participation

1. *There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voter’s roll, and, in general, proportional representation.*
2. *That procedures relating to the election of members to a Parliament of the Northern Territory should ensure effective levels of representation of Aboriginal people.*
3. *Noting that Aboriginal people are under-represented in the NT and Commonwealth parliaments and that international jurisdictions provide a range of options for the empowerment and representation of Indigenous and minority peoples including: Proportional representation; Multimember electorates; Special assemblies for Indigenous peoples and issues; Reserved Aboriginal seats in Parliament; Aboriginal political parties; Aboriginal people as candidates for existing parties and electoral system. This Convention resolves to establish a Committee of the Convention to commission and oversee research into the options for political participation.*

Representation of Aboriginal peoples by Aboriginal peoples is an issue that has been considered in other jurisdictions. For example, in New Zealand since 1867 Maori electorates were created allowing all Maori men over 21 the right to vote in these electorates. However on a *per capita* basis at the time, the Maori would have deserved approximately 14 members.[77]

77 *New Zealand Indigenous Peoples and Parliament* Paper presented to the Australasian Parliamentary Educators Conference held at Parliament House Darwin Friday 1 September 2006 by New Zealand Delegate Jodi Willison.

Under the mixed member proportional system introduced at the 1996 New Zealand General Election (arising from the 1985 Royal Commission into the New Zealand electoral system), Maori seats have been retained and by 2002 there were seven such seats. Maori may opt to be on the general roll or the Maori roll. The current New Zealand Parliament has 21 MPs identifying as Maori in a total of 121 seats.

In the Northern Territory, there are six members of the current Legislative Assembly with Aboriginal heritage of the total 25 members of the Assembly. In the current Australian experience, there are only nine Aboriginal members of all the parliaments which in total house 822 seats.[78] Proportionally, the Northern Territory has a high level of Aboriginal representation with a population of approximately 30%[79] being Aboriginal people.[80] Aboriginal people could therefore be said to hold 24% of seats in the Northern Territory Legislative Assembly.

This has not always been the case. In all of its 10 assemblies, the Northern Territory Legislative Assembly has hosted a total of 12 Aboriginal members[81] (including current sitting members).

Consideration of guarantees of Aboriginal representation remain a concern to many Aboriginal Territorians. This paper may provide avenues for discussion of this issue in the context of finding different ways to elect our representatives. As noted above, the *1996 Final Draft Constitution* also gave this matter some consideration.

Consideration of the Hare Clark[82] model or mixed member proportional voting systems or other methods which may promote increased participation[83] in the political arena is encouraged (see also the discussion of bicameralism in Part Three below). The Statehood Steering Committee anticipates submissions and discussion on the topic will continue in the lead up to any future Constitutional Convention.

The *Indigenous Constitutional Strategy* also seeks **Good Government**:

1. *There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.*

A principle of the complete and utter separation of the judiciary and the executive in a State may be a difficult goal to achieve. There are many tribunals and other bodies in States that probably exercise some judicial power, a situation that would be prohibited under complete separation. The judiciary would also not be able to exercise any non-judicial powers except perhaps incidentally. No existing Australian State has complete separation.

78 Six in the Northern Territory, two in Western Australia and one in New South Wales.

79 The National Indigenous Times covers the level of indigenous parliamentary representation in Issue 101 Volume 5 March 23 2006. ABS statistics indicate the Aboriginal population of the Northern Territory is 28.5% of the total residents; however the 2006 census is expected to reveal a significant increase when figures are released in 2007.

80 These are Members of the Legislative Assembly who identify as Aboriginal people. Under our system they represent their electorates rather than a specific segment of peoples in the community. The Minister for Indigenous Affairs is the person in Government who specifically represents Aboriginal Territorians.

81 *History of the Indigenous Vote*. Australian Electoral Commission publication August 2005 p iv.

82 Hare-Clark is one version of a category of electoral systems often called 'quota-preferential'. Candidates are elected from multi-member constituencies, but not using the proportional representation methods common in European countries. See further explanation by ABC election analyst Antony Green at http://www.abc.net.au/elections/tas/2006/guide/hareclark.htm

83 See Discussion Paper: *Greater Democracy for the House of Representatives* Senator Bob Brown October 2003 www.kerrynettle.org.au/files/campaigns/extras/Democracy%204%20HoR.pdf

2. *That any Constitution for the Northern Territory must provide effective mechanisms for the accountability of governments, including: (a) Freedom of Information legislation; (b) An independent, adequately resourced Ombudsman Office; (c) An independent, adequately resourced Auditor-General; (d) An independent commission against corruption; (e) An independent electoral office; (f) Adequate provision for judicial and administrative review of government decisions; (g) Measures to ensure fairness in government contracts.*

The *Information Act* came into force on 5 May 2004. The Ombudsman is independent but remains subject to the budget process requiring funding through the Treasury.[84] The Budget Estimates process provides for public accountability of the funds made available to this Office as to all Government agencies.

The Auditor-General is not subject to the control of the Government but is accountable to the Legislative Assembly. The Statehood Steering Committee is unaware of any Territory Government consideration of an Independent Commission Against Corruption as exists in New South Wales. It may be argued the office of the Ombudsman and the Auditor-General provide for accountability mechanisms that satisfy such a role.

On 8 April 2005, Mr Bill Shepheard was appointed as the Northern Territory Electoral Commissioner. The Government media release associated with his appointment advises Mr Shepheard was unanimously recommended by an independent selection panel. The Leader of the Opposition and the two independent members of the Legislative Assembly were also consulted before the recommendation for Mr Shepheard's appointment went to the Administrator.

The Statehood Steering Committee is unsure as to what are considered ‘adequate measures’ to review government decisions and the Committee also understands that Government contracts are let through a transparent tendering process.

The desirability of a Constitution enshrining, or in some way entrenching the role of these named positions and processes should be discussed openly by the broad Northern Territory community in the context of this paper.

The final section of the Indigenous Constitutional Strategy document examines **process**:

1. *This Convention notes that constitutional reform to recognise, enhance and protect Aboriginal rights is an ongoing process requiring further investigation, research, negotiation and development.*
2. *The Convention Committee shall commence a process of negotiation with relevant political organs, government representatives and others regarding the further development and entrenchment of Indigenous rights and interests in the Commonwealth and NT Constitutions, in particular the terms and conditions for the establishment of the Northern Territory as a State.*
3. *The Convention Committee shall undertake an extensive consultation, information and education campaign to inform all Aboriginal people of the NT of the outcomes of the Batchelor Indigenous Constitutional Convention and the Kalkaringi Constitutional Convention. The Committee shall also inform and involve non-indigenous Territorians with interests in Constitutional development.*

84 At the 2005/06 Legislative Assembly Budget Estimates hearings the Ombudsman indicated she has ‘barely sufficient funds’ Hansard 20 June 2006.

4. *The Northern Territory and Commonwealth Governments shall make adequate resources available.*

The Statehood Steering Committee welcomes any opportunities to consult with the Convention Committee or the Land Councils on the above issues.

The creation of the Statehood Steering Committee provides a new opportunity for the work undertaken at Batchelor and Kalkaringi to be examined and discussed with a view to achieving Statehood for the Northern Territory. The Committee's role of advising Parliament on the issues that must be addressed in the lead up to any further constitutional convention will provide an important avenue for these issues to be examined.

This overview of the *Indigenous Convention Strategy* document is aimed at commencing a process for achieving an eventual grant of Statehood that is inclusive and acceptable to the majority of Territorians.

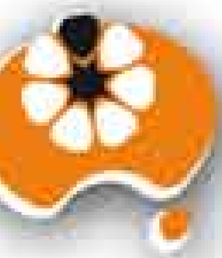
For the first time, all Territorians are being asked by the Statehood Steering Committee to seriously examine the issues raised in 1998 by Aboriginal Territorians and comment on them through this discussion process by making a submission to the Statehood Steering Committee.

OPTION 7 **As Suggested**

This paper has so far provided six options for discussion based upon papers and concepts already developed and in most instances made public. The variations are limitless. Blended versions of some of these options and/or concepts from other jurisdictions not considered here may end up as part of the final model. The Statehood Steering Committee does not wish to limit the available models for consideration.

Any interested Territorian who would like to suggest an option not considered in this paper is welcome to make a detailed submission to the Statehood Steering Committee.

Territorians requiring assistance in making a submission should make contact with the Office of the Chairman, Statehood Steering Committee.



Part Three

Discussion Topics

The Australian Constitutional Experience

Each State in the Australian Federation has its own Constitution which was preserved from its original status as the Constitution of the colony which eventually formed the State in question.

Section 106 of the *Australian Constitution* states as follows:

> *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.*

This section of the *Australian Constitution* has relevance to the future admission of the Northern Territory as a State.

The Statehood Steering Committee takes the view a future Northern Territory Constitution should be in force just prior to admission as a new State in order to attract the protection of section 106.[85]

Consideration of what should be in a Constitution will probably be the starting point for many Territorians. As outlined in Part One of this paper, certain principles may be considered standard whilst issues such as those raised particularly at the Batchelor convention may be addressed either in policy or law outside of the constitutional context.

Context is always vitally important when considering what is in a Constitution. The United States and South African Constitutions reflect serious conflict involving race relations. For example, the 13th Amendment to the United States Constitution prohibits slavery as a direct response to the bitter and divisive Civil War. This amendment reflects the desire by constitutional framers in the United States to express that slavery was no longer acceptable. Citizens of the vanquished states after the Civil War may well have thought this amendment was triumphalism on the part of the North. As indicated above, context is important when considering what goes into a Constitution.

In Australia, the expanding colonies in the 1880s and 1890s informed the development of our Australian Constitution. A desire for bringing together the continent as a nation in a peaceful union under the British Crown was the motivation of the leaders of the day, rather than bloodshed or war.

What will be important in the context of the 21st century and beyond for the new Northern Territory State Constitution?

85 See generally the Sessional Committee on Constitutional Development Discussion Paper No 5 *The Merits or Otherwise of Bringing an NT Constitution into force before Statehood*. March 1993.

Recent Experiences in Constitutional Development

When considering recent experiences in constitutional development, we first look at the 1998 Statehood Convention held at Parliament House in Darwin in April of that year.

As noted previously, the 1998 convention was officially called *Statehood: The Convention*. It is significant that the convention was tasked with determining whether the Northern Territory should become a State and the form of a Constitution for the State as well as the name of the State and the timeframe for becoming a State.

The Statehood Steering Committee takes the view a future constitutional convention would not consider anything other than the form and content of the Constitution.

It would later be a matter for the people of the Northern Territory to either accept or reject that Constitution in the context of knowing and understanding the Commonwealth terms and conditions of Statehood. Two referenda questions may be required: the first one to gauge the acceptability of a new draft Constitution; and the second to seek agreement or disagreement with Statehood based on the terms and conditions offered by the Commonwealth at the time.

The 1998 Statehood Convention had 53 delegates appointed (with 52 attending), 26 were 'elected' by government-nominated organisations, with the remaining 27 appointed directly by the Government. One deputy chairman was appointed by the Leader of the Opposition. There was much criticism at the time inside and outside of the Convention about the method of selection of delegates. This is acknowledged in the Convention Report.[86]

It is well known that ATSIC[87] delegates withdrew from the convention due to a perceived lack of recognition of Indigenous participation and lack of support for the process of reconciliation. The Northern and Central Land Councils declined to attend.

Some 59 resolutions were formulated and incorporated into the minutes of the Convention. The chairman highlighted six resolutions in his report that were passed either unanimously or with near unanimity:

1. *The Northern Territory should become a new State in the Commonwealth of Australia;*
2. *The new State should be called the State of the Northern Territory;*
3. *The Northern Territory should become a State as soon as possible;*
4. *Recognition of Aboriginal customary law as a source of law in a new Constitution;*
5. *The level of Senate representation;*[88] *and*
6. *A declaration of Statehood.*

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86 Statehood Convention March 1998-April 1998 Darwin Report Volume 1 *Chairman's Introduction* p 1.

87 The former Aboriginal and Torres Strait Islander Commission.

88 Resolution G *That, prior to the Northern Territory becoming a new State, the Parliament ensure that the following matters be finalised: (a) the level of the new State's representation in the Senate (b) a formula for increasing that representation*. It appears the Convention contemplated less than equal representation given the inclusion of clause (b) in this resolution.

Whilst the outcomes of the Convention are informative, the 1999 *Report into Appropriate Measures to Facilitate Statehood*[89] notes most people surveyed who voted *No* at the 1998 referendum were not opposed to Statehood *per se* but cited certain deficiencies in process as to the reasons for voting *No*. These included a lack of information and understanding as well as a level of concern about the Statehood Convention process and the events surrounding it, a lack of trust in those responsible for the 1998 process, inadequate consultation, the role and approach of the Chief Minister, a protest against the (then) Chief Minister and 'the arrogance of politicians'.[90]

Contemporary reports of the Convention are of interest. June Tuzewski wrote:

> *Delegates' hearts and minds have been well and truly focused on constitutional issues during the second week of the Territory Statehood Convention. As well as the convention's formal gathering, there have been working groups, public forums, and much informal discussion. It has become apparent to those of us attending that we are not writing a Constitution - that must be left to the people with the technical and legal skills in parliamentary drafting. What we are doing is framing a set of principles to be included in the Territory's proposed Constitution and establishing the framework of how we wish to be governed.*[91]

Her report notes a number of working groups were part of the process with some delegates attending several groups. One group examined the issues on each day's formal agenda, and others covered such topics as local government, representative government, Aboriginal issues, and a Bill of Rights.

After some introductory matters were completed, four days were allocated to discuss separate aspects of Statehood, focussing mainly on what should be included in the proposed Constitution. Topics included the protection of the independence of the judiciary and issues such as the appointment of Supreme Court judges as well as consideration of the Executive and who should be the head of State, the function of an Executive Council and whether the Constitution should recognise 'Cabinet'.

Ms Tuzewski noted also that:

> *Delegates have been lobbied by individuals, organisations and special interest groups, from across the Territory, on a wide range of issues, through letters, faxes and email*

demonstrating an informal participatory aspect of the proceedings.

Whilst this paper provides a simple overview of this recent constitutional development experience, interested readers should examine the Convention Report and contemporary analysis at the time.

There are a range of high profile constitutional development exercises through which the Statehood Steering Committee and Territorians may inform themselves of in contemplating how we undertake our own convention process.

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89 Published by the Standing Committee on Legal and Constitutional Affairs to analyse the referendum results.

90 1999 Report Op Cit p 2.

91 *Statehood Convention Hits Some Hurdles*. Comment by June Tuzewski Alice Springs News 8 April 1998.

For example, East Timor, South Africa and Cambodia have all developed new constitutions in the past decade or so, and Fiji has famously been engaged in a number of coups, reviews and reform processes in recent times. Thailand had its Constitution 'suspended' in 2006 as a result of a bloodless military coup. It is worthwhile noting that these international experiences came from events or disturbances we have not experienced in the recent past in the Northern Territory. War, military coup and the dismantling of apartheid do not have direct relevance to us.

South Africa's Constitutional Assembly convened between May 1994 and December 1996.[92] The resulting Constitution is *a 'hybrid with genes from all over the globe'.*[93] The Assembly formed a Constitutional Committee which in turn formed six theme committees to coordinate input on issues to create the content of the Constitution; a work plan was devised to form the core of the process. Public submissions were called and public meetings held with some 5000 participants turning up to have their say.[94]

Of interest to the Northern Territory experience is a report that says:

> *What was extraordinary was that when the constitutional people arrived at these far-flung meetings there were people there who had decided it was worth coming to hear them. Often these people hadn't a clue what a Constitution was and often there was not the word for it in their language. But they quickly got the message and soon let their thoughts and feelings be known.*[95]

Whilst of historical interest, the South African experience was an undertaking on a grand scale, engaging a huge number of disparate political parties and members of the South African Parliament over a two-year period to draft a Constitution. The Statehood Steering Committee proposes a Northern Territory Constitution be considered once again by a convention.

The Role of a Constitutional Convention

Following from the brief discussion in Option Four above, this section discusses in further detail the role and scope of a constitutional convention.

The Select Committee on Constitutional Development produced a *Discussion Paper on Representation in a Territory Constitutional Convention* in October 1987, publishing *Interim Report Number 1*. The Sessional Committee on Constitutional Development published a paper entitled *A Northern Territory Constitutional Convention* in February 1995.

In a speech delivered on 21 May 2003[96], the Northern Territory Chief Minister stated:

> *Today I announce my Government will work with the community on a new campaign to achieve Statehood, based on a Territory Constitution we develop ourselves. This time…we will get it right. We will do this with careful community consultation and community involvement from the start. It will not be hijacked by politicians. And so I pledge, today that a majority of delegates to any future Constitutional Convention will be elected by the people, not imposed by political leaders. I further pledge that decision-making processes, such as constitutional conventions and a final referendum shall be independent of the normal electoral cycle.*

92 The Making of the Constitution – The Story of South Africa's Constitutional Assembly. Churchill Murray 1997.
93 Ibid p 8.
94 Ibid p 35.
95 Ibid p 35.
96 Hon Clare Martin MLA. Op Cit.

The 1998 Statehood Convention examined in detail the development of a new Constitution for the Northern Territory. However as noted elsewhere, it was not called a C*onstitutional Convention* rather a S*tatehood Convention*. This distinction may appear to be semantics, however the fact the 1998 Convention gave consideration to the issue of Statehood as well as a Constitution may have blurred the process. It may be preferable that a future Constitutional Convention not make any presumptions about Statehood even though it is clear that a goal of Statehood would coincide with the implementation of a new Constitution for the Northern Territory.

The 1987 *Discussion Paper* gave consideration to the advantages and disadvantages of representation and nomination to a Constitutional Convention even to the point of considering whether the appropriate system for election would involve a series of multimember electorates to ensure the interests of all Territorians could be fairly represented.[97]

The February 1995 Interim Report[98] noted the Constitutions of the Australian self-governing colonies (later the original States) were framed by the legislatures of each colony under Imperial legislation. The convention method was not used.

The National Australasian Convention commenced in Sydney in 1891 as a stepping stone to Federation in 1901. It was comprised of delegates appointed by resolutions of their respective colonial legislatures. It was at this convention that the drafting of the new Commonwealth Constitution began.

For the next convention, elections were held in most jurisdictions for representatives of the colony to attend. Most of the delegates were colonial parliamentarians with a few exceptions and this convention met in Adelaide in 1897.

A Constitutional Convention was the method used for consideration of the Republic question in the late 1990s. Constitutional conventions have also been established in the United States for their Federal Constitution as well as the creation of some state Constitutions.[99] There is rich history of constitutional conventions dating back to 1787 in the United States.

The method for Constitution making that will produce a document that is generally acceptable to the populace and reflects the majority will appears to favour the use of constitutional conventions. As the Sessional Committee said in 1995, a Constitutional Convention:

> *provides an excellent means by which a wide cross-section of the Northern Territory community can participate in framing their own fundamental rules as to how the Northern Territory and its government is to operate.*[100]

The Sessional Committee recommended not to have a wholly nominated convention as it was considered inconsistent with the principles of representative democracy. The rationale was that such a principle (democracy) should underpin the entire new Northern Territory Constitution, including its creation.

The Northern Territory Government in 1998 established a system of appointed and 'elected' delegates, however a question arises over the form of the election of the elected delegates considering it was not open for all Territorians to nominate to be elected for the Convention; it was only open to organisations invited by the Government to elect their nominee.

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97 Select Committee Discussion Paper 1987 Op Cit p 4.

98 Sessional Committee on Constitutional Development Interim Report Number1 *A Northern Territory Constitutional Convention* February 1995.

99 See generally; Victor Fisher Alaska's Constitutional Convention University of Alaska Press 1975.

100 *Interim Report No 1* at Page 10.

At the time, even though invited to participate, the then Chairman of the Northern Land Council, Galarrwuy Yunupingu, wrote:

> *The current NT constitutional convention is not a real convention and the land councils are losing nothing by not being involved. It is an insult to the people of the Northern Territory - black and white - to have the historic opportunity to participate in the development of a modern democratic constitution snatched from our grasp.*
>
> *By throwing away 12 years of work from the Sessional Committee on Constitutional Development, the Government has chosen to throw out many modern and groundbreaking ideas which would have made the NT stand out as an inclusive, tolerant, open and democratic jurisdiction.*[101]

Whilst it is always up to individual organisations to determine whether or not they participate, a future process may consider promoting a desire to participate as a key feature. The Statehood Steering Committee takes the view it is vitally important for all Territorians to participate in forming our new Constitution.

Some commentators may take the view a wholly elected Northern Territory Constitutional Convention would be the most democratic approach. Others may consider a partly elected and partly appointed Convention would be more inclusive so as to ensure a more diverse range of voices will be heard.

The Statehood Convention was held at Parliament House in Darwin. It is of interest to note the Alaskan Constitutional Convention was kept separate from the political arena and not held in its Assembly building or even in its capital city (Juneau). Rather, it was held over a long period at Fairbanks University in Northern Central Alaska. Whilst it should not be overstated, the venue for a future Northern Territory convention may be of significance.

Interested Territorians may wish to comment on developing the process for representation in a Territory Constitutional Convention and how a future Constitutional Convention should be formed, taking into account the 2003 comments of the Chief Minister (that a majority of delegates would be elected), the 1998 experience at the Statehood Convention, and the content of the 1987 *Discussion Paper* mentioned here.

The Role of a Preamble in a State Constitution

In his former role serving the Northern Territory Government, Statehood Steering Committee Legal Adviser Mr Graham Nicholson crafted a paper for consideration at the Statehood Convention in 1998 entitled *The Relevance of a Preamble in Constitutional Interpretation*.

Mr Nicholson noted that a preamble is a common device in Constitutions throughout the world and they perform a useful purpose in a Constitution. A preamble does not of itself give rise to enforceable legal rights and it cannot alter the clear meaning of the constitutional text itself. In providing his advice, Mr Nicholson gave regard to the High Court's consideration of the preamble to the *Commonwealth of Australia Constitution Act 1900*. Courts have sometimes taken constitutional preambles into consideration when interpreting particular substantive provisions of the Constitution.

At the Statehood Convention, Mr Nicholson provided a suggested redraft of the preamble to the proposed Northern Territory Constitution drawing from a combination of key features of the *1996 Final Draft Constitution* prepared by the sessional Committee and the newer draft proposed by the Hon Dennis Burke MLA.

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101 Galarrwuy Yunupingu; *The Convention: Why It's Not Real* Northern Territory News 1 April 1998.

As a preamble may be referred to as evidence of the origin, scope and purpose of the Constitution, its content will be significant. In this context it is interesting to note the preamble to the Constitution of the Republic of South Africa recognises the '*injustice of the past'* and states the adoption of the Constitution has the purpose of *healing the divisions of the past and establishing a society based on democratic values, social justice and fundamental human rights*. Therefore, it may be that some of the principles being considered to establish a Northern Territory State Constitution could be included in a preamble as well as or instead of being expressed in the Constitution proper itself.

The preambles suggested in the *1996 Final Draft Constitution* and in the Convention's *1998 New State Constitution* both acknowledge and recognise Aboriginal peoples of the Northern Territory. Interested Territorians are invited to comment on the issue of a preamble for a Northern Territory State Constitution.

Options for a Head of State

As mentioned previously, the role and function of a Head of State are matters for consideration in developing a Constitution. Can we and do we want to adopt a system of Government where the Crown is at the peak represented in the Northern Territory by her representative Governor? What does the Northern Territory consider the best model, bearing in mind it is not an option for the Territory to become a republic?

The Northern Territory is served by an Administrator under the *Northern Territory* (*Self-Government) Act 1978*, appointed by the Governor-General and chosen by the Commonwealth Government.

Recent form and practice means the Northern Territory Government advises the Commonwealth whom it feels should serve in the position, but there is no requirement for the Commonwealth to seek or heed such advice. Despite the many ceremonial tasks associated with the role, the current designation is that of a senior Commonwealth Public Servant, not that of a vice regal. The Northern Territory Administrator has no direct connection to the Crown.

In Canada, the Lieutenant-Governor[102] of each province is appointed by the Governor-General on the advice of the Prime Minister, usually in consultation with the relevant premiers. A similar proposal was considered more than once leading up to and following Australian Federation but never adopted.

Under Section 7 of the *Australia Act 1986* the Crown is represented in each of the existing Australian States by a Governor and at subsection (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.*

When it comes to States' relations with the Crown and the appointment of Governors, the Commonwealth has no role.[103]

A model for direct election of a Governor appears to have had its first outing in South Australia in the 1890s, but as constitutional lawyer Dr Anne Twomey points out, one of the difficulties with direct election is how to provide for removal.[104]

102 Not to be confused with the role of the same name in Australian States which is a role subordinate to a Governor and usually taken on by an existing official when the Governor is outside the jurisdiction. Often the Chief Justice of a Supreme Court takes on this role.

103 Twomey Op Cit.

104 Ibid p 25.

The *Australian Constitution* refers to State Governors (as mentioned in Part One of this paper) but does not appear to insist there must be State Governors. Section 110 indicates there may be some other arrangement instead including a Chief Executive Officer position. Whether a CEO is the term we would use today for what is more a ceremonial than an operational role is worth considering. Even then, there may be no requirement at all for any like position. The South Australian, Victorian and Tasmanian parliaments debated abolition of the position of their Governors early last century.[105]

The *Australia Act 1986* refers at Section 7 to the Governors of the States:

> *Her Majesty's representatives in each State shall be the Governor.*

This may mean a State cannot unilaterally sever its ties to the Crown. Change was planned for in anticipation of the 1999 republic referendum. The draft State-based legislation requesting the required change to Section 7 (enacted by all States in anticipation of a yes vote on the republic question) never commenced because the referendum question failed.[106]

Technically, State Governors serve at the pleasure of the Monarch. In practice, their terms are generally for a set timeframe and can be renewed. The commission can be terminated at any time, once again at the pleasure of the Crown. The current arrangement to dismiss a Governor would involve a premier communicating with the Queen and her choosing to act on advice by terminating the commission. Termination of Governors in the States of Australia has been rare, with no examples since the commencement of the *Australia Act 1986*.

A future Northern Territory State Constitution may wish to provide for the process of selection of a State Governor as well as the role and responsibilities, the length of office and method for removal. Territorians must consider whether there is a place in the 21st Century for a direct connection to the Monarch at Buckingham Palace (even in the guise of Queen of Australia[107]) who appoints the Governor, or whether the appointment, by whatever method, should belong to the Northern Territory or another model.

The Statehood Steering Committee is interested in achieving Statehood on the basis of equality with the existing states. Being equal, however, does not necessarily mean being the same. Equality is about having the capacity to opt to be different, but from the same powerful starting position. Arrangements concerning access or otherwise to the Monarch must not be confused with equality.

If the Governor of a new State is not appointed by the Queen and does not represent the Queen, who does he or she represent? Perhaps the Parliament in exercising such functions as the approval of Bills that have been passed to become laws of the Northern Territory, or maybe representing the people in overseeing the proper functioning of the democratically elected government.

What is technically and legally possible would require further specific advice prior to any attempts at drafting a Constitution; however the views of all Territorians are important in this stage of our discussion.

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105 Twomey Op Cit pp 31-39.

106 See Chapter 14 *The States and a Republic* in Anne Twomey, The Constitution of New South Wales Federation press 2004. This chapter explores, amongst other issues, whether States can retain links to the Crown should Australia ever become a republic.

107 The interesting distinction has been in the past that the Queen of Australia appoints the Governor General but the Queen of the United Kingdom appoints State Governors. See Twomey The Chameleon Crown p 48.

Professor Cheryl Saunders wrote:

> *If provision were made for a position akin to that of Governor, different procedures would be needed for appointment and removal. On the assumption that these new procedures involved the State government, Parliament or people, new State Constitutions would offer an interesting testing ground for the choice of heads-of-state in a republican Australia.*[108]

The issue of the election of State Governors continues to be considered in what has become a fairly low key debate on Australian republicanism.[109] The Statehood Steering Committee is interested in debate and discussion on the role, function and selection of a future State Governor or other like officer.

Constitutional Interpretation

The analysis of the 1996 *Final Draft Constitution* and the 1998 *New State Constitution for the Northern Territory* considered in Part Two of this paper provides some consideration of the issue of interpretation of a Constitution, specifically the different approach taken to the issue in the two versions.

The 1996 *Final Draft Constitution* provided a mechanism to assist the courts in the interpretation of the Constitution. The clauses in Part 11, allowed for consideration of matters that did not form part of the Constitution but which may have been set out in the documents containing the text of the Constitution that had been publicly released before the time when the provision commenced. It also allowed for any relevant paper, report or other document of a Committee of the Legislative Assembly or other committee of enquiry or other similar body that was laid before the Assembly before the time where the provision had commenced to be considered for interpretive purposes.

In accordance with proposed clause 11.2 (4) of the 1996 *Final Draft Constitution*, in determining the weight to be given to material a court would be able to consider, the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision, while taking into account its context in the Constitution, and any purpose of object underlying the Constitution, as well as the need to avoid prolonged legal or other proceedings without compensating advantage.

In comparison, by Resolution 59 of the Statehood Convention, it was determined that the *New Constitution* coming from that convention, apart from containing definitions of specific terms as per ordinary legislative drafting, would have no provisions regarding interpretation of the Constitution.

Various legislation exists at Commonwealth, State and Territory levels across Australia to assist with interpretation of legislation and reference to extrinsic sources is available. Constitutional interpretation is an important consideration as we talk about developing a new home grown version for the Northern Territory.[110]

This issue is of particular concern when considering the idea of a *living Constitution,* where a pragmatic approach is taken in order to provide flexibility that a changing society requires for the Constitution to serve that society. Is constitutional interpretation to give effect to the *intent* of the drafters of the Constitution? Or is the intention of the Constitution

108 Saunders Op Cit p 71.
109 Professor John Warhurst *Options Sought for Selecting State Governors* Canberra Times 14 June 2002.
110 See also Chapter 8 *Constitutional Interpretation* Australian Constitutional Law and Theory Commentary and Materials Tony Blackshield & George Williams Federation Press 2006.

to be determined from the clear text of the Constitution therefore looking at what is *said* rather than what is intended?

There is an argument that in selecting the words of the statute, the legislature might have misspoken and the court should permit that to be demonstrated from the debates from the floor of the parliament or other documentation.[111] This would appear to have been the intention of the drafters of the 1996 *Final Draft Constitution*.

An accepted approach to textual interpretation is to give words and phrases an expansive rather than narrow interpretation, however not an interpretation that would skew the language or make it meaningless. For example, the provision of the first Amendment of the United States Constitution that forbids constraints on freedom of speech and the press does not list the full range of communicative expressions. Handwritten letters and emails, for example, are neither speech nor press, yet there is no doubt they cannot be censored in this constitutional context.[112]

Constitutional development and interpretation depends on the views of those examining the issues and the text. A measured approach is to look at the text as the starting point.[113]

Justice Scalia[114] looked for the original meaning of the text, not the original intention of the draftsperson. For example, he said he would examine the contemporary writings of the founding fathers of the United States Constitution:

> *not because they were framers and therefore their intent is authoritative but because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood.*[115]

In the Judge's view, a common approach to constitutional interpretation in the United States sees little consideration being given to the original constitutional provision or the originally understood meaning of that text that is at issue (he sees this as a flawed approach). The starting point of the analysis in these instances will be Supreme Court cases and the new issue would be decided upon the logic expressed using these cases with no regard for how far that may be removed from the original text and understanding. In this instance, he said we may end up with a reduction of democracy because the process does not facilitate social change, but prevents it.

However, using 'originalism' as a concept, one may be able to examine a 200 year old document and exclude modern concepts such as 'affirmative action' because the framers did not speak of it and it was not of their language at the time. Some see danger in the concept that one can *discover* which provisions mean what in the modern context by meditating upon the language used at the time using the tools of history, psychology and biography.[116]

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111 Antonin Scalia , *Common Law Courts in a Civil Law System: the Role of United States Federal Courts in Interpreting the Constitution and Laws*. In: A Matter of Interpretation: Federal Courts and the Law (1997) Princeton University Press, New Jersey: p 16.

112 Ibid.

113 This Paper looks briefly at two leading jurists, one from the United States and the other from Australia, not because their views and methods of interpretation are superior, but because both have used their positions to write extensively on the subject and shine some light on the issues. Many other jurists have been examined in detail over the years.

114 Justice Scalia is a Justice of the Supreme Court of the United States known for his extensive writings on 'originalism' - the concept that a Constitution has a fixed and knowable meaning which is established at the time of passage or ratification.

115 Scalia J. Op Cit.

116 Lawrence H. Tribe, Comment in, A Matter of Interpretation: Federal Courts and the Law (1997) Princeton University Press, New Jersey, p 67.

Whether limits on state actions or impositions requiring state actions result in limiting individual rights is a matter for considerable discussion outside the scope of this paper.

Do the framers of a future Northern Territory Constitution wish to take the opportunity to state on the face of their Constitution how interpretation of the document should be undertaken by future courts?

Original intentions adjudication may be encouraged by a version such as the *Final Draft Constitution*, with its reference to various source documents and contemporary reports and papers. However, just because one is directed to consider the papers and source documents, it should not necessarily be considered an exercise in originalism. The divide between original meaning and current meaning is what is to be bridged in constitutional interpretation. If we believe a Constitution is a living document, we may still use those source documents not constrained by a theory of original text being paramount.

In the Federal Australian experience, constitutional interpretation is a vital part of the role of the High Court and may be considered somewhat differently from the United States.[117] The text of the Australian Constitution - like that of the United States - is written in succinct and occasionally obscure language that is also often ambiguous. Australian cases such as *Cole v Whitfield* demonstrate that even where the meaning of the Constitution appears to be settled, it does not preclude re-examination of the Constitution.[118]

Is constitutional interpretation very different in Australia*? In Ex parte Eastman*[119] the Court, (Kirby J dissenting), adhered to longstanding authority holding that the Australian Territories are, for the purpose of the judiciary, 'disjoined' from the Federation and that Territory courts are not 'federal courts' under the Constitution, even where they are created by the Parliament of the Commonwealth itself.

This was a view with which Kirby J disagreed because of the approach he took to the task of construing the Constitution:

> *Whatever may have been the position in 1901, to treat the Australian Capital Territory and the Northern Territory today as "non-federal" and to view their court systems as outside the constitutionally protected right of appeal to the High Court did not seem to me an acceptable construction of the Constitution, read with the eyes of 1999.*[120]

This example, very close to home, shows us how constitutional interpretation may directly impact upon us here in the Northern Territory.

On the whole it may be said the High Court has not subscribed to the concept of originalism and pure intentionalism. Overall, it has tended to view the Australian Constitution as a living document designed to serve the ongoing democratic government of contemporary Australia.

117 University of Melbourne Law Students' Society, Faculty of Law, 9 September 1999 1999 Sir Anthony Mason Lecture: *Constitutional Interpretation and Original Intent - A Form of Ancestor Worship?* The Hon Justice Michael Kirby AC CMG Available at: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_constitu.htm
118 *Cole v Whitfield* (1988) 165 CLR 360.
119 *Re the Governor, Goulburn Corrections Centre; Ex parte Eastman* (1999) 200 CLR 322.
120 Kirby J. Op Cit.

Professor Cheryl Saunders said it is possible to identify four phases in scholarly debate on the issue in the Australian context.[121] Early on, the High Court rejected seeking an understanding of the meaning of the constitutional text from the debates at the 1890s Conventions, reflecting the then current view that language always had objectively discoverable meanings to be found by careful study of the text and context; and external and historical materials may just obscure the task of interpretation. However, then came *Cole v Whitfield,* where in a unanimous opinion in 1988, the old legal rule was reversed and the books of the Convention debate were read in open court.[122]

Kirby J asked in his 1999 paper if scrutiny of the Convention debates is to be an exercise in discovering the subjective *intentions* of our founders, as Justice Scalia urges, or whether use of those debates is more limited. Whilst it may appear that use of debates in Constitutional Conventions amounted to acceptance by the Australian High Court of originalism, the conclusion of the High Court in *Sue v Hill*[123] demonstrates the way in which Australian constitutional jurisprudence has freed itself from the doctrine of original intent that still has such an influence on constitutional construction in the United States.

Kirby J took the view:

> *A consistent application of the view that the Constitution was set free from its founders in 1901 is the rule that we should apply. That our Constitution belongs to succeeding generations of the Australian people. That it is bound to be read in changing ways as time passes and circumstances change. That it should be read so as to achieve the purposes of good government which the Constitution was designed to promote and secure. The Australian Constitution belongs to the twenty-first century, not to the nineteenth.*

Whether we wish to restrain or limit future courts or liberate them will be a matter for Territorians to decide in the drafting of a new Constitution. What model restrains and what model liberates is a matter for consideration.[124] Territorians are welcome to provide their views on issues of interpretation and the place for such clauses in a Constitution for the future State.

Entrenchment of a Constitution or parts of a Constitution

In 1987 the former Select Committee on Constitutional Development published Information Paper No 2: *Entrenchment of a New State Constitution.*

That Committee took the view that some degree of entrenchment of the whole of the new State constitution was desirable. The Committee further determined that whatever the method chosen for amending the new State Constitution, the method itself should be

121 *Interpreting the Constitution* Cheryl Saunders (2004) 15 PLR 289.

122 Kirby J. Op Cit. To explain the true purposes of the guarantee in s 92 of the Australian Constitution, that trade, commerce and intercourse amongst the States would be "absolutely free", the Justices in *Cole v Whitfield* examined the record of the constitutional debates and the essays on Australian legal history. Scholars, such as Professor J A LaNauze, had earlier analysed those debates.

123 HCA 23 June 1999 The High Court found that under s. 44 of the Australian Constitution the United Kingdom is a foreign power.

124 An article in the Federal Law Review examining case law interpreting the Papua New Guinea Constitution notes that the makers of the Constitution provided for the courts to interpret the Constitution based on the social philosophy of its creation and PNG legislative history. However, the article entitled *Judicial Method and the Interpretation of Papua New Guinea's Constitution* by Peter Bayne FLR 11(2) June 1990 121-166 claims the Court adopted an 'absolutist' mode undermining the framers of the Constitution which had envisaged courts would adopt a 'purposive' mode in interpretation.

entrenched. This was to ensure amendment of the Constitution by some other method cannot be achieved by changing the amendment mechanism itself.[125]

The Statehood Steering Committee has not formed a view on the desirability or otherwise of entrenchment. It has, however, examined the issue of entrenchment *per se.*

The Committee has informed itself of the work of the Select Committee and was provided with a briefing by the Central Land Council (CLC) on Monday 19 June 2006 on the issue of entrenchment.

The CLC was coming from a perspective of protecting the *Aboriginal Land Rights (Northern Territory) Act* under a future State Constitution.[126] Putting aside the reasons for considering entrenchment, the Committee was interested in the views of the Land Council that entrenchment at a State level, is in its view, very uncertain and may not lead to the protections sought.

The CLC advised they had expert advice on the operation of a State Constitution in the context of the *Australia Acts 1986 (Cth)* and as a result of this advice, the CLC took the view a new State Constitution cannot be created that would be at the more 'rigid' end of the scale and required referenda to change it where the entrenched aspect is other than a clause protecting the structures of parliament or government.[127]

The argument was based on a 'higher authority' concept. The CLC took the view the *Australia Act* provides that higher authority as it enshrines principles of Westminster that led to the creation of the existing rather loose and flexible State Constitutions.[128]

Statehood Steering Committee members discussed whether the *Australian Constitution* could therefore be the higher authority, given the *Australian Constitution* allows for the creation of the new State and a new State Constitution would be endorsed as part of this process.

The CLC representatives considered that and took the view that it is difficult to convert a State Constitution into a more rigid document without holding a nationwide referendum under Section 128 of the *Australian Constitution*.

The CLC's advice was that the High Court may be reluctant to protect a process where a parliament has attempted to protect what would otherwise be ordinary law by requiring a referendum when the decision was taken by an ordinary act of parliament rather than the parliament putting the issue itself to a referendum to then protect the law in question. It was suggested that it may have higher protection if the Constitution of the new State was determined by a constitutional convention and endorsed by the citizens of the Northern Territory at a subsequent referendum, but even this may not be enough.

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125 Op Cit. Information Paper No 2 p 3.

126 For more detailed consideration of entrenchment of the *Aboriginal Land Rights (Northern Territory) Act* and other issues concerning Aboriginal Territorians in particular, see Sessional Committee *Discussion Paper No 6 Aboriginal Rights and Issues-Options for Entrenchment*. July 1993.

127 The *Australia Act 1986* at s.6 provides the existing States must make laws within the constraints of their legal capacity - *Notwithstanding sections 2 and 3(2) above, a law made after the commencement of this Act by the Parliament of a State respecting the constitution, powers or procedure of the Parliament of the State shall be of no force or effect unless it is made in such manner and form as may from time to time be required by a law made by that Parliament, whether made before or after the commencement of this Act.*

128 An analysis of the creation of various State Constitutions by the original colonial parliaments with the authority and approval of Westminster can be found in: Twomey Chameleon Crown Op Cit Chapter 1.

The Statehood Steering Committee has since received advice from the Committee's legal advisor concerning the issue of entrenchment in a new State Constitution. This advice has been shared with the CLC and is the subject of ongoing discussion with that organisation. Consideration of the advice is included in this paper for discussion purposes to ensure transparency and open consideration of an important aspect of constitutional development.

The Statehood Steering Committee's legal advisor noted the CLC view that the patriation of the *Aboriginal Land Rights (Northern Territory) Act from* a Commonwealth Act to incorporation in a new State Constitution or in a new State Act did not offer sufficient guarantees of that Act, and the CLC took the view there was some doubt that a patriated *Land Rights Act* could be legally entrenched in a new State Constitution so as to be difficult to amend in the future (the CLC's stated desire). As a result, the CLC suggested that Statehood could be conferred by a national referendum under Section 128 of the Commonwealth Constitution.

The Committee's legal advisor takes a different view. He advocates the use of Section 121 of the Australian Constitution, and advises that it would be legally possible to entrench provisions in a new State Constitution upon a grant of Statehood by that method. The advice stated that the 'manner and form' provisions of Section 6 of the *Australia Acts* have no application to a new State Constitution brought into operation by this method. Section 6 only applies to a manner and form provision that was enacted by the new State Parliament providing a special method of future legislative change. That section has no application to a new State Constitution with entrenched provisions for its future change, the new Constitution necessarily being in operation from the moment of a grant of Statehood.

The advice stated that entrenchment of provisions in a new State Constitution was legally possible by a combination of sections 106 and 121. This would be assisted if the new Constitution came into operation immediately prior to the grant of Statehood.

This analysis appears to concur with the view of by Professor Colin Howard in his memorandum of advice of 29 June 1989 included in the second edition of Information Paper No 2[129] which was published in 1995.

Both Professor Howard and the Statehood Steering Committee's legal advisor Mr Nicholson concluded the degree of protection under a new Northern Territory State Constitution would likely to be greater where the protections under the Constitution were expressly included in the new Constitution at the establishment of the new State.[130]

The Statehood Steering Committee is interested in the views of Territorians about the issue of entrenchment.

First, do Territorians take a view that certain aspects of law should be entrenched and, second, if that is the view, what sorts of laws should be entrenched? Any comments on the technical issue of whether entrenchment is possible or not are also welcome. At this stage, the Committee accepts the advice that valid entrenchment is a possibility under a new Northern Territory State Constitution.

129 Originally published in 1987 and re-published in 1995 to include Professor Howard's advice.
130 Op Cit. Information Paper No. 2 p 16.

Aboriginal Customary Law

This paper gives some consideration to the issue of Aboriginal customary law and whether Aboriginal customary laws should be recognised within the Northern Territory legal system through its Constitution.

The issue was examined by the Northern Territory Law Reform Committee[131] as well as the former Sessional and Select Committees as demonstrated in the *1996 Final Draft Constitution* and the *1998 Statehood Convention Constitution*. It is also given consideration in the *Indigenous Strategy* document outlined in Part Two above.

Recently, the Law Reform Commission of Western Australia published a *Final Report on Aboriginal Customary Laws* which may be of assistance to us in the Northern Territory when considering these issues.[132]

During 2006, a number of media reports focused on issues regarding customary law including examination of allegations that customary law has resulted in abuse.[133] It is not the intention of this paper to revisit these allegations. However, legislative developments in the Commonwealth and Northern Territory over recent years must be considered in the context of constitutional development and customary law in order to understand the past and current views on the issue.

In 2004, the Northern Territory Government introduced the *Sentencing Amendment (Aboriginal Customary Law) Bill*[134] which provides for a regime to be complied with when an offender seeks mitigation of their sentence based on the offence being related to an act of Aboriginal customary law.

The *Sentencing Amendment Act* requires a party to give notice if they seek to submit information on customary law, or the views of members of an Aboriginal community regarding an offence, and for that information to be provided by way of sworn evidence, affidavit or statutory declaration. The Government promoted this as designed to improve the quality and reliability of information on customary law and give the other party an opportunity to provide information about differences in opinion about the practice of customary law as it relates to the particular case before the court.

On 13 October 2004, the Attorney-General said in his second reading speech introducing the Bill:

> *The purpose of this Bill is to ensure that courts are provided with fully tested evidence about relevant customary law issues when they are sentencing an offender. The Bill implements one of the Government's commitments made in response to the Northern Territory Law Reform Committee's Inquiry into Aboriginal Customary Law. The Government made a commitment to developing mechanisms to ensure that where customary law is relevant in a case, the courts have access to fully tested evidence about the relevant customary law issues.*

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131 *Report of the Committee of Inquiry into Aboriginal Customary Law*, Northern Territory Law Reform Committee 2003.

132 *Aboriginal Customary Laws Discussion Paper Project Number 94* Law Reform Commission of Western Australia December 2005 and the *Final Report* September 2006.

133 See reports such as - *One Law for All? That'd Be a Crime* Janet Albrechtsen The Australian 31 May 2006; *Australian Law Should Apply to All: Brough* - Kerry O'Brien ABC Television 730 Report 23 May 2006 Transcript online at www.abc.net.au/7.30/content/2006/s1645722.htm; *Get Violent Men Out Says Brough*. The Age Russell Skelton and Lindsay Murdoch 24 May 2006.

134 Which became the *Sentencing Amendment (Customary Law) Act 2004* No 1 of 2005.

This Bill provides a formal mechanism for raising issues relating to customary law, or the views of members of an Aboriginal community, when a court is sentencing an offender. It has long been an accepted practice for courts in the Northern Territory to accept and take into account evidence of relevant customary law when passing sentence on an Indigenous person. Aspects of customary law and attitudes of members of a particular Indigenous community towards an offence or an offender are often material facts that a court must take into account in the sentencing process.[135]

The Northern Territory Opposition did not vote against the legislation but held a contrary position, stating that customary law should not be available to mitigate sentence.[136] In November 2006, the Attorney-General, the Hon. Syd Stirling MLA in response to an Opposition Private Members Bill on customary law had the following to say:

This government believes courts must be free to take into account every relevant consideration in sentencing in order to deliver an appropriate sentence. Otherwise sentencing simply becomes a mechanical, thoughtless exercise along the lines of the mandatory sentencing that the CLP is so fond of, so that it administers exactly the same sentence on everyone convicted of the same crime regardless of how the individual's personal circumstances or beliefs were affected in the committing of the crime. The community recognises, for example, that specific forms of abuse or taunting behaviour toward a deeply religious person, for example, could lead to an offence that would not have occurred if the same abuse had been directed at a non-religious person. It is, therefore, a pretty fundamental principle of fairness that a person's religious or cultural beliefs ought be taken into account in such situations - not to justify or excuse the crime, but as a factor in sentencing.

In the Territory, if an individual judge errs and hands down a manifestly inadequate sentence as a result of their consideration of any offender's cultural practice or belief in customary law, it has invariably been corrected on appeal. One example is the decision of the Court of Criminal Appeal in the Yarralin case.[137]

The Northern Territory Law Reform Committee's Inquiry into Aboriginal Customary Law at Recommendation 5 recommended that in-so-far as the concept of 'promised brides' exists in Aboriginal communities, the Government set up a system of consultation and communication with such communities to explain and clarify government policy in this area.

The Government's response to this recommendation was:

The Government supports improved communication and education about current law and policy in this area. The Government's position on customary marriages is that those marriages should continue to be recognised but they cannot breach criminal or general law. Under the Criminal Code, intercourse with a child under 16 years is a criminal offence without exception. The legal protections afforded to children from physical and sexual abuse cannot be affected or diminished by customary marriage.

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135 Northern Territory Legislative Assembly Hansard *Sentencing Amendment (Aboriginal Customary Law) Bill* Serial 254.

136 Three private members bills have been put forward by the Member for Araluen Ms Jodeen Carney MLA seeking to prohibit consideration of customary law in mitigation. See in particular the *Sentencing Amendment (Aboriginal Customary Law) Bill 2005* and a previous almost identical version introduced in August 2003.

137 Northern Territory Legislative Assembly Hansard 29 November 2006.

> *The Government will look at mechanisms which can be introduced to ensure that where customary law is relevant in a case, the courts have access to fully tested evidence about the relevant customary law issues. In addition, the Government will also consider mechanisms to ensure customary law cannot be used by defendants to mitigate their responsibility for offences where this would conflict with the human rights of victims. It is critical to the proper functioning of the justice system that, when customary law is raised as an issue in any criminal or civil case, the court is able to receive full and accurate evidence on that issue and can only take it into account consistent with human rights standards.*[138]

The *Sentencing Amendment (Aboriginal Customary Law)* Act was designed to implement the second part of the Government's response to Recommendation 5.

In *Munungurr v R*[139] the court held that it was no longer satisfactory for information about an Aboriginal community's views and proposed tribal punishment to be admitted in an informal manner. The court said that more information ought to have been put before it by way of detailed statements in the form of affidavits or statutory declarations, served upon the Crown in time for the prosecution to make its own enquiries, to decide whether to call evidence of its own or require the deponents to be made available for cross-examination. The Government relied upon this as the rationale for their 2004 legislative response.

The Government took the overall view that in contemporary Aboriginal society there are differences in terms of practice and support for aspects of traditional or customary law and it is important to provide opportunities for different perspectives to be presented to the court.

The Northern Land Council vocally opposed the law stating it was in their view discriminatory and offended the Commonwealth *Racial Discrimination Act*. The Territory Government countered during the debate that advice received from the Solicitor-General indicated the law does not contravene the *Racial Discrimination Act*.

In 2006, the Commonwealth Government introduced legislation to amend the *Crimes Act (Cth) 1902* to rule out cultural practice as a factor in sentencing. The Commonwealth Act has been criticised as a 'knee-jerk reaction' to recent high-profile reports from Central Australia.[140]

The *Crimes Amendment Act 2006* amends current bail and sentencing provisions of the Crimes *Act 1914* (Commonwealth) so that a court determining bail:

> *must not take into consideration any form of customary law or cultural practice as a reason for excusing, justifying, authorising, requiring or rendering less serious the alleged criminal behaviour to which the alleged offence relates, or the criminal behaviour to which the offence relate.*[141]

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138 Northern Territory Government Response to the Report of the NT Law Reform Committee Inquiry into Aboriginal Customary Law: *Toward Mutual Benefit November* 2003.

139 (1994) 4 NTLR 63.

140 *Knee-Jerk Response Will Create Injustice for Aboriginal Defendants* Tom Calma Sydney Morning Herald October 3, 2006.
See also the views of the Australian Human Rights and Equal Opportunity Commission opposing the passage of the Bill: http://www.hreoc.gov.au/legal/submissions/crimes_amendment.html

141 *Crimes Amendment (Bail and Sentencing) Bill 2006* Clause 15AB (b).

and a court may not consider:

> *'cultural background' on sentence.*[142]

It is relevant to consider this legislation because, whilst the Statehood Steering Committee takes the view the content of a Northern Territory State Constitution must be developed and agreed to by Territorians, the attitudes of the Commonwealth in this regard are worth noting. The Commonwealth will have ultimate power of veto or approval over the draft State Constitution prior to the admission of the Northern Territory as a new State. Whether this is explicit in terms and conditions negotiations between the Territory and Commonwealth governments or whether it is required at a later time is not yet known.

The Commonwealth has not moved to overturn Northern Territory sentencing laws, and, therefore, the Commonwealth laws will only apply to breaches of Commonwealth criminal law. However, the Commonwealth has indicated a desire for all State and Territory jurisdictions to remove any ability to cite customary law to mitigate sentence.

The Commonwealth Minister Assisting the Prime Minister on Indigenous Affairs foreshadowed a cooperative attempt to ban consideration of customary law on ABC Television in May 2006:

> *Well, it's quite simple, Kerry. What you do is you have the States and the Territories agree that they will legislate that using such defence, or using it to lessen a sentence as a mitigating circumstances, is actually - is unlawful. In other words, you don't allow not just Indigenous people, not Australian Indigenous people, but any group to use what they would claim to be a culturally sensitive or culturally traditional practices which involve serious crime, serious pain to other people, they will not be able to use that as a defence.*[143]

It is important to understand the Northern Territory legislation does not permit the use of customary law as a defence. Rather, upon a finding of guilt, a defendant may seek to explain why their reliance or belief in customary law should be considered by the court when the court delivers its sentence. This may well determine whether a convicted person goes to jail or for how long. Law and culture have been long-standing factors amongst a whole range of factors that can be considered upon sentence. Whether or not this is desirable is a matter for individual Territorians to consider.

The Northern Territory has not agreed to amend or repeal its 2004 sentencing legislation.

The 1996 *Final Draft Constitution* sought to provide recognition for the first time of current Aboriginal customary law as a source of law in the Northern Territory. The concept allowed for continued implementation and enforcement amongst Aboriginal people by traditional Aboriginal methods and pursuant to court decisions. The 1996 *Final Draft Constitution* provided two alternatives for consideration. These are considered in further detail below. As outlined in Part Two, the Statehood Convention in 1998 resolved that the new Constitution should provide that Aboriginal customary law is recognised as a source of law to be enacted as the law of the State within a period of five years.

In 2003, the Northern Territory Law Reform Committee said at Recommendation 11 the Statehood Convention resolution that Aboriginal customary law be recognised as 'a

142 *Crimes Amendment (Bail and Sentencing) Bill 2006* Paragraph 16A(2)(m).
143 7.30 Report Op Cit.

source of law' should be implemented. This recommendation was previously referred to the Ninth Legislative Assembly Standing Committee on Legal and Constitutional Affairs. However, the Assembly lapsed prior to the Committee reporting on the issue, a further reference has since been provided to the Committee on this issue.

Territorians are invited to consider the models outlined in this paper and provide their views on the issue of including customary law as a source of law in a future Northern Territory Constitution.

A Bill of Rights?

In Part One of this paper, we briefly considered the notion of a constitution being 'counter-majoritarian' - a binding document that may inhibit the will of the majority by its entrenchment of certain rules and principles. A Bill of Rights similarly faces such a dilemma. It is often stated that Australia does not require a Bill of Rights because the parliaments and the courts are effective places to ensure the protection of individuals' rights, but in many jurisdictions this argument has been rejected. If human rights matter,[144] then we need to discuss this issue in terms of constitutional development.

Some of the models outlined in this paper consider issues with regard to specific rights. As mentioned, a Northern Territory Bill of Rights was considered by the Sessional Committee on Constitutional Development in Discussion Paper Number 8 published in March 1995.

Since the publication of that paper, various Australian jurisdictions have held inquiries and initiated some form of charter of rights. New South Wales in 2001 determined not to pursue a Bill of Rights.[145] The ACT enacted and commenced a Charter of Rights in mid-2004, and in Victoria the *Charter of Human Rights and Responsibilities Act 2006* was passed on 25 July 2006, with effect from January 2007.[146]

The Australian Government is a party to a number of United Nations covenants and conventions on human rights. For example, the *International Covenant on Political and Civil Rights* has some implementation in Commonwealth legislation under the *Human Rights and Equal Opportunity Commission Act 1986*.

The Commonwealth has the capacity to use its external affairs power to implement laws in relation to any of the instruments it has become a party to in the treaty and United Nations context. Under the external affairs power (section 51 (xxix)) of the Australian Constitution, the laws of any State or Territory that are inconsistent with Commonwealth law that arose from this power will be overridden. There is, however, no overarching Australian Bill of Rights. A campaign for a human rights Act for Australia was launched in

144 In a speech to the Senate Occasional Lecture Series on 17 November 2006, Dr Simon Evans examines the role of parliaments in protecting human rights in Australia and cites surveys which indicate 95% of Australians consider rights either 'important or very important'. Evans: *Australian Parliaments and the Protection of Human Rights* Senate Occasional Lecture Parliament House Canberra. Available at: http://www.aph.gov.au/Senate/pubs/occa_lect/transcripts/171106/index.htm

145 New South Wales Legislative Council Law and Justice Committee Report 17 *Report in Relation to the Inquiry into a NSW Bill of Rights* Tabled 3 October 2001 available at: http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/c91ccf757cb06189ca256e500038888d/8569eddf131da5dbca256ad90082a3d3!OpenDocument

146 For copies of these Acts see www.austlii.edu.au Further background and information on the process in Victoria is available at - www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Your+Rights/Human+Rights/

2006 by an organisation called *New Matilda*.[147]

The United States Bill of Rights[148] constitutes the first 10 amendments to the United States Constitution coming into effect in December 1791. It is often the case that many Australians can cite examples of rights under the US Constitution more than any other human rights instrument.[149]

Many commentators criticise the United States experience on the basis that citizens may invoke their rights in a litigious manner rather than seeking to resolve disputes in a more constructive or less litigious manner.[150]

Human rights issues may be the responsibility of either the Commonwealth or State governments. Issues such as criminal law procedure and sentencing are often state responsibilities and have a daily impact on peoples 'rights'.[151]

The 1995 Discussion Paper provides a brief background and the position at that time. With reference to the *Magna Carta* and the *Bill of Rights 1688* neither of which have an entrenched constitutional status and both of which have limited contemporary application in Australia, it may be time for the Northern Territory to consider its position in terms of constitutional development and whether we wish to pursue a Bill of Rights.

Interestingly, the last two states to be admitted to the United States, Alaska and Hawaii, included a Bill of Rights in their new state constitutions.

The former Sessional Committee Discussion Paper stated:

> *Considerable controversy has surrounded the role of the USA Supreme Court in interpreting some of the provisions of the Bill of Rights, particularly those concerning rights of free speech and freedom of the press, the right to bear arms, provisions as to search and arrest and freedom of religion. In part, these concerns stem from the particular formulation of some rights considered appropriate over 200 years ago, but now of questionable value.*[152]

A Bill of Rights may become part of a Constitution or be a stand alone instrument. Both the ACT and Victoria have chosen to enact charters of rights as legislation, which do not give individual citizens a right to litigate. Rather, they provide for the legislature to consider all new legislation in light of the requirements of the charter. Should the legislature decide to debate and pass legislation that does not comply with the charter of rights this is permitted so long as it is well explained through the debate process and the appropriate course of action by way of Attorney-General's approval is followed.[153]

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147 See their website at: http://www.humanrightsact.com.au/

148 Many US States have their own Bills of Rights, some more far reaching than their federal Bill of Rights.

149 The United States Bill of Rights comprises: freedom of speech, freedom of the press, freedom of assembly, freedom of religious worship, and the right to bear arms, preventing unreasonable search and seizure, cruel and unusual punishment, and self-incrimination, and guaranteeing due process of law and a speedy public trial with an impartial jury.

150 New South Wales Legislative Council Law And Justice Committee Report 17 Op Cit.

151 Simon Evans Op Cit. The article looks at recent legislative amendments in NSW and Victoria that directly restrict 'rights' in the name of popular law making and 'tough on crime' arguments.

152 Sessional Committee on Constitutional Development Discussion Paper No 8 *A Northern Territory Bill of Rights? March 1995 p 14.*

153 ACT *Human Rights Act 2004* Part 5: *Scrutiny of Territory Laws.*

At a seminar examining the introduction and operation of the ACT *Human Rights Act* held in June 2005, a number of presentations were provided that have relevance to our consideration of constitutional development and rights in the Statehood consultation process.

The Seminar heard that compatibility certificates issued by the Attorney-General of the ACT upon the introduction of new legislation are fairly simple instruments to state an opinion that the proposed law is compatible. The New Zealand approach is considered more rigorous as the certificates required are more detailed. New Zealand has had a Bill of Rights for more than 18 years.

Section 28 of the ACT Act allows the ACT Government to determine its limits rather than taking any policy analysis role itself. By way of comparison, in the UK, a Joint Committee determines a 'risk of incompatibility' test which has a role of educating the parliament. The ACT Act does not make any changes to rights already recognised at common law.

The Hong Kong Bill of Rights directly incorporates the *International Covenant on Civil and Political Rights* as a domestic law of Hong Kong justiciable in the local courts.

There is no remedy section in the Australian models to date. Whether the courts will need to evolve meaningful answers to what is at stake, for example, order a stay of proceedings or exclude evidence or award costs, is not clear. There is no provision allowing for recovery against the ACT where ACT law is incompatible with a citizen's 'rights'.

In *Simpson v. Attorney-General,*[154] the New Zealand Court of Appeal found an implied right in New Zealand to sue the state for breaches of the law – implacably contradicting what was said in the Parliament when the New Zealand law was being debated. The dilemma of legislation as a host for litigation is a major issue of debate in this context.

The South African Constitution has an extensive remedies clause, whereas in the Australian examples so far, there is no capacity for courts to strike down 'invalid' legislation only the capacity to issue a certificate of incompatibility.

'Incompatibility' is a difficult 'remedy' to sell to potential litigants because practitioners have no incentive to be an expert on this kind of law if it will not assist their client with an immediate result. Obtaining a 'win' by achieving a certificate of incompatibility issued from the Court to the Parliament is of little real value to a client.

In the case of *Coco v. R,*[155] the High Court said any legislation's intention to interfere with common law rights must be very specific.

It is much less likely the ACT *Human Rights Act* will succeed where the UK did in terms of grounds for remedies. The ACT is small and bound by the High Court, particularly with regard to common law, which is a single common law for the Commonwealth.

The Victorian *Charter* is intended to play an important role in policy development in government, in the preparation of legislation, in the way in which courts and tribunals interpret laws and it should make government more accountable.

154 (1994) 3 NZLR 667.
155 1994) 179 CLR 427.

The Victorian Committee recommended the *Charter* protect rights most important to an open and free democracy - such as the rights to expression, association, the protection of families, and to vote. These are contained in the *International Covenant on Civil and Political Rights* 1966, to which Australia is a party. Once again, the ICCPR was the template as it was for the ACT model. However the Victorian Committee examining the issue noted some of the rights in this instrument need to be modified to make sure that the charter best matches the aspirations of Victorians.[156]

Elected representatives will continue to make decisions on behalf of the community about matters such as how best to balance rights against each other. The power of parliament is protected to override the rights listed in the charter where this is needed for the benefit of the community. Parliament, not the people, is the apex in the Westminster (Australian) system.

During 2007, the Charles Darwin University Symposia Series will consider this issue, inviting key experts in constitutional development and rights issues to an open forum for all Territorians to participate in the process of consideration of a Bill of Rights. Territorians who have taken part in the symposia series may be inspired to submit their views to the consultation process in this options paper.

The question as to whether the Northern Territory either as a new State or separately from that process should adopt a Bill of Rights is one that is incidental to this paper. Whether the people of the Northern Territory feel there is a need to entrench rights to ensure they do not suffer from undue interference of government in their daily lives will be a matter for Territorians to consider.

It is important to remember that mere enactment of legislation protecting rights does not in and of itself create a culture of human rights. The struggle to achieve human rights is not won merely by the passage of a human rights Act. It will ultimately depend upon the parliamentarians and the governments administering them,[157] particularly where there are restraints on government action that government may be able to circumvent as in the ACT and Victorian models outlined in this paper above.

It is envisaged the Committee will receive submissions on this issue both for and against. These may be considered at a future constitutional convention or resolved by the government of the day beforehand if it chose to enact a Bill of Rights separate from the constitutional consideration process.

Bicameralism

In November 2005, the Premier of South Australia the Hon Mike Rann said:

> *It's time to modernise our Parliament so it reflects the demands and expectations of a confident state as it prospers and grows into this 21st century... Let's face it; in my view the upper house has become a relic of time in our democratic history that is long gone. It is past its use by date.*[158]

156 *Rights Responsibilities and Respect – The Report of the Human Rights Consultation Committee* Victorian Government Justice Department 2005 Available at: http://www.gtcentre.unsw.edu.au/resources/cohr/victorianCharterofHumanRightsandResponsibilities.asp

157 See Simon Evans Op Cit in his Conclusion.

158 Jordan Bastoni *Does the South Australian Legislative Council Have a Future?* Democratic Audit of Australia Discussion Paper 29/10 (October 2006), Australian National University http://democratic.audit.anu.edu.au p 2, citing AAP Newswire 24 October 2005.

On 23 March 1922 an Act was proclaimed by King George V abolishing the 63-year-old Queensland Legislative Council. Its abolition came about after the then Labor Government of Queensland elevated 30 appointed members to its upper house in order to prevent obstruction by political opponents and bring about its abolition.[159]

In March 2006, discussion commenced about resurrection of a Legislative Council in the Queensland Parliament[160] arising from a view that Queensland Governments of all political persuasions have been able to dominate a unicameral Parliament over which they have virtually complete control.

The democratic process of electing our rulers may not be a safeguard from the excesses of a government:

> *Electors will vote for tyrants who give them prosperity, peace and/or glory, or the illusion thereof. Democratic electorates are also careless of corruption and malfeasance in government unless and until it begins to affect their personal circumstances.*[161]

One of the arguments for a bicameral system relates to the number of seats a government can win on single member electorates with less than 50% of the primary vote and therefore form majority government. Whilst this was not the case at the 2005 Northern Territory election, where the Government was returned with 51.9% of the primary vote, at the 2006 Queensland election with just 46.9% of the primary vote, the Labor Government secured 59 of the Legislative Assembly's 89 seats to obtain a fourth term in office, not because of gerrymander but as a result of an electoral system based on single-member constituencies.

In the Northern Territory, the Opposition secured 35.7% of the primary vote in the 2005 election yet holds just four (16%) of the 25 seats in the Legislative Assembly.

This brings us to consideration not just of bicameralism, but other forms of electoral reform such as multimember or mixed member proportional electorates. The 1996 *Final Draft Constitution* gave consideration to this option as outlined in Part Two of this paper.

Bicameralism is one way of establishing a division of power, but is it the best way? Looking at the principles in Part One of this paper such as an independent judiciary with guaranteed tenure and aspects of our current system such as federalism, responsible government, a powerful Constitution with an independent head of state, do we have enough checks and balances?

It is the contention of the Clerk of the Senate that the carefully planned scheme of those he calls the "ancient founders" has been frustrated by recent examples of legislation being devoted to retaining power, rewarding supporters and punishing opponents leading to the conclusion that bicameralism is a political safeguard.[162]

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159 See National Archives of Australia Documenting a Democracy. Available at http://www.foundingdocs.gov.au/item.asp?dID=63

160 Nicholas Aroney (the Brisbane Institute) *An Upper House for Queensland?* 29 March 2006. Available at: http://www.brisinst.org.au/resources/brisbane_institute_aroney_upperhouse.html

161 Harry Evans, Clerk of the Senate: *The Case for Bicameralism* paper presented to the Centre for Public International and Comparative Law, University of Queensland, Brisbane 21 April 2006 p 1.

162 Ibid p 4.

Even with bicameralism, however, there is the chance that the upper house would be 'captured' by the government of the day. To overcome this, election by proportional representation may be required to establish an upper house with the means to exercise a division of power. Clerk Evans notes that government with effective control of the rest of the system are not enthusiastic about limiting their own power. Some commentators may believe this is what happened in 1998 with the revision of the *1996 Final Draft Constitution* into the *1998 New State Constitution* document deleting the proposals concerning electoral reform where consideration had been given to replacing the current system with multimember electorates.

In South Australia, the Government does not enjoy control of its Legislative Council. Governments are sometimes fond of saying that they can be judged at the ballot box and that a house of review is 'undemocratic'. Yet in the South Australian situation, since the Legislative Council members are elected on a proportional system, there is an argument it is more democratic because unlike single member electorates, it rewards parties proportional to the overall vote received.

This paper provides Territorians another chance to consider the issue of bicameralism[163] and any other electoral reform that may be suggested in the constitution making process.

Concluding Notes

A Northern Territory State Constitution will require some fixed elements as outlined in Option One.

The Statehood Steering Committee has not taken a position on the kind of Constitution the Territory should have. Some individual members have expressed a view that a minimalist version will work best and decrease the likelihood of dispute and litigation and hopefully assist by making interpretation issues less difficult; others have indicated the opportunity for specific clauses of recognition, intent and/or protection are vital from their viewpoint.

It is up to Territorians to decide the model with which they are most comfortable. This paper with its various options is being released for community discussion and is expressly designed for community involvement and debate.

Individuals, groups or organisations may wish to comment on issues raised in Part Two examining some of the models or discuss in detail some of the features discussed in Part Three. Constitutional issues that may not be covered in this paper may be brought to the attention of the Statehood Steering Committee as well.

Your participation is critical to the future of accountable government in the Northern Territory. Territorians today have an opportunity to create an enduring legacy in the form of good government for all future generations.

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163 For examples of previous consideration see Erwin Chlanda. A*n Upper House for the Territory Parliament*? Alice Springs News April 1998 reporting on the formation of an Alice Springs chapter of the group: *Territorians for Democratic Statehood*.

To comment on this paper please contact the Statehood Steering Committee at GPO Box 3721 Darwin 0801, on the web at www.statehood.nt.gov.au, by email at statehood@nt.gov.au or by telephone on toll free 1800 237 909 Submissions may be as short or as detailed as you like. All submissions will be made public on the Statehood Website unless otherwise specified by the author.

In the interests of accessibility, the Committee welcomes submissions from all interested parties. If an interpreter/translator is required, this can be accommodated. To discuss options for making a submission by audio, video or other means, please contact the Committee Office.

Arising from the release of this paper and receipt of submissions, it is envisaged a consolidated paper with final recommendations will be prepared to take to a future Constitutional Convention.

All comments and submissions should be received by the Office of the Chairman, Statehood Steering Committee by close of business Monday 31 December 2007.