LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Sessional Committee on Constitutional Development

Foundations for a Common Future:

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

Volume 4 [2] —
Written Submissions Received

(Submissions 71 to 141)

November 1996
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PLEASE NOTE:

• The Written Submissions in this Volume have been edited for consistency purposes. The substantial content of the Submissions have not been changed. In most instances the enclosures sent with the Submissions have been omitted.

• Copies of the Original Submissions (including enclosures) can be viewed either at the Table Office, Northern Territory Legislative Assembly or the Northern Territory Library, Parliament House, State Square, Darwin NT 0800.

   Telephone (08) 8946 1537; Facsimile: (08) 8941 2558
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PARLIAMENT OF AUSTRALIA . THE SENATE

SENATOR CHERYL KERNOT
Australian Democrat Senator for Queensland

November 20, 1991

Rick Gray
Executive Officer
Committee on Constitutional Development
GPO Box 3721
Darwin NT 0801

Dear Mr Gray

Thank you for inviting me to provide a submission to your Committee on the issue of Citizens' Initiated Referenda. This is an issue which has been strongly supported by the Australian Democrats right from our inception in 1977. When the Democrats were founded, a major aim was to provide greater participation for the general public in the democratic process, and our commitment to this has certainly not diminished.

Rather than outline the arguments in favour of Citizens' Initiated Referenda myself, I have provided a copy of the Democrats' current policy on the matter and some material by former Senator Michael Macklin which puts forward the case in favour of this issue. I note the Discussion Paper mentions the actions of former Democrat Senators in promoting this issue, so I assume you already have access to some material outlining the Democrats' position. However, please don't hesitate to contact me if you would like more information.

It is pleasing to see that the Northern Territory Parliament is seriously considering this important issue, and I hope the Committee is able to show the way for the rest of Australia in being the first Australian Parliament to adopt this democratic procedure. From correspondence I have received from a wide range of people, I am sure that introducing CIR would be quite popular with the community.

I wish the Committee well in its deliberations.

Yours sincerely

Cheryl Kernot
Australian Democrat Senator for Queensland
1. Public petitions are largely ignored, and the means of accepting and acting on them must be improved. People should have every opportunity of using this method of gaining access to Parliament. No government has a mandate on every issue, and referenda should be used more often to register public opinion on major issues.

2. If 2% of the population petitions for a referendum on an issue, the referendum be held, and a proposal passed at such a referendum may only be rescinded by another referendum.

3. A parliamentary committee will be obliged to examine any matter when petitioned to do so by 0.5% of the population (or by two Regional Governments when these are established).

4. Parliament will respond to petitions, other than those dealt with by referendum or by referral to a committee, either publicly or by letter to each petitioner.

5. Every petition will be brought to the attention of the relevant committee, which may seek further information from the petitioners or may investigate the matter directly.

6. If the use of rapid communications technology becomes effective and economical for the purpose, referenda will be used to register public opinion on significant issues if and as they arise between elections, or are best decided apart from elections or other issues.

7. Otherwise, to reduce expense, referenda will be held concurrently with general elections, except that where a petition gains the support of 2% of the population, then the required referendum will be held forthwith if the due date for the next election is more than 12 months away.

8. An independent Referendum Commission will be established to be responsible for:
   - wording the referenda.
   - preparation of the related documents.
   - inviting and noting submissions from the public on the wording of the referenda.
   - presenting options where public opinion requires it.

For further information contact:
National Secretariat
Suite 1, 3rd Floor, 10-12 Brisbane Avenue, Canberra, 2600
(062) 731059, or

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INTRODUCTION

If democracy is based on the right of individuals to vote for their political representatives, then the right of individuals to participate in the determination of the legislation which governs them (legislative process) is of equal importance.

The Australian Democrats believe that citizens should have the right to initiate legislation and to petition for the alteration of the Constitution. This right which is known alternately as "popular," "citizens," or "electors' initiative" must be enshrined in the Constitution.

The Democrats have had legislation proposing a system of popular initiative before the Federal Parliament since 1980. Former New South Wales Senator Colin Mason introduced the first Constitution Alteration (Electors' Initiative) Bill into the Senate on 10 September 1980, with the aim of promoting debate on the subject and seeking support for the proposal.

Since this time there has been widespread community and political debate about the proposal which has resulted in a considerable level of support and understanding. This is best reflected in a recommendation of the Advisory Committee on Individual and Democratic Rights in its report to the Constitutional Commission in late 1987.

The Advisory Committee recommended that:

There should be provision in the Constitution for voter-initiated referendums for constitutional change. Ultimately it is the people of Australia, voting at a referendum who have control of their Constitution. So if a substantial section of the population (say 500,000 voters) are prepared to petition for constitutional change, the proposed change should be submitted to a referendum. The mechanics of such referendums would be a matter for consideration by the Federal Parliament.

The Committee recommended that consideration of voter-initiated legislation and legislative veto should be deferred until there has been an opportunity to consider the operation of voter-initiated constitutional referendums.

The Australian Democrats believe that electors' initiative should extend to petitioning for the introduction of legislation as well as for the alteration of the Constitution. The mechanics of this process is outlined in my Constitution Alteration (Electors' Initiative) Bill 1987.
Under the provisions of this Bill, if five per cent of voters in Australia (currently over 500,000 people) petition for a law to come into effect or an alteration of the Constitution to take place, then there must be a national referendum on this issue within a period of twelve months.

In this bicentennial year 1988 the time is ripe for the people of Australia to decide if there should be provision for electors' initiative in the Constitution. The Federal Government could and should capitalise on the widespread community understanding of and support for electors' initiative by including this proposal on the agenda for the national referendum to be held later this year.

Currently Australia is very much a country with an "elected dictatorship". All legislative power rests with the Government or more specifically the Cabinet, and the Prime Minister determines if and when there is to be a national referendum and on what issues it is to be held.

Overseas experience shows that popular initiative has worked successfully over a long period of time. However, whenever it has come up for debate in the Federal Parliament, the Labor, Liberal and National Party members have combined to vote against this Democrat proposal.

This opposition to the concept of electors' initiative is based on a fear that political power would be lost and reflects a paternalistic "we know best" attitude. Surely however, if people are encouraged and indeed required by law to vote for their representatives, they should be entitled to the right of active participation in the legislative process?

Apathy and a lack of knowledge about the government of Australia - its institutions and practices - are perhaps the major reasons for the low morale which afflicts daily political life in this country. This combined with the few possibilities for participation in politics, has created a situation which threatens the viable, vigorous political democracy which for so long was a matter of national pride and international envy.

The encouragement of greater public participation through the introduction of popular initiative would go a long way to improving the current political climate. The Australian Democrats believe that the cure for the ills of democracy is more democracy, not less.

I would be very interested to receive comments and further information about popular initiative, and will be happy to distribute copies of this booklet upon request. All information and enquiries should be directed to:

Senator Michael Macklin, 8 Lockhart Street, Woolloongabba 4102, Qld. Australia- Telephone (07) 3918899; OR

c/- Parliament House, Canberra 2600, ACT Australia - Telephone (062) 72 7595
CHRONOLOGY SO FAR

Chronology of the Australian Democrats' Constitution Alteration (Electors' Initiative) Bills

22 August 1978 - Senator Colin Mason (Australian Democrats, NSW) in his Maiden Speech moved a motion to have the following matter referred to the Senate Standing Committee on Constitutional and Legal Affairs:

"The desirability and practicability of consulting the Australian people on whether or not they wish to have the right to initiate Federal legislation."

10 September 1980 - Senator Colin Mason introduced the Constitution Alteration (Electors' Initiative) Bill into the Senate.

18 September - Senator Mason's Second Reading Speech on the Bill.

10 June 1981 - Senator Colin Mason moved a Notice of Motion that he will be seeking leave to introduce his Electors' Initiative Bill which is "for an Act to alter the Constitution so as to vest in the electors power to propose laws and to approve or disapprove such proposed laws".

24 September 1981 - Senator Michael Macklin (Australian Democrats, Qld.) speaking in the Senate:

"Citizens in this land should never be considered mere observers of the Constitutional Convention. These are the basic rules which govern our democracy and they are so important and fundamental that citizens .... should be active participants in the formulation, in the debate, and even in the eventual drawing up of proposals for rules.

That is why the Australian Democrats in this House and outside have pushed for the notion of having a citizens' initiative brought forward in this country to allow citizens to intrude themselves into the political arena at whatever time they choose, whether that is acceptable to politicians or not."

20 May 1982 - Senator Colin Mason introduces his Constitution Alteration (Electors' Initiative) Bill 1982, which is a rerun of his 1980 Private Members Bill. His Second Reading Speech to the Bill is given.

22 April 1983 - Senator Macklin moved to have the Constitution Alteration (Electors' Initiative) Bill 1982 restored back onto the Notice Paper.

24 May 1983 - Senator Macklin speaks on the Constitution Alteration (Electors' Initiative) Bill 1982 and says that the system of citizens' initiative is the best form of constitutional review, as opposed to having the executive determine what should be altered in the Constitution.
19 May 1983 - The Senate debates cognate Bills to alter the Constitution including Senator Mason's Constitution Alteration (Electors' Initiative) Bill 1982.

Liberal Senator Peter Durack said: "The Opposition is opposed to such a proposal because it would lead to quite fantastic and fundamental change in not only our parliamentary democracy but responsible government."

12 October 1983 - Senate debate on 9 cognate Constitution Alteration Bills including Senator Mason's Electors' Initiative Bill.

Labor Senator (and current Environment Minister) Graham Richardson, described the Bill as "misguided populism". He suggested that if this sort of proposition is carried, "the programs of governments could easily be thrown into disarray".

By contrast, Labor Senator Michael Tate referred to the referendum process as "the highest expression of our democracy". Then he went on to suggest that the proposal for electors to be able to initiate the referendum process is "misconceived and comes from a completely different political culture".

13 October 1983 - The Attorney-General Senator Evans said the Bill if enacted would constitute "a paradise for single-issue loonies in this country", and that the proposals "ought to be better dealt with by the people's representatives in this Parliament".

The Senate defeats Senator Mason's 1982 Bill. Liberal, Labor and National Party Senators combined to vote (48 - 5) against the Democrats to have the Constitution Alteration (Electors' Initiative) Bill 1982 read a second time.

19 October 1983 - Senator Mason moves for the restoration of his 1982 Private Members Bill on the Notice Paper.


May 1984 - Senator Macklin presents his Paper "The Case for a Popular Initiative" to the Constitutional Amendment Sub-Committee of the Australian Constitutional Convention, supporting the right of electors to propose matters concerning the alteration of the Constitution for a national referendum.

In the conclusion Senator Macklin says:

"Our current system invests a lot of power in the elected government and the only opportunity most people have to participate in the decision-making process is when they cast their vote for a new government every three years. In the interim, they have little say on how they are governed or the legislative program enacted on their behalf.

The popular initiative would enhance, rather than denigrate, our system of Parliamentary democracy because it allows the people an opportunity to participate. If we continue to deny the people this opportunity, it will be to the detriment of our democratic system."
The arguments against a popular initiative basically suggest that the people are incapable of making rational and responsible decisions on legislation that affects them. This is a naive and paternalistic attitude and clouds rather than enhances the debate. Surely, one would assume that if the people are rational and responsible enough to decide who will represent them they are also capable of making decisions on issues that affect them.”

June 1984- The Constitutional Amendment Sub-Committee recommended that a motion, allowing five per cent of Australian voters to initiate items of constitutional reform which must subsequently be put to a national referendum, be listed on the agenda of the Brisbane meeting of the Constitutional Convention.

22 February 1985 - Senator Macklin moves for the restoration of the Constitution Alteration (Electors' Initiative) Bill onto the Senate Notice Paper.

May 1985 - Professor Geoffrey Walker writing in the Australian Law Journal Volume 59 cites electors' initiative as a respite from the present system of "elective dictatorship".

July 1985 - In the July Australian Law Journal, Professor Walker points out that "it is a sign of the rapid spread of the participatory ethic in democratic countries that referenda relating to treaties have become more common since the beginning of the 1970s”.

Introducing a mechanism for the participation of electors in the ratification of treaties in Australia would not be difficult. "As the Constitution is silent on the matter of treaty ratification, it could be effected by ordinary Act of t the Federal Parliament".

Currently, the process of treaty negotiation and treaty ratification is the exclusive preserve of the Executive without the involvement of the Parliament.

1 August 1985 - Senator Macklin's Proposal E to the Plenary Session of the Australian Constitutional Convention in Brisbane is defeated by 57 votes to 11 votes.

Proposal E stated: "That the Constitution be amended to provide that a proposed amendment to the Constitution may be initiated by petition to a House of the Parliament signed within the period of 6 months immediately preceding presentation of the petition by not less than 5 per cent of electors qualified to vote for the election of members of the House of Representatives.

Any such proposed amendment shall be submitted to the electors in each State and Territory at the same time as the next election for the House of Representatives or the Senate.

If a majority of all electors voting approve the proposed amendment and in the majority of the States a majority of the electors voting also approve the proposed amendment such amendment will be presented to the Governor-General for the Queen's assent.

19 December 1985 - The Deputy Prime Minister, Mr Bowen, announced the formation of the Constitutional Commission, following the approval by Federal Cabinet of his proposal for a major review of the Commonwealth Constitution, involving extensive consultation with the public, and to report by 30 June 1988.
The Commission will be assisted in this task by advisory committees which will examine:

- executive government;
- distribution of powers;
- trade and national economic management;
- individual and democratic rights under the Constitution; and
- the Australian judicial system.

9 April 1987 - Press Release - Senator Janine Haines (Leader of the Australian Democrats) calls for the introduction of Electors' Initiative and describes it as an "enormously beneficial reform" which is long overdue.

10 August 1987 - The Age - In an article titled "Battle Ahead for Bowen's Reforms" Michelle Grattan examines the Government's approach to constitutional reform and writes:

"At the moment Bob Hawke and his deputy, Lionel Bowen, are each travelling aboard their own constitutional trains but have been travelling on separate tracks." Mr Hawke has focused on just a few items for a possible national referendum, notably fixed four-year terms of parliament.

By contrast, Mr Bowen has "a grand dream to put a whole batch of reforms to the people at the end of 1988, arising from the Constitutional Commission's inquiry." Mr Bowen favours a sweeping agenda for possible referendum questions, and according to Grattan personally supports the proposal from the Commission's Advisory Committee on Individual and Democratic Rights for citizen-initiated referendums. The Deputy Prime Minister is quoted as saying:

"I see merit for having a provision for citizens' referenda - if half a million people want a referendum on anything that's a good idea."

Grattan claims that "one reason why Bowen supports this is that he thinks it would be a popular proposal that would attract people to other reform proposals." However she says "the chances of it (citizen-initiated referendum) finding favour with the Prime Minister and his colleagues are Buckley's."

September 1987 - "Australia's Constitution - Time to Update" - In its report to the Constitutional Commission, the Individual and Democratic Rights Committee, recommended that:

"There should be provision in the Constitution for voter-initiated referendums for constitutional change .... If a substantial section of the people (say 500,000 voters) are prepared to petition for constitutional change, the proposed change should be submitted to a referendum. The mechanics of such referendum would be a matter for consideration by the federal parliament."

9 September 1987 - Press Release - Senator Macklin urges the Federal Government to hold a referendum to ask voters whether they want a national identification card.
14 September 1987 - The Australian Democrats give formal notice in the Senate of their intention to introduce legislation for a nation-wide referendum on the I.D. Card proposal.

A massive public campaign of petitioning against the Government's I.D. Card proposal is evidence that there is a real need for more direct public participation in the legislative process and that a potentially viable citizens' initiative movement does exist in Australia.

Clearly, in very controversial cases such as the I.D. Card proposal, the option for electors' initiative to petition for a referendum is essential. This option is currently not available to voters in Australia.

23 September 1987 - Senator Michael Macklin introduces a package of five Bills to alter the Constitution. Included in this package is the Constitution Alteration (Electors' Initiative) Bill 1987.

27 January 1988 - Senator Macklin writes to the Attorney-General, Mr Bowen, seeking his support in getting the Electors' Initiative proposal as outlined in the Constitution Alteration (Electors' Initiative) Bill 1987 included in the package of items which is expected to be put to a national referendum in late 1988.
THE CASE FOR A POPULAR INITIATIVE

INTRODUCTION

In 1980, the Australian Democrats first introduced the Constitution Alteration (Electors' Initiative) Bill. It was introduced into the 32nd, 33rd, and 34th Parliaments and most recently on 23rd September 1987, but it has so far failed to be passed. This was the first attempt since federation to introduce a popular initiative into Australia and the reason for the Australian Democrats' persistence is the considerable support the concept has attracted.

This paper will argue the merits of the popular initiative. It will explain briefly what it is and how it is envisaged it would operate, its advantages as well as answer some of the criticisms it has attracted. Finally, it will outline the built-in safeguards against abuse.

WHAT IS POPULAR INITIATIVE?

Vernon Bogdanor (1981 p.85) describes the initiative as "a weapon of direct democracy whereby the electorate itself can trigger off a referendum". He claims the reason for this devise is to "repair the government's sins of omission".

Certainly the popular initiative is one of the most practical devices for direct democracy that currently operates but it is not a new concept. It was first established in Switzerland in 1892 and in the USA in 1898. There are now 23 American States using popular initiatives (plus the District of Columbia) and it is available in 100 cities in the United States.

Geoffrey Walker (1987, p.10) describes initiative and referendum as "procedural mechanisms created by statute or by constitutional amendment, which enable the people directly to approve or reject particular laws that have passed through parliament but have not yet taken effect, or that enable the people to compel the repeal of an existing law or the enactment of a new law."

Walker draws the distinction between the initiative on one hand and the referendum on the other and suggests that initiatives are of two kinds, constitutional and legislative.

"The constitutional initiative gives a prescribed number of voters the power to petition for the holding of a ballot on a proposed amendment to the Constitution." It is one of the less widespread forms of initiative, and exists in Switzerland, in the Swiss cantons, and in 14 of the American states.

Walker suggests that there are two kinds of legislative initiative, the direct and the indirect. "Under the direct initiative, the petition causes the proposed measure to be placed on the ballot paper for submission to the electorate without any action or intervention by the parliament." By contrast, the indirect initiative "gives the parliament a specified time in which to enact the measure proposed by the citizens' initiative and if parliament refuses or fails to a act, the measure is then submitted to the voters for their verdict."

The discussion of referendums is concerned with referendum that are automatically binding and that must be held if a certain number of voters sign a petition - thus encompassing an element of citizens'
initiative. As with the initiative there are two types of referendum, the constitutional and the legislative.

Under Section 128 of the Commonwealth Constitution, there is provision for compulsory referenda for constitutional amendments. Walker says that the legislative referendum allows a specified number of voters (usually between three and five per cent) to petition for a referendum concerning a Bill that has passed through parliament in the normal way but has not yet taken effect. The effect of a valid petition is that the statute will not come into force until the voters have had the opportunity to approve or reject it in a referendum, and is often described as the power of 'veto'.

A third related facility of more direct, participatory democracy is the "recall". This is the power of the people to petition for the holding of an election on the recall, or removal, of a public official. Sometimes it is confined to elected officials, but more often it applies to both elected and appointed members of the legislature, executive and judicial branches" (Walker 1987 p.13).

The Australian Democrats' proposal seeks the creation of a new chapter to the Australian Constitution - Chapter IX - which would allow the operation of a popular initiative for the introduction of laws or changes to the Constitution itself, through a petition of five per cent of voters eligible to vote for the House of Representatives.

The Constitution Alteration (Electors' Initiative) Bill 1987 outlines the procedures for the initiation of legislation and the alteration of the Constitution by petitioning. The Democrats have focussed on these two aspects of popular initiative for a variety of reasons. Firstly they are the most well-known and popular aspects which do have wide community support. Secondly they have the greatest chance of achieving political success in the Parliament because they represent the "lesser of the evils" as far as critics of the popular initiative are concerned. Thirdly the procedure of alteration of the Constitution is very similar to the current requirements which apply to constitutional change, notably the need for the support of an overall majority of electors and electors in a majority of states, and therefore should receive some measure of conservative support.

Under the provisions of the Bill, once the required number of signatures was gained for a particular proposal, the normal provisions of a referendum would need to be observed before it could become law. The support of the majority of all electors voting in Australia is required before a proposed law is presented for the Governor General's assent.

If an alteration of the Constitution is proposed, it will not be presented for Assent unless it has received the support of:

(i) a majority of all the electors voting throughout Australia and a majority of all electors voting in a majority of States; or

(ii) two-thirds of all electors voting throughout Australia approve the proposed constitutional alteration.
THE CASE FOR POPULAR INITIATIVE

(i) Reduce Alienation and Voter Apathy

An important positive aspect of the initiative is that it tends to involve people in political issues, thus reducing their sense of alienation from government. Charles Bell (1978 p.4) cites some American research which supports this belief. For instance a poll conducted by Cambridge Survey Organization showed three out of four voters would be more likely to vote if there were initiative measures on the ballot.

Comparisons of voter turn-out in American states that use the initiative with states that do not also support this premise. Fifty per cent of the high turn-out states use the initiative while only fourteen per cent of the low turn-out states use it.

Apathy, which Wilcox (1912 p.109) describes as 'the curse of our politics', is a direct result of alienation from the processes of government Many people feel they have no control over the operation of government or legislation and they feel removed from the decision-making process. This can result in frustration and apathy and was most graphically illustrated in Australia recently by the high percentage of youths who were not registered to vote. No expensive advertising campaign can remedy this if these people do not believe they can have an impact upon the political process.

Bogdanor (1981 p.89) supports this and says that almost all studies of political behaviour undertaken in Western democracies have shown low levels of knowledge and political awareness amongst the electorate as a whole. He believes it is very possible that this public apathy is a result of the electorate's lack of impact upon the political process. He says, "It may well be that if citizens believed that their opinions were of importance and that politicians and civil servants would be required to take account of them, that their interest in and knowledge of political affairs could become greater".

By making people more directly involved in the decision-making process the initiative reduces political apathy. As Wilcox (1912 p.109) states, "The initiative, as its very name implies, is designed to unlock for the uses of the state all the potential political capacity of the people".

(ii) Enhance Accountability

One problem that exists in our political system is that an elected government only faces the people once every three years. During that period it can virtually operate as an elected dictatorship.

The initiative is an important method of checking the government's powers. Bogdanor (1981 p.89) says it is an important tool for checking the power of party oligarchies and this encourages the growth of consensus. He points to the Danish experience where governments carefully evaluate important laws before they are passed to ensure a majority of people approve.

The initiative would, of course, place an extra burden of responsibility on the voter, but experience shows that this has not proved a problem in countries where the initiative operates. Many critics raise the spectre of Proposition 13 which was a popular initiative, passed in California, to cut land tax. They fail to mention that because of booming real estate values, California had collected and held on to billions of dollars in windfall property taxes. The tax cuts were, therefore, warranted. Also, similar propositions have been proposed eleven times by various American states and have been rejected on eight of those occasions. In 1980, another Californian proposition which would have halved income tax was overwhelmingly defeated.
This criticism comes down to the argument that people do not know enough to decide for
temselves. This argument was used to oppose other reforms such as women's suffrage and
universal suffrage. The initiative allows matters of considerable public interest to be decided by the
electorate and, in doing so, creates more interest in these matters. The greater sense of
responsibility and involvement this form of participatory democracy gives to the people also
encourages them to be more far-sighted.

(iii) Opens Debate and Educates the Public

Another benefit of the initiative is that it focuses on issues rather than personalities and parties. Bell
(1978 p.4) talks about the "solid body of research data" that shows that in elections the candidate's
personality and party affiliation are more important to the voter than the issues. The initiative can
therefore play an educative role.

The initiative allows the electorate to define the issues, which may be different from the definition
given by political parties or other political leaders. John Bryce, quoted in Bogdanor (1981 p.90)
says of the popular initiative:

"It is unequalled as an instrument of practical instruction in politics. Every voting compels the citizen
who has a sense of civic duty to understand the question submitted, and reach a conclusion thereon.
Many, sometimes even half, fail to come to the polls, yet even these may derive some benefit from
the public discussion that goes on ... It is a good thing for the citizen to be relieved from the
pressure of those personal or party predilections which draw him to one candidate or another and to
be taken out of the realm of abstract ideology to face concrete proposals. Here is a plan which
throws on him the responsibility of declaring a definite opinion on a specific proposition, forcing him
to ask himself, 'Is it sound in principle? 'Will it work? 'Shall I vote for or against it? "

The initiative can also be used to resolve controversial issues that governments are reluctant to
tackle. It allows these issues to be openly debated, which often does not occur when a government
decides to ignore a "politically hot" issue, and takes them out of the hands of inactive governments to
be resolved by the electorate.

This view is supported by Robert Benenson (1982 p.786) when he talks about using the initiative to
overcome "legislative inertia". He says that those who support the initiative argue "that without the
threat of direct action by the voters, legislatures will tend to protect the status quo and to avoid
controversial legislation". Patrick Mcguigan, quoted in Benenson (1982 p.786), talking about the
Proposition 13 says, "The only way they were able to get any property tax relief in California and in
a number of other cases was by having this club over the head of the legislature".

Many critics argue that a popular initiative actually promotes "legislative inertia" by encouraging
legislators to hand over decisions on controversial legislation to voters. This argument, however,
lacks credibility when one looks at the number of controversial issues that are placed in the "too
hard" basket and remain unresolved. The popular initiative does not encourage "legislative inertia", it
ensures that these controversial issues are resolved rather than delayed indefinitely or shelved
completely.

4. WHAT THE CRITICS SAY

(i) Decline of the Legislature
Some critics claim that the use of the popular initiative will result in the decline in importance of the legislature. They claim that allowing voters to resolve certain issues diminishes the status and importance of the legislature and discourages able candidates from serving in them.

Charles Price (1975 p.256) states that "according to this view, the legislature is supposed to be the prime avenue for compromising knotty issues of competing interests. When issues are transferred from the legislative arena to the public arena, there is the implicit suggestion that a particular legislature has failed to perform its prime function: resolving conflict among competing interests".

Price, however, goes on to discount this suggestion. He refers to a study conducted by "Sometimes Governments" which ranked U.S. state legislatures from one to 50 in terms of their quality. He concludes from this that, for the most part, there is little difference in overall quality between high-use or low-use initiative states or between initiative states and noninitiative states. "Hence, the conventional wisdom view that frequent initiative use denotes legislative ineptness or failure can, at least, be questioned". On the contrary, the study showed by a statistically significant margin that high-use initiative states had more effective legislatures than low-use states.

If anything, the introduction of a popular initiative would enhance the democratic process. Technical legislation and legislation required for the day to day running of the country would be left in the hands of the Parliament, which is best suited to cope with this type of business. However, the more controversial issues such as uranium mining and the recent I.D. Card issue, which Parliament often has trouble resolving because of the political implications, would be resolved through popular initiative. The number of signatures required is sufficient to ensure that only issues which attracted wide public concern would be dealt with by popular initiative. If the people were happy with the way the Parliament was handling an issue then it would be unlikely to attract much support for an initiative. The initiative is only likely to be used when the community is dissatisfied with Parliament's performance, which is surely the essence of a democratic society.

It should also be noted that currently in Australia the Government, or in effect the Cabinet, is the sole holder of the power to hold a referendum. The Parliament has no power in this respect. This, I believe, supports my previous premise that the government becomes a virtual elected dictatorship for three years. The current system only allows the people to have a direct say on an issue of grave importance when the government is willing to allow it.

(ii) Frivolous Legislation

Some critics argue that the initiative encourages frivolous legislation. Certainly, there have been initiatives in, for example, the U.S. which could be called frivolous - such as prize fighting and wrestling regulations - but, as Bell (1979 p.2) notes, these have been few and far between.

It should be noted that the number of signatures required to put a proposal, to referendum and the guidelines of a referendum preclude frivolous legislation. If a proposal can obtain such strong support, one could hardly describe it as frivolous. Frivolous measures do not, by definition, attract wide support.

(iii) Unsound Legislation and Technical Issues

Another argument put forward by critics is that initiative measures tend to over-simplify complicated policy issues which results in unsound legislation.

I believe this is a greatly over-exaggerated argument. Any proposal that went to referendum would receive wide public debate and media attention. Poorly thought out initiatives would attract strong
condemnation from opponents and the media and, judging on past referenda, would have little chance of being accepted.

A similar criticism of the initiative claims technical or complicated issues, such as taxation, are not likely to attract an intelligent public vote. This is another example of the paternalistic approach - the public is unable to decide issues for itself. I believe, however, that such technical issues would seldom be dealt with via this means. Certainly, guidance may be required but this would occur during the extensive process of public debate that would take place on initiative issues. Again, as history shows, if the people are in doubt the majority tend to vote against a proposal in question.

(iv) Interest Group Domination

Another frequently quoted argument against a popular initiative is that it is open to abuse by interest groups. These critics argue that well-organised, affluent pressure groups would dominate the initiative process. They contend that rather than being a citizen weapon it becomes a vehicle for special interests.

Recent experience in California suggests this is not so. Poorly organised and less affluent groups have had measures placed on the ballot paper and voters do not seem to be as easily misled by deceptive advertising or expensive campaigns as once thought. Voter manipulation by expensive campaigns and deceptive advertising can be a problem in any election but it is hardly a justification for abolishing elections. Measures such as strict guidelines for advertising and public funding can, if not overcome the problem, greatly minimise it.

Professor Colin Hughes, in a paper to the Australian Constitutional Convention meeting in Brisbane in 1985 made the valid point that the initiative "allows groups with such goals and values (referring to 'radical' proposals) to have an opportunity to parade their options before the public with an apparent legitimacy, and possibly public assistance, that they could not otherwise command."

Surely, in a democratic society, we should not be afraid of allowing groups which espouse values to which we do not necessarily subscribe, to offer their alternatives. This is what the initiative offers and the inherent safeguards, which will be discussed later in this paper, ensure that only those proposals with wide acceptance are passed.

It would be naive to suggest that the current Parliamentary system, with its rigid party structure, is not subject to pressure from strong special-interest groups. A small number of these groups can exert enormous and, by community standards, disproportionate influence. The initiative gives other groups that do not have this access an outlet for their proposals.

(v) Ideological Domination

This is closely linked with the last argument and suggests that the initiative produces conservative, even reactionary results. This argument tends to be very selective and has little credence. An article in the New York Times in November 1978 asked "If California voters show themselves to be conservative by reviving the death penalty then what do they show themselves to be by upholding the right of homosexuals to teach in public schools?" Results such as this are evident in other American states and in other years and dispel the fear that this process invites ideological domination.

The initiative tends to be used for specific problems that have been suppressed or ignored by the legislature. Unless the measure appeals to the majority it will not be passed which is one reason why so few measures ever become law.
(vi) Too Expensive to Hold

Critics often raise the expense involved in holding a referendum as an argument against a popular initiative. Recent estimates put this cost at about $20 million.

But referenda do not have to be held separately; they could be conducted jointly with each election. The major disadvantage in this is the long waiting period between elections but should a proposal prove urgent or the number of proposals waiting to be voted on becomes too great, a separate referendum could be arranged.

The best argument against this criticism comes from Professor Colin Hughes in his paper to the Constitutional Convention previously mentioned. He says, "if one supposes either that direct democracy is a good thing that ought to be encouraged, or that the initiative may uncover worthwhile amendments that ought to be put and would not come from other sources, the problem of cost is minor".

I believe the cost argument to be of minor significance when considering the implementation of an initiative. One must compare the costs involved with the result achieved. If the taxpayers are willing to bear the cost, and it is their money we are talking about, then this is hardly a reason for deciding against a popular initiative.

SAFEGUARDS

Having canvassed the major arguments for and against the concept of a popular initiative, I believe it is important to stress the safeguards which would make abuse nominal.

Firstly, before a proposition can even be voted on in a referendum it needs significant support via a signed petition. The 1987 Australian Democrat Bill stipulates petitioning by five per cent of electors eligible to vote for the House of Representatives - that is currently over 500,000 signatures - but this can be increased if it is felt to be too small a number. However, one does not want to set an impossible goal. This limit would ensure that only issues that attracted wide support would be put to the people. The suggested figure is certainly a considerable goal to achieve and it is rare for any petition presented to Parliament to have anywhere near this number of signatures.

The provisions of a referendum are also a significant safeguard. A petition to introduce a proposed law must be signed within a period of six months immediately preceding its presentation to a House of Parliament. Thereafter it must be submitted to referendum of eligible voters in each State and Territory within twelve months of its presentation to Parliament, and must be approved by a majority of all the electors voting before being presented for the Governor General's assent.

For alteration of the Constitution there are more stringent safeguards which are similar to those that currently exist for constitutional referenda. To attract an overall majority as well as a majority in four States is a very difficult achievement and this would ensure only widely accepted proposals would be passed. One need only look at the history of referenda in Australia - 8 out of 38 being successful - to appreciate the difficulty of having a measure accepted.

Proposed amendments to the Constitution could also be presented for the Governor General's assent if two-thirds of all the electors voting approve such laws. Only on a very few occasions since Federation have two-thirds of all electors throughout Australia voted in favour of a referendum proposal. Clearly this is also a very firm requirement for a proposed alteration of the Constitution to be successful.
I have already mentioned other measures such as strict guidelines for advertising, public disclosure of donations, and public funding which would also reduce the risk of abuse. Many of the recent amendments to the Electoral Act designed to minimise abuse would be applicable to a popular initiative.

These safeguards would ensure that any abuse of the initiative was minimised. It is impossible to eradicate abuse totally but this is no justification for rejecting a concept which has merits far exceeding any disadvantages that may arise.

CONCLUSION

This paper has canvassed the major advantages of a popular initiative and addressed the major criticisms leveled at it.

It presents, I believe, a strong argument for its implementation in Australia and will hopefully instigate constructive and thoughtful debate.

I believe one needs to look dispassionately at our system of government to improve its operations. It is clear by the number of frustrated and disillusioned people in the community that such a review is urgent.

Our current system invests a lot of power in the elected government and the only opportunity most people have to participate in the decision-making process is when they cast their vote for a new government every three years. In the interim, they have little say on how they are governed or the legislative program enacted on their behalf.

The popular initiative would enhance, rather than denigrate, our system of Parliamentary democracy because it allows the people an opportunity to participate. If we continue to deny the people this opportunity, it will be to the detriment of our democratic system.

The arguments against a popular initiative all basically suggest that the people are incapable of making rational and responsible decisions on legislation that affects them. This is a naive and paternalistic attitude and clouds rather than enhances the debate. Surely, one would assume that if the people are rational and responsible enough to decide who will represent them they are also capable of making decisions on the legislation governing them and issues that affect them.

I believe, as a representative of the people, that the final decision must rest with the people. They should be the ones to decide whether they wish to have this responsibility. Denying the people this decision would in fact be the strongest argument for the introduction of a popular initiative.
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THE CONSTITUTION ALTERATION

(ELECTORS' INITIATIVE) BILL 1987

1987

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

(Presented and read a first time, 23 September 1987)

(SENIOR MACKLIN)

A BILL

FOR

An act to alter the Constitution so as to vest in the electors power to propose laws and to approve or disapprove such proposed laws

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, with the approval of the electors, as required by the Constitution, as follows:

5 Short title

1. This act may be cited as the Constitution Alteration (Electors' Initiative) 1987

Table at beginning of Constitution

2. The Constitution is altered by omitting from the table at the beginning thereof "Chapter VIII - Alteration of the Constitution," and substituting:

"Chapter VIII - Alteration of the Constitution"

"Chapter IX - Electors' Initiative."

Legislative power

3. Section 1 of the Constitution is altered by omitting "The" (first occurring) and substituting "Subject to Chapter IX of this Constitution, the".

Mode of altering the Constitution

4. Section 128 of the Constitution is altered by omitting "This" and substituting "Subject to Chapter IX of this Constitution, this".
5. The Constitution is altered by inserting after Chapter VIII the following Chapters

"CHAPTER IX.  

ELECTORS' INITIATIVE."

Legislative powers of the electors

"129. The electors in the States and the Territories qualified to vote for the election of members of the House of Representatives shall, subject to this Constitution, have power to make laws in accordance with this Chapter of the Constitution for the peace, order and good government of the Commonwealth, including laws with respect to any matter with respect to which the Parliament has power to make laws and laws altering this Constitution.

Mode of exercising the legislative powers of the electors

"130. The power of the electors referred to in section one hundred and twenty-nine of this Constitution to make laws shall be exercised in the following manner:

"A proposed law shall be proposed by petition to a House of the Parliament signed within the period of six months immediately preceding presentation of the petition by not less than five per cent of the total number of electors qualified to vote for the election of members of the House of Representatives.

"The proposed law shall be submitted, not less than two nor more than twelve months after presentation of the petition, to the electors in each State and Territory who are qualified to vote for the election of members of the House of Representatives.

"When a proposed law is so submitted to the electors, the vote shall be taken in such manner as the Parliament prescribes.

"If a majority of all the electors voting approve the proposed law, then, except as hereinafter provided, it shall be presented to the Governor-General for the Queen's assent.

"If the proposed law provides for an alteration of this Constitution, it shall not be presented to the Governor-General for the Queen's assent unless:

(i) a majority of all the electors voting approve the proposed law and in a majority of the States a majority of the electors voting also approve the proposed law; or

(ii) two-thirds of all the electors voting approve the proposed law.

"No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing diminishing or otherwise altering the limits of the State, or in any manner affecting the provisions of this Constitution in relation thereto, shall become law unless:
(i) the majority of the electors voting in that State approve the proposed law; or

(ii) two-thirds of all the electors voting approve the proposed law.

Parliament not to repeal or amend laws

"131. The Parliament does not have power to repeal or amend a law made by virtue of this Chapter of this Constitution except in so far as that law otherwise provides or as is hereinafter provided.

"A proposed law to repeal or amend a law made by virtue of this Chapter of the Constitution must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than twelve months after its passage through both Houses the proposed law shall be submitted to the electors in each State and Territory who are qualified to vote for the election of members of the House of Representatives.

"When a proposed law is so submitted to the electors, the vote shall be taken in such manner as the Parliament prescribes.

"If a majority of all the electors voting approved the proposed law, it shall be presented to the Governor-General for the Queen's Assent.

"Where a law made by virtue of this Chapter of this Constitution is expressed to operate for a particular period or until a particular date, nothing in this section shall be taken to prevent the Parliament repealing that law after the expiration of that period or after that date, as the case may be.

"Nothing in this section shall be taken to prevent the alteration of this Constitution in accordance with Chapter V VIII of this Constitution.

Inconsistency of laws

"132. If a law of the Commonwealth made otherwise than by virtue of this Chapter of this Constitution is inconsistent with law made by virtue of this Chapter of this Constitution, the latter shall prevail and the former shall, to the extent of the inconsistency, be invalid.

References to a law of the Commonwealth

"133. A reference in this Constitution (other than in this Chapter) to a law of the Commonwealth shall be construed as including a reference to a law made by virtue of this Chapter of this Constitution.

Interpretation

"134. A reference in this Chapter of this Constitution to a Territory shall be construed as a reference to any territory to which section one hundred and twenty-two of this Constitution applies in respect of which there is in force a law allowing its representation in the House of Representatives."
SECOND READING SPEECH

CONSTITUTION ALTERATION (ELECTORS' INITIATIVE) BILL 1987

WEDNESDAY 23 SEPTEMBER 1987

SENATOR MICHAEL MACKLIN

The right of the people of a country to make laws independent of politicians should be a basic and independent right - this is known colloquially as citizens' initiative.

This is not only because the system has worked so well and effectively in other countries, but because there seems a particular need for it in Australia.

Time and again national problems appear to be intractable because of the entrenched and largely self-interested position of the long-established political power groupings. In fact it suits these traditional power groupings very well not to find solutions, but merely to indulge in a variety of complex cosmetic operations, designed to demonstrate that the problem is being dealt with, when in fact it is not.

The real losers are always the people.

In a sense this is inevitable, and even has a kind of rough justice - for many decades now the Australian people have surrendered their political powers to clique-like political groupings which fundamentally operate in their own interests and in the interest of those from whom they receive liberal election financial funding.

The answer is for the people to shoulder some of the responsibility again themselves, and to vote themselves the right to make legislation, not all the time, but where important and deeply controversial, even divisive, issues need to be debated and decided upon.

The machinery of citizens' initiative proposed in this Bill is very similar to that operating successfully in other parts of the world. It is virtually identical to a similar Bill introduced by the former Deputy Leader of the Australian Democrats, Senator Colin Mason.

The Bill proposes that if five per cent of the electors petition the government to hold a referendum to create a law then that proposed law should be submitted not less than two months or more than twelve months after presentation of the petition to the electors in each state and territory who are qualified for the election of members of the House of Representatives.

Under the provisions of the Bill, the people would acquire for the first time a potentially significant measure of control in the legislative process. The matters which would be proposed under the terms of the Bill are unlikely to be trivial. In most recent times there has been no petition in the federal parliament large enough to secure a referendum - any issue would have to be of very considerable public interest to generate the number of signatures necessary to have it put to a national vote.
There has been much opposition expressed to this issue within Parliament itself. This opposition amounts mainly to the arguments which were historically presented against universal suffrage and later women's suffrage - the argument that the people whose lives are ruled by these laws are not knowledgeable enough to decide what is best for them. This patronising attitude, whilst it is prevalent amongst most parliamentarians, is overwhelmingly dismissed by the people it would affect. They see it for what it truly is - an argument for some type of dictatorship or oligarchy.

Like every other right, there is a possibility that this one could be misused by powerful pressure groups. No freedom can be absolutely guarantee. However, it must be borne in mind that the Australian electorate is essentially a conservative one. Historically, changes brought about by referendum are few and far between. It should also be pointed out here that the granting of this right would not affect the authority or usefulness of the parliament - far from it. In other countries with the initiative, the making of the vast body of law, especially in technical or complex areas, has remained the responsibility of the parliament, and I believe that would also be the case here.

The use of citizen-initiated referenda would not be costly in either real or relative terms. It would cost about the same as a national election, amounting to about $1.15c per head of population. In addition, every three years the date of a proposed referendum could coincide with the date of the national election, which would diminish the cost enormously in that year.

The right of the citizen to initiate referenda is practised already in several of the more enlightened countries, including Switzerland, Austria, and the United States of America. This right is often found to be a long-standing one - the Swiss people were granted this right in 1892, and it has been adopted by progressively more states of the U.S.A. since 1890.

In Switzerland, about one-quarter of the initiatives put to referendum are adopted - the others being either rejected or withdrawn.

In the U.S.A., the most famous example of a citizen-initiated referendum is probably the Californian 'Proposition 13' of 1977, which altered the taxation laws. Another proposition aimed at cutting a different area of taxation was rejected which indicates, I feel, that citizens can be trusted to judge a referendum topic on its individual merits and not just on whether it will result in personal gain.

In a future which is acknowledged generally to have difficulties, to present problems, to require some sacrifices from the community at large, is it not best to allow that community to involve itself in the issues, and to give it the means to study and know the facts?

Such a responsibility would, over a period, encourage the people to a more far-sighted attitude, and one which would be more healthy for Australia.

Australians today are better educated and more politically aware than in the past. The great media and public interest in politics and the rapid growth of citizen movements demonstrate this. The whole point of democracy is that it is the responsibility of the people to govern.
THE NEXT STEP

Citizens interested in seeing popular initiative become a reality in Australia have a number of avenues available to them in pursuit of this goal. A massive public action campaign supporting the electors' initiative proposal as outlined in the Constitution Alteration (Electors' Initiative) Bill 1987 would be conclusive proof of the community support and demand for this concept in Australia's daily political life.

As a next step, undertaking one or more of the following options would provide an inexpensive, quick and effective method of supporting the popular initiative proposal and encouraging others to do likewise. In particular this concept now requires political support from members of the Government and Opposition and the aim must be to encourage that support.

(i) Local Members of Parliament

Write and/or phone your local Members of Parliament seeking written statements of their individual and party positions on the popular initiative proposal. A written acknowledgment of the worth or otherwise of the concept provides a position on the subject which must then be reconciled with the parliamentary voting record on the popular initiative proposal.

(ii) The Attorney-General

Write to the Attorney-General, Mr Bowen, urging him to have the electors' initiative proposal as outlined in my Constitutional Alteration (Electors' Initiative) Bill 1987 included on the agenda for the national referendum to be held in late 1988.

(iii) Print Media

Raise the concept in the print media by writing to newspapers (the Letters pages) and magazines about popular initiative and outline its positive aspects. The more widely known the concept is, the greater the understanding and support that it may receive.

(iv) Electronic Media

Speak about the issue on radio and other avenues of the electronic media whenever possible. Talk-back radio programs are a very good forum for discussion of such topical issues.

(v) A Vote for Popular Initiative

Ultimately citizens who are genuinely aware of the value of the popular initiative proposal may even direct their vote at election time to candidates and parties who actively endorse and support the immediate introduction of a popular initiative in Australia.
SUBMISSION NO. 72
T S WORTHINGTON-EYRE

Heathcots Court, Flat 3
36 Gunn Street, MATARANKA
NT 0852,

Mon 25 November 1991

The Executive Officer
Sessional Committee on Constitutional Development
GPO Box 3721
DARWIN NT 0801

Dear Sir

To start ones comments - on the strength of the Citizens' Initiated - PAPER NO. 3 - together with consideration of the Television News items screenings - of 1988 to now - about our NT NEW STATE Governments plans for Northern coastal New Lands Usages - New Towns Purposes - Factories - and taking our NT NEW STATES - situation now, with the first 50 years futures of progressive SETTLEMENTS certainties (with Australian Commonwealth combined Capital Projects drawn from Australian acclimatised English manpower - material - resources - to help). And with all the instances that Citizens Initiative PAPER NO. 3 - cites - keeping wholly and solely within the N.T. NEW STATE CONSTITUTION body of Laws of the Land - the main precedent apparent - is that a PROVINCIAL CLAUSE for Citizen Initiative Referendums - is a must.

How much latitude - how much broader than Australias already managing representative Government - Can Citizen Initiated Referendums (necessary adjunct as they have become) Provisional Clause permanency contents - within the N.T. NEW STATE CONSTITUTION - best and most likely to succeed be allowed.

In Australia it is the English Initiative characteristics - and the topics that have the best chance of getting the Citizen Initiative Referendums through into a Provisional Clause in our N.T. NEW STATE CONSTITUTION - appear to be the Committee's short list of low key restricted issues - as the Electoral Re-appointment - environment controls - death penalty.

In our Commonwealth global and Westministracy toward more peoples parties Governments run - and within individual States supremacy - sovereignty proper principles - their hast got to be more itemising from me for the moment must meet your postal - 29th November 1991 - return limit.

Regards

T S Worthington-Eyre

A MERRY XMAS    HAPPY NEW YEAR
Dear Sir,

RE: SUBMISSION "CITIZENS’ INITIATED REFERENDUMS"

Thank you for the opportunity to lodge a submission on a democratic concept close to my heart - citizens' initiated referendums. Although time has not allowed me adequate preparation for such an important task, I will attempt to add some specific proposals related to the concepts of the initiative, referendum and recall of elected officials.

I would like to state from the onset, my views have been formulated, as one might expect, from my experience and study of these popular representative democratic principles. I was raised in the American state of Arizona. As a citizen of that jurisdiction, we practised these precepts at state and local level; as well as, upon and in conjunction with the executive, legislative, judicial and administrative branches of government. I hasten to add, I studied the philosophical basis and practical effects of these populist precepts throughout my public school and university education.

If one accepts the adoption of democratic principles for a particular society, then their ideal implementation would seek to maximise direct personal involvement in the decision making process. The initiative, referendum and recall are valid and historic attempts to maximise participatory democracy in industrialised societies. It is worth noting the first attempts to successfully introduce these political practices in the United States were accomplished by the new lightly populated frontier states and territories - a position the Northern Territory may be seen as occupying in the Australian context.

As my time constraints prohibit an extensive analysis and presentation, I shall attempt to be brief and to the point by concentrating my presentation upon the practical aspects of the proposals rather than the philosophical.

The initiative power should be restricted to legislative proposals and constitutional amendments. If a bill of individual rights were incorporated into the N.T. constitution, I would either exempt certain
elements from change or require popular amendment to occur with high percentage approval by the 
registered electorate e.g. 75-90%.

I recommend for normal legislative proposals to be placed before the electorate halfway through the particular governments maximum legal lifetime if 25% of the registered voters so petition the parliament/council within that period. If such an election (hereafter referred to as a special election) is to be held, then all other properly constituted initiative, referendum and recall of that and lesser jurisdictions (e.g. local government, semi-government bodies) shall be included in the polls and information literature. If such a situation does not present itself during the first half of the parliament's or council's life, all such proposals which meet the percentage criteria of the registered voters of the jurisdiction shall be considered at the next general election of the particular jurisdiction next general election of the particular jurisdiction or next general N.T. election if it occurs first. I recommend setting the general percentage for legislative initiatives at 10-15% of the registered voters of the particular jurisdiction. Hence any normal legislation which attracts 25% of the duly registered voters may trigger a special election which will include all properly constituted initiatives, referendums, and recalls for that and any lesser jurisdiction.

Initiatives which seek to amend the constitution of the Northern Territory, excluding any individual bill of rights, I propose should require the signatures of 35% of the registered voters to bring a special election and 25% for qualification as a properly accepted initiative. All proposed constitutional amendments passed by the parliament, shall be placed before the electorate (treated as they were general initiatives - it does not create a special election but can be submitted at that time) with the same voter acceptance level as the constitutional initiatives to become a legal amendment - a proposed 60-66% of the registered voters. All other initiatives (other than constitutional) and referendum would require 50% + 1 vote to be passed or accepted by those voting.

Referendum would allow the various legislatures or the electorate of the particular jurisdiction to put forward proposed legislation or legislative options before the electorate for their acceptance/rejection and/or choice of options. If the proposal is accepted by 50% + 1 vote of those voting, the proposal becomes law. If there are options, and the voters accept the need to select an option, the outcome shall be decided by preferential voting as per normal elections. I would normally only wish to include legislation to be included by referendum; however there could well be grounds to allow referendum to gauge administrative changes or other issues gauged to affect only a certain segment of the particular jurisdiction (e.g. daylight savings to be considered only by registered voters in the impacted area such as below Tennant Creek).

I propose referendum could not be used for any constitutional changes. I would also apply the same percentage provisions to formally constitute a popularly proposed referendum as I have with the initiative (e.g. 25% for special election and 10-15% for general inclusion). I would also propose a time or deadline which legislative constitutional amendments and referendum must be passed by the parliament or council before their inclusion in any special or general election so as to allow the electorate more time to digest/study the proposed changes. I believe two months would be an appropriate time.

I suggest the power of recall, to remove elected and some appointed officials of ALL BRANCHES AND LEVELS OF GOVERNMENT in the N.T., be put before the voters at
special elections created by 35% of the registered voters of the relevant jurisdiction or at all other elections by 25% of the registered voters. In the cases of non-elected officials, the recall, if accepted by 50% + 1 vote of the voters of the relevant jurisdiction, would force the officials immediate removal and replacement of someone else chosen and approved by the relevant parliament/council. In the case of a recall of an elected official, if the proposal is accepted by 50% + 1 vote of the voters, the ballot is then calculated with the result from the pre-nominated candidates list. The result of the ballot would be achieved on the same basis as normal elections for that jurisdiction. There would be no recall held or an elected official, if the position is to be elected normally by the electorate at the general or special election.

The format designed for an initiative, referendum and recall would be essentially the same and kept simple. The wording of the initiative and referendum would contain a section outlining the precise wording of the proposed legislation, amendment or other proposal. The recall must identify the individual to be recalled by using the person's exact name and the position the person is to be removed from if the recall succeeds. Once the recall proposal achieves the required percentage to constitute a formal proposal, the N.T. Electoral Office (the body designated to examine all initiative, referendum and recall petitions; accept all relevant nominations for office; accept retractions of petitioners; organise and distribute appropriate arguments pro and con of the proposals; and conduct the special and general elections) may call for and accept nominations for the potential vacancy. The petitioners must print and sign their name as it appears on their electoral registration. It must also contain the voters residential address. The petitioner will be allowed to apply for registration and register any name or address change at the time she/he signs the petition. The N.T. Electoral Office will provide forms to those organising the petition, which will allow photocopies and facsimiles to be used for voter registration purposes. Retractions of a person's support for an initiative, referendum and recall will be accepted in person, by post or by presentation by another person; either singly or in a group, at the N.T. Electoral Office.

I close my submission to the Sessional Committee on Constitutional Development at this time. I will be visiting North America over the upcoming school holidays and will attempt to obtain additional information on these particular subjects. I may be contacted at work (tel. 227127) or at home (tel. 451188) if further or more detailed information is requested by the Committee.

Yours faithfully

R.M. "Gordo" Harris

36 Todd Crescent
MALAK NT 0812

25 November 1991
TO THE SESSIONAL COMMITTEE ON CONSTITUTIONAL DEVELOPMENT,
LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY.

Submission Relating to Discussion Paper No. 3

CITIZENS' INITIATED REFERENDUMS

1. PERSONAL COMMENTS AND OPINIONS

1.1 In answer to an advertisement in the Weekend Australian of 12-13th October, I submit for your consideration my thoughts on Citizens' Initiated Referendums.

1.2 I must say at the outset how surprised I was that it was considered at all and congratulate those responsible for its inclusion in the factors that will be considered in the compilation of your new Constitution.

1.3 I am a resident of Queensland and wish that our Constitution was being written from a clean slate so we could give this most important concept unfettered consideration.

1.4 My faith in the concept is based on its success in all those places where it is included in the political system; and the prosperity and social harmony of those places. In most cases, prior to its introduction, the opposite was the case.

1.5 The concept of C.I.R. carries in its structure the means of its own destruction. If any society that incorporates C.I.R. wishes to remove it, the means are readily to hand. The true measure of this concept is in its application and acceptance and, although it has been in place for decades in most places that have it, there is not one example where a referendum has repealed it.

1.6 The necessity for C.I.R. in the Northern Territory, indeed throughout Australia, is caused by the Party System that has dominated politics for decades. It was envisaged that the roles of
the Governor General and the State Governors, and also the Upper Houses, would act as a reviewing force on Lower Houses, but the Party System has effectively stopped this.

1.7 Should the Northern Territory adopt C.I.R. the reviewing could and would be done by the electorate and the cost of referendums would not be as great as having an Upper House.

2. COMMENTS ON DISCUSSION PAPER NO. 3

2.1 I will not offer precise details of the mechanism that the Northern Territory should have as that would be impertinent, but I would like to comment on matters outlined in Discussion Paper No. 3.

2.2 Re: Section B - U.S.A. [Par.1]

This appears to be a summary of the proceeding paragraphs and concludes with the allegation that "the use of the initiative" has "wide political opposition". If by "political" it means "Party Political", this is understandable as the incumbent cannot control the destiny of the States as much as if the system was not there. They must always do as the electorate requires, not as the Party wishes.

2.3 Re: Section C - [Par.M]

Attention is drawn to the activities of Mr. Mack. Mr. Mack displaced a high profile incumbent member of a blue-ribbon Liberal seat in North Sydney at an election at which the Liberal Party did very well in that city. Such is the popularity of C.I.R. where people know of it. [Mr. Mack used C.I.R. while serving in Local Government in that area.]

2.4 Re: Section D - Disadvantages

2.4.1 Can it be argued that the system of representative government is infallible and ideal in everyone's estimation? That it is under challenge by C.I.R. is an indication that it is not perfect. That C.I.R. has never been removed from a system of government and is strongly supported where people are aware of it, shows that it is complementary at least, and probably necessary. Because the sovereignty of parliament is absolute, C.I.R. is needed as a check and a balance.

2.4.2 If the democratic institutions are seen to be working for society and not for particular individuals, they must be held in high regard.

2.4.3 C.I.R. is no more inflexible than parliament and its proponents would favour a period of deliberation between declaration of the Referendum and the actual voting day.

2.4.4 If there is only one issue, that must appear to be easier to decide than a choice between large blocks of issues, many of which are not known by most people.

2.4.5 The evidence is that the outcome of referendums are far more difficult to influence than elections.
2.4.6 There are examples of Federal Referendums where the result has been mixed, despite the call from all the major parties for a "yes" vote to all proposals.

2.4.7 If there are a lot of referendums it is because it is necessary to correct a lot of perceived faults. As to the cost of the system it is not relatively costly. If C.I.R. was used instead of a House of Review or Upper House it would be very cheap. The actual cost of such a system is debatable, but if a referendum cost $10 million to stage nationally, is that a high cost when the car pool in Canberra costs $55 million annually? If voters become disenchanted with a plethora of referendums they could use the system to do away with compulsory voting.

2.4.8 This worry is unfounded on experience in Australia and Overseas, and not a reason for the benefits of the system to be denied to any society.

2.5 Re: Section F - Tentative Views

2.5.1 The Sessional Committee is comprised of 6 people all politicians. Politicians, generally, are people that are strong-minded and assertive and it is not surprising that the Committee takes a less than enthusiastic view of a system that may allow a challenge to the decisions of politicians. However, that the politicians of the Northern Territory would even accept and consider public submissions on this system, for possible use, is a measure of their integrity and commitment to serving society.

2.5.2 If Parliament should accept C.I.R., it would imply that it recognises its fallibility and acknowledges that it is in existence to serve its society, and that that society must be the final arbiter of any decision. This implication and this acknowledgment would enhance the status of the duties and powers of Parliament, and of its members, much more than the simplistic notion that is common today that Parliamentary decisions must be obeyed and accepted without question - at least until the next election.

2.5.3 Though a figure of say 2 1/2% of the voting population may seem a small number, it is sufficient to give an indication of a trend or attitude and should not be ignored.

3. CLOSING COMMENTS

3.1 In this age of easy and instant access to information it is not surprising that participatory democracy is flourishing. People are much better informed and politically aware and the competence that enables them to elect a Parliament is more than sufficient to decide a single issue. Single issues, if important enough to fulfil prescribed criteria, should be decided by Referendums and not allowed to become so inflated as to cause single-issue candidates to be elected to Parliament, as has happened in Tasmania.

3.2 I wish to extend my best wishes to the Sessional Committee in their deliberations, and thank them for the opportunity to put this submission.

J.M. Fitzgerald

"Glenelg"
Cement Mills 4352 QLD 23 November 1991
Reference is made to your letter dated 23 October 1991 concerning the above subject.

As a tax payer and citizen I would have no objection to the above proposals. I would however, like to see two limitations placed on the scheme. Such limitations would be:

(1) A petition with at least 10 000 signatures be obtained in the first instance, and

(2) That if the proposal fails then the persons pushing for the change must be prepared to pay $5 000 to $10 000 towards the costs of the referendum.

This I feel would prevent frivolous attempts to seek a change just for change sake.

Yours sincerely

K F Fletcher
The Executive Officer  
Sessional Committee on Constitutional Development 
GPO Box 3721 
DARWIN NT 0801

Dear Sir  

I refer to your minute of 13 November 1991 requesting comment on Citizens’ Initiated Referendums.

A staff meeting was convened to discuss the subject matter and after going through the discussion paper debate was centred on the four topics listed at page twenty-two with reference to the questions posed on page twenty.

CONSTITUTIONAL CHANGE/LEGISLATIVE CHANGE OR VETO

Both of these subjects were discussed as one and the following comments made:

1 Only persons on current electoral roll should be able to sign petitions or vote at a referendum.

2 15-20% of eligible persons to sign a petition if the requirement is for a referendum to be held, or 55% of eligible persons if the proposal is required to be enacted.

3 It was considered that if a formal petition format was followed then random sampling of signatories would be the most appropriate. However, it was generally felt that formal type petitions could be subject to manipulation and that some type of computer based system should be possible whereby eligibility and decision gathering could be implemented at the same time. Or, alternatively using the same system as currently in use for elections except that the ballot paper would be yes or no.

4 The suggestions on the time span required for the collection of signatures ranged from less than to more than thirty days. Referring to three above it can be seen that the exercise could be completed in the vary short term (ie pose the question and set the date for attendance (not compulsory) to signify acceptance or rejection).
Each issue should be kept separate one from the other, though allowance should be made for possible multiple yes/no answers if required for a specific issue.

Changes to Constitution or legislation should only be amended or enacted by referendum after initiative is passed. An alternative as in two above is to set a high requirement for voter turnout and approval for an initiative to be directly acted upon.

Any restriction on repeating unsuccessful initiatives should be confined to the life of the existing government.

The initial stages of any initiative should be through the Attorney-Generals Department who could advise on wording, existing legislation etc. They should not however have the right of veto.

An initiative once proposed becomes the property of the public and should only be withdrawn through application by the initiator through the High Court.

Opinion was split over the cost of such initiatives, some felt it should lay with the tax-payer while others felt that original initiators should bear the cost.

**GOVERNMENT POLICY CHANGES**

The general consensus was that government policy should not be subject to referendum but best left as election issues.

**RECALL OF ELECTED AND APPOINTED PUBLIC OFFICIALS**

Some discussion arose around political appointments but it was generally agreed that such a system could be open to abuse and therefore if it was implemented some strong safeguards would need to be put into place.

**GENERAL**

The consensus of opinion seemed to be that there is a place for Citizens' Initiated Referendums in a new constitution.

A point was raised that perhaps the principle of Citizens' Initiated Referendums could be in the constitution and backed up by specific legislation.

It was also noted that a form of Citizen Referendum already exists in the Local Government Act relative to the creation of a Community Government Council.

Some concern was expressed that popular opinion does not necessarily equate with the best decision. It was also stated that some issues underpinning community "standards/ethics" should not be subject to a popularity poll, for example the introduction of death sentence etc.

ROBYN LESLEY
RE: Discussion Paper No. 3 Citizen Initiated Referendums

My responses to the points raised are:

"Disadvantages" of CIRs, pp 18 and 18.

a) *it tends to undermine the system of representative government*

'Undermine' no, 'alter' yes.

CIRs introduce "backseat driving" to government, however, electors are the ones "paying the fare" and will become accustomed to the new role with practice. Responsibility shifts from representative to electors.

b) *it devalues the role of the legislature*

Who cares, as long as the system functions well?

and can result in a loss of respect for democratic institutions

Disagree. With the onus of responsibility on the electors and the legislature at their collective disposal, the elector can only blame his/her self for poor government. Those inclined to "blame their tools" will do so whatever the system of government.

c) *it is inflexible*

I don't understand this objection. A voter with a complaint who approaches his/her government representative and gets no satisfaction, contacts other electors in the same electorate by public notice or private communication, collects enough signatures to trigger a referendum and presents it to the Electoral Office, which verifies them and serves an Order for Referendum.

and lacks the deliberative aspect of representative democracy

Disagree. Since the topic under referendum requires the vote of the majority of electors, it will have a surfeit of deliberation.
**d) it tends to over-simplify issues**

Disagree. Without CIRs (or some other form of overrule), voters have to choose at election time between a very few **sets** of policies, commitments and individuals to set in place for years. Using CIRs, the chosen legislatures can be fine-tuned, sub-issue by sub-issue if need be.

**e) it may service sectional interests**

It can only serve the interest of the majority of electors, since otherwise the referendum will not pass.

and can be manipulated by special interest, since interest or ideological groups, media, etc

Again, only if such groups have the support of the majority of electors.

**f) it can result in confusion between multiple proposals**

Voters tend to vote against changes that they do not understand, which makes the CIR only effective for issues which are immediate or pressing.

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

The experience elsewhere of CIRs is that after a few years (clearing a backlog of issues, adjustment by both electors and representatives) the number of ballots is not excessive. The effect on electors is that they feel that they have control of their own government and their destinies, and that they can force significant, if minor, issues to be heard.

What high cost?

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

[This contradicts the "tendency to oversimplify" given in 'd' above.]

Again, voters tend to vote against a change that they do not understand.

**i) it may threaten unpopular minority groups**

Everything threatens unpopular minority groups except the desire of the community at large to see justice done. Without that desire we are finished: no statute will make a difference.
k) it may produce defective constitutional provisions or legislation

Agreed, but the alternative of entrenched effective provisions or legislation is far worse. The only way to be sure of a provision is to try it, and to remove it if it doesn't work. (eg USA 1920's Prohibition).

Re 'Options' on pp 19-21

Questions 2-6.

Suggested methods that use a committee are no longer CIRs, since the petition, from any number of voters, has no more force than suggestion. There is no longer any requirement for the Government to hold the referendum.

Question 8.

a) Who may sign?

Electors on the electoral roll.

b) How many signatures are required?

A percentage of registered voters sufficiently great to avoid trivial abuse of the process. The Swiss requirements are about one quarter of one percent. My recommendation of 20% was deliberately high.

c) What must they sign?

A document, standardised or otherwise, that specifies word for word the proposal of the referendum.

d) How are signatures to be authenticated?

Phone call or personal visit, until the Electoral Office is satisfied that sufficient signatures are genuine.

e) During that period must signatures be collected?

Not significant. Any period less than a year and more than a month will do.

f) Must issues be kept in separate proposals?

No.

g) May any part of the new state constitution be amended by initiative?

Yes.

h) May any legislation be enacted by initiative?
Yes. (This need not be included in the Constitution as long as the Constitution itself can later be modified by CIR).

\(i\) **Should there be any restriction against repeating unsuccessful initiatives?**

No. If proposals are repeated too often, voters can use the CIR to revise the qualification percentages in 'b' above.

\(j\) **Should there be provision for withdrawing an initiative?**

No. Not necessary. An elector who changes his/her mind need only remove his/her signature from the petition, or notify the Electoral Office, or vote against the petition.

\(k\) **Should there be provision for an unformulated proposal?**

No. Unfair to require legislature to act upon wishful thinking.

**Question 9.**

[What should the timing of the CIR be?]

Within a fixed period only long enough to permit administrative arrangements to be made. (30 days or so).

'Tentative View', pp 22-23

The country of Switzerland, before its Cantons introduced CIR, was known as the "Cockpit of Europe". In the four hundred years since their first introduction, the country has been largely free of war, and occasionally **devalues** its currency to match the rest of the world. In a country where every male up to age 50 is required to keep a military firearm and ammunition in his house, firearm abuse is conspicuous by its absence.

California's legislative initiatives in the field of environmental control, are among the most advanced in the world.

To my knowledge, no country or state that has adopted the CIR has abandoned it.

If (when) The Northern Territory becomes a State, I do not want it to be the same as the other States, with financial, environmental and economic problems. I want it to be substantially **better**. The Territory is still a better place to live than the Eastern States, without being a state. I do not want to join them in "muddlin' through".

**General Notes**

A The claimed virtue of the present relative invulnerability of representatives to redirection is that decisions with long term benefits and short term unpopularity can be made and vindicated before election time rolls around.

The flaws in this arrangement are:
a) the same invulnerability lessens the urgency to make decisions at all
b) the public is isolated from decision making to avoid interference
c) decisions with every long term benefits receive a lesser priority
d) vindication is replaced by justification and image control for elections.

When voters have CIRs at their disposal, the nearness or otherwise of elections ceases to be relevant.

B That a voter's ability to overrule or dismiss representative is undemocratic is nonsense. Election to Parliament is only granting power of attorney, not a choice between destinies.

David J. Shannon

27/11/1991
Dear Sir

Thank you for your recent letter and for sending me a copy of discussion paper No. 3.

I offer the submission that referendums initiated by citizens must be an integral part of rules laid down in the formulation of any Constitution or any legislation.

It is a vital part of an effective and just form of Democracy. The debatable point is that a certain number of eligible voters may or may not make up the numbers to submit.

It would seem desirable that the ordinary functions of an elected Government should not be under the threat of referendums put forward by minority interests.

I would think that a referendum to alter a State Constitution should be on the basis of 51% of eligible voters and 25% to alter Legislation.

The numbers are debatable, but for obvious reasons they should be sufficient to represent a substantial portion of elected delegates to any Parliamentary Delegation on these matters, and a substantial number of eligible voters.

I wish to congratulate your Department and all the people whom have served on this Committee so far.

No doubt the Committee would be disappointed at the number of responses received. Not very encouraging, but the work done is excellent and I wish all of you well.

Yours sincerely

PHILLIP R HOCKEY
Due to the short notice given I have decided to submit an informal and unstructured submission.

History has emphatically proven than human beings in the vast majority of cases can't be trusted with monopolies or power or concentrations of power.

Power generally comes in the form of (i) the media and communication (ii) money and credit (iii) political power and/or military force. Each of these powers MUST have checks, balances and sanctions. If this does not happen then misuse of these powers will occur. History has proven this.

Man made structures, governments and institutions will never find a panacea and will never be perfect. However, we must call upon the lessons of history and use our intelligence to find the best that man can do in creating man made structures which wield power.

This is because of the follow:

(i) The dignity of the human person
(ii) The common good
(iii) Solidarity
(iv) Structural violence.
The most fundamental concept is the essential dignity of all human beings. If the human person has such intrinsic value, it follows that society's structures, institutions, laws and customs exist for persons and for their full, authentic development and not the reverse.

The human person achieves his or her potential as a member of society, where the needs and rights of others have to be respected. It is wrong to pursue one's own interests without regard to this truth. It is essential for the health of any society that the majority of its members have a moral commitment to work together in order to promote the common good.

Solidarity is the firm and preserving determination to commit oneself to the common good; that is to say, to the good of all and of each individual, because we are all really responsible for all. The concept applies to every level of human behaviour from one's immediate family and neighbourhood to the relationship between nations and in particular way between the industrialised world and the so-called developing world. It requires a joint effort and a willingness to regard the other; whether a person, a people or a nation as not just some kind instrument to be exploited and discarded when no longer useful; but to instead regard the other as our neighbour, a helper, to be made a sharer on a par with ourselves in the abundance of life.

Structural violence has its roots in institutions and systems which are so dominated by the philosophy of self-interest that they constantly foster and cause injustice. These structures sometimes discriminate against some members of society; this society may be local, national or a global society; with the results being the prevention of these members from reaching their true potential.

These are the reasons for pursuing the best man made structures because it is through structures that power is wielded for the good, indifference or evil of society; local, national or global.

The powers I spoke about earlier (i) the media and communication (ii) money and credit (iii) political power and/or military force are wielded in the main through our social, economic and political structures of our society; local, national and global.

As I have said before there needs and must be checks, balances and sanctions on all power lest human nature will exploit this power. This fact is indisputable even if the present custodians are benign, there is no guarantee for future custodians. The price of the best structures is vigilance through checks, balances and sanctions on the structures that wield and shape these powers. The reasons for seeking the best structures have been given.

I turn to Citizens' Initiated Referendums. This mechanism provides a check a balance and a sanction to the political structure in a democracy. This mechanism decentralises political power and allows citizens to participate in democracy.

Of the three structures in society, it is the political structure which is the most important. It influences the type and nature of the economic and social structures in society. Citizens' Initiated Referendums takes on great importance because of this.

Decentralised political power, participatory democracy, checks, balances and sanctions are all necessary for a successful democracy. C.I.R. is one aspect, for a successful democracy. Proportional Representation also provides participatory democracy, and decentralises political
power, and balances C.I.R. by giving minorities representation. Proportional Representation and C.I.R. should be seen as a package to compliment each other.

I trust that my submission has given some insight into the reasons for C.I.R. I have enclosed a booklet "The People's Law" which goes further into C.I.R. I submit this as part of my submission.

This booklet is a synopsis of a larger book by the same name and author. I recommend this book for those interested in further study. I have also enclosed the current Australian Democrats policy on Citizens Initiated Referenda.

I trust that you can see how C.I.R. is one part of a wider perspective and it should not be viewed in isolation but with reference to the whole picture as I have suggested.

A more democratic society, locally, nationally and globally means a more just world which means less poor and oppressed in these societies.

The words of Ezekial 36: 26,27 inspire me in this position of a more democratic society ...

"I will give you a new heart and a new mind. I will take away your heart of stone and give you a heart of flesh. I will put my spirit within you".

Yours for a more Democratic society,

Lee Nightingale (Mr).
SUBMISSION NO. 80
KATHERINE TOWN COUNCIL

PO Box 1071,
KATHERINE NT 0851

File 90/5/5 : ARM/nl

26 November 1991

Mr R Gray
Executive Officer
Sessional Committee on Constitutional Development
GPO Box 3721
DARWIN NT 0801

Dear Mr Gray

RE: DISCUSSION PAPER NO. 3

I refer to your letter of 22 October 1991 in which you sought comments on Discussion Paper No. 3 on "Citizens' Initiated Referendums".

The Council considered the matter at its meeting on 25 November 1991 and supported the concepts expressed in the Paper.

The Council is of the view that citizens should have the right to initiate a referendum but is not in a position to suggest how this should be achieved.

I thank you for the opportunity to comment.

Yours sincerely

(Mrs) N E Lockley
for Allan R McGill
TOWN CLERK
I refer to your letter dated 28 October 1991 concerning Citizens' Initiated Referendums.

The Speaker of the Legislative Assembly in the Australian Capital Territory, Mr David Prowse, recently introduced a Bill entitled "Citizens' Initiated Referendums" in the Assembly as part of Private Members' Business.

An outline of the Citizens Initiated Referendums Bill 1991 ("the Prowse Bill")

The Prowse Bill (a copy of which is attached) provides for the registration by the Speaker of any petition of 400 electors signed within 3 months of the lodgement of the petition for registration. Once the petition is lodged, up to 12 "petitioners" nominated by 100 of the electors who sign the original petition may prepare a case for the petition and propose changes to the petition (within certain guidelines and subject to an appeal).

The petitioners may appoint any number of "petition representatives" who then seek signatures of electors for the petition. Signatures must be witnessed by a person from a particular category including a petition representative, a person appointed by the Speaker or a Justice of the Peace. Provided that 5% of electors sign the petition within 12 months of registration and the signatures are lodged within a further 2 months then the proposal will be submitted to a referendum.

The range of topics which may be the subject of referenda are only limited by the requirement that a petition shall not nominate a person for appointment to an Office.

A petition that qualifies for submission to a referendum is required to be published in the Gazette and tabled in the Assembly by the Speaker. The Parliamentary Counsel is then required to draft a law on the instructions of the petitioners.
Where a petition is signed by 8% of electors, the proposal must be submitted to a referendum within 6 months of being signed by that number of persons. Otherwise, a referendum can only be held in conjunction with an election or another referendum unless the Speaker desires to "issue a write" for the referendum at an earlier time.

Laws made pursuant to the Prowse Bill would take precedence over other laws where there is any inconsistency.

The Prowse Bill also provides for the entrenchment of most of the provisions of the Bill pursuant to section 26 of the Australian Capital Territory (Self-Government) Act 1988. In order to entrench a law under that section, the entrenching law must itself be passed by a majority of voters at a referendum.

**Legal Policy Considerations**

Apart from drafting errors contained in the Bill, there are a number of legal policy questions which can be raised in regard to this Bill.

Once a law is passed by referendum, the Prowse Bill provides that it can only be changed by referendum unless the law specifically provides that the Assembly can amend it. This is in contrast to similar legislation operating in parts of Europe and America and is a significant problem with the Bill.

The referendum process is slow and inefficient. If a minor change (having a major effect) was necessary to a law passed under the Prowse Bill it could take up to 3 years to pass the amendment.

The process could be used to remove the power of the Executive to control the spending of money and consequently make government unworkable. Because of the small number of electors in the ACT, it is likely that the 5% quota for a referendum could be achieved quite frequently on various issues resulting in a burdensome drain on revenue.

The Prowse Bill has not as yet been considered by the Assembly. However, I will advise you of its progress.

Karen Gosling
Constitutional and Machinery of Government
ACT Attorney General's Department
Ph: 2744313
29 November 1991

[Enclosures to this Submission have not been included in this Volume.]
Dear Mr Gray

Thank you for your letter of 22 October 1991 with which you provided a copy of the Committee's Discussion Paper on Citizens' Initiated Referendums.

For the Northern Territory to adopt a State Constitution, it is important that the roles of the citizen is carefully considered so that the new State is based on modern innovative structures and not merely be a reflection of other models in the Federation. However, as expressed by the Committee in its "tentative views", the objective should be to enhance the status of Parliament and the representative parliamentary process. Effective and responsible government may not be aided by Citizen Initiated Referendum, indeed such provisions may well introduce added volatility in a period when the new State must strive for stability and growth in its economy, population and political structure.

The new constitution should provide mechanisms for constitutional review and which include public participation. However, the initiation of referendums on constitutional change should be left with the Parliament.

PETER CONRAN
SUBMISSION NO. 83
FRANK COWMAN

FRANK COWMAN, JP, QLD (Retired factory manager)
28 Harding Street
ASHGROVE
BRISBANE QLD 4060
Phone (07) 366 1753

28 November 1991

The Executive Officer
Sessional Committee on Constitutional Development
GPO Box 3721,
DARWIN NT 0801

Dear Sir,

Constitution for the Northern Territory

In response to your advertisement in The Weekend Australian Oct. 12-13 1991, I have pleasure in enclosing my submission on CITIZENS' INITIATED REFERENDUMS with examples of how some of these have, in the past, been manipulated for political expediency.

I apologise for missing your deadline, but I was anxious to include

1 a highly relevant matter which finally surfaced in Queensland on 15 November, and
2 Western Australia's implementation of a short Trial period of "Summer Time" rushed through to commence on November 17, to be followed by yet another referendum - their third - on this issue.

Most sincerely, I hope the residents of the Northern Territory will soon achieve their ambition to become a State of Australia, which is long overdue.

You have the opportunity, the responsibility and the duty to ensure that the Constitution of the Northern Territory is the best in the Commonwealth. As you wisely seem determined to learn from mistakes made in other Constitutions and their amendments, and to have the courage to seriously consider including provisions for Citizens' Initiated Referendums, I am sure it will be.

I wish you complete success in your efforts.

Frank Cowman

Encl.: 1. The SUN (Brisbane) November 15, 1991, pp. 1, 2, & 65
2. YES/NO Pamphlet, Queensland Referendum 1991
INTRODUCTION

Proponents of Referenda, whether raised by Federal or State Governments, or by Private Citizens, must face the unpalatable reality posed in the question:

"WHAT IS THE POINT IN SPENDING MILLIONS OF DOLLARS OF PUBLIC MONEY ON A REFERENDUM WHEN THE MAJORITY DECISION CAN BE OVERTURNEO BY SUBSEQUENT LEGISLATION PASSED BY STATE OR FEDERAL GOVERNMENTS?"

You must be warned: this happened in the past and currently the practice is increasing.

This is what my submission is all about, to give you information of some of these events and to urge you to ensure - should you decide to adopt Citizens' Initiated Referendums - That the majority decision can only be amended or overturned by another Referendum - NOT by Government legislation. This will not be easy to achieve.

THE NEED FOR CITIZENS' INITIATED REFERENDUMS

It is indisputable that a rapidly increasing number of thinking and caring Australians are completely disillusioned at the lack of efficient performance by their elected representatives in Federal and State Parliaments, and are searching for a "Better Way".

They are disgusted by the lamentable lack of expertise which has resulted in many State finances being ruined. The Federal debt has assumed astronomical proportions while the number of those out of work has reached one million and is still rising.

People are appalled at the woeful scandals associated with failed entrepreneurs and their political cronies: the widespread corruption; the bribery; the "jobs for the boys and girls", and the cover-ups.

The loutish misbehaviour of some politicians in our Parliaments, as seen on TV, sets a very poor example to viewers, and is well below the minimum standard required. Instead of looking up to them the public look down on them with increasing contempt. Yet, they still get re-elected!

Surely, much of this aggravation can be traced to the fact that we are increasingly government by minorities. Most of our political parties are controlled by a powerful minority. Generally, they are a small group of unelected power-brokers who meet in conclave and have unlimited control over all their party's activities. They decide what issues will be dealt with, and how. They select candidates for election and thereafter control those elected.

In turn, they come under pressure from other, outside, powerful minority groups who ruthlessly use their voting pressure to extract concessions they demand. Whatever happened to the old naive belief that the first duty of parliamentarians was to the people in their own electorates?

Many taxpayers and voters feel badly let down by the increasing practice Governments adopt by appointing outside bodies e.g. Consultants and Commissions - often at great public expense - to investigate and report on certain contentious matters which might lose politicians votes and seats if they did what they are paid for: to make decisions, harsh or not. This abstention, they believe, frees
them from all blame: "We all must accept the decision of the Umpire" they proclaim. But why, in so many instances, do the views of the Umpire and their employer coincide?

One time they did not coincide - although they appeared to do so at first - was Queensland's Fitzgerald Inquiry, appointed in 1987 to investigate alleged corruption associated with brothels and illegal gaming houses. (The terms were extended later)

Even before Commissioner Fitzgerald tabled his Report, with a State election pending, the then leaders of the three political parties competed with each other in shouting they would implement his recommendations "LOCK, STOCK and BARREL". But after the election, with a change of Government, resolution wavered on the Prostitution issue and delaying tactics were the only things implemented.

(The Criminal Justice Commission handles these matters now).

The long-awaited Prostitution Issue in the Queensland Parliament eventually surfaced in mid-November 1991 with practically all members of all partiesducking for cover, particularly those in the Labor Government, badly bruised after the "backlash in the bush" over Premier Goss' admitted "arrogance" in legislating permanent "Summer-Time" in Queensland. (See p.5)

Enclosed, please find pages 1 and 2 of the Brisbane SUN, Friday, 15 November 1991, whose survey shows the cowardly negative attitudes of nearly all members of the Queensland Parliament. Many people here are sickened by it, disappointed and frustrated.

Currently, prostitution in Queensland is flourishing, far more widespread than in the pre-Fitzgerald period, with even greater opportunities for Police bribery (but there is no evidence this is occurring). Those same newspapers which clamoured for the original inquiry with lurid stories and photographs of illegal brothels, today carry page-full advertisements for sex. Enclosed is page 65 of the SUN illustrating his hypocrisy.

This major issue is still stalled in the Parliament. Not one party or party leader shows the slightest inclination to tackle it. The LOCK is in Limbo, the STOCK is Stolen and the BARREL has Burst, or was it all an illusion?

Northern Territorians who want to have provision made for citizens' Initiated Referendums in the Northern Territory Constitution could not possibly have a better example than the foregoing to support their case.

The Fitzgerald Inquiry reportedly cost almost $25 million and the permanent C.J.C. is not cheap. And for what? on this issue, the only result we see is petrified politicians exhibiting inertia. It is a very expensive lesson to learn what was already well known before Fitzgerald began.

Obviously, when Governments are too timid to act on contentious issues such as this, Citizens must have the power to override them and raise a Referendum to settle the matter. Cost = $5 million in Queensland. It is the best way to reverse the frustrated trend to apathy.

REFERRENDUMS USED AND ABUSED
(The following examples are from Queensland, Western Australia, Tasmania, Canberra and Federal)

QUEENSLAND 1

"Queensland, now, is the only State in the Commonwealth which does not have an Upper House (Legislative Council)".

Early this century, successive Labor Governments became increasingly frustrated when Queensland's Upper House amended or rejected some of their Bills. They pledged to abolish it and various tactics were discussed.

Early in 1917, when the World's attention was focused on events in the "Great War", Labor Premier Ryan confidently introduced a Bill to hold a Referendum designed to abolish the Legislative Council. However, challenges in three courts and other factors had an effect. On 5 May 1917, the people voted approximately 60% to 40% to retain it. Labor's plan had backfired and their ambitions thwarted.

Premier Ryan then tried to stack the Legislative Council (L/C) with Labor members but this did not succeed. Thoughts then concentrated on overturning the decision of the Referendum. Caucus voted to hold another Referendum to overturn the previous one, but they did not proceed with it. Other ploys were tried but failed.

In the lead-up to the State election due in October 1920, Labour leader Mr Theodore promised voters he would abolish the Upper House if elected. He won narrowly, eventually having a majority of only two and planned secret legislation to accomplish this.

When the Parliamentary Session opened in August 1921, no mention was made of a Bill to abolish the Upper House, nor was Caucus told of this on 12 October, when they met at their "last meeting of the year. But a Special Meeting was convened on Saturday 22 October, when they were told the Abolition Bill would be introduced on Monday 24th.

The Opposition was caught completely unaware by this dubious tactic, and THE CONSTITUTION ACT AMENDMENT ACT OF 1922 (12 Geo V No. 32) was passed with a comfortable majority. On Thursday, 27 October 1921, the Legislative Council of Queensland met for the last time, and on 23 March 1922, the Act received Royal Assent and was proclaimed.

That Act abolished more than Queensland's Upper House that fateful day. It also abolished the principle of the majority decision of the people as expressed in the 1917 Referendum.

Premier Theodore was not bothered by that. What concerned him was there was nothing to stop the Country Party from carrying out their promise to restore the Upper House when they gained power, by adopting similar tactics.

In 1929, they did gain power, but the Great Depression thwarted any hopes of accomplishing it.

1 This Act is in Queensland Statutes, Vol. 11, pp 524/5
With Labor back in power, Premier W. Forgan Smith, in 1934, decided to legislate for a delaying clause to prevent the Upper House from being restored quickly (as Theodore had one in 1922) should the Country Party gain power again.

In 1922, a Referendum decision was overridden to abolish the Legislative Council. Now, A REFERENDUM IS COMPULSORY BEFORE THE LEGISLATIVE COUNCIL CAN BE RESTORED!

Politicians see Referendums as playthings to be manipulated!

THE CONSTITUTION ACT AMENDMENT ACT OF 1934\(^2\) (24 Geo. V. No. 35) received the Royal Assent and was proclaimed on 13 April 1934. The Act states: "... that a Legislative Council ... shall not be restored ... unless or until a Referendum of the Electors of Queensland shall so approve ... ".

For more than 30 years, to the end of 1989, first a Conservative Coalition and then the National Party alone, were in power, but NO ATTEMPT WAS MADE TO RESTORE THE UPPER HOUSE!

QUEENSLAND 2

"Daylight Saving" or "Summer-time"

Preamble: I believe this is an issue which cannot be decided or resolved by a Referendum demanding a simple Yes/No vote in vast States with large areas in both the Temperate and Tropic Zones. Nor should it be resolved by a similar Federal Referendum. In both cases, populous areas in the Temperate Zone could carry the vote, imposing their will on the minority in the Tropic, where conditions are quite different.

It is a geographic issue, and great care must be taken by those in favour of Referendums to ensure that they do not fall into this trap. (Currently, the Queensland Government is finding this out the hard way. Their Referendum on this issue, to be held in March/April 1992, is ridiculed as a waste of $5 million, as the result is already known).

In the early 1970's, Queensland held a trial period of so-called "Daylight Saving" but the unimpressed National/Liberal Coalition Government did not continue it.

In 1988, under the shadow of the Fitzgerald Inquiry and coinciding with the Federal Government's 4 Referendums, Queensland's Liberals - now out of coalition - began a campaign for "Daylight Saving" in Queensland, believing they could win seats from the other parties at the 1989 State election, particularly in the South-east corner of the State.

Supported by the media, the push for "Daylight Saving" intensified in 1989, as all parties fought to gain political advantage. In August, Premier Ahearn bowed to pressure from within and without, and did what the media calls "a back-flip", in agreeing to have another trial.

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\(^2\) This Act is in Queensland Statutes Vol. 11, pp 530-532
The **DAYLIGHT SAVING ACT 1989, NO. 78** was rushed through Parliament to introduce the trial period from 29 October 1989 to 4 March 1990. It received Royal Assent on 18 September 1989. A task force was appointed to monitor the trial and report their findings, and submissions from the public and all interested parties were invited. The results were to be reviewed and published after the findings and submissions had been analysed.

The "Report of the Trial of Daylight Saving" was submitted by the Daylight Saving Task Force to the new elected Labor Government (early December 1989) on 27 April 1990.

We have not been told the coast of this expensive exercise. Whatever, it was all wasted as the Goss Government gave it short shrift. In the euphoria following Labor's landslide win, Premier Goss ignored the Report's findings and the many thousands of submissions, and legislated to make "Summer Time" permanent throughout Queensland.

His **SUMMER TIME ACT (ELIZABETH II NO. 72 OF 1990)** received the Royal Assent and was proclaimed on 4 October 1990.

(The Weekend Australian, October 26-27, 1991, reported: "Last year, the Prime Minister, Mr Hawke asked that Victoria, NSW and Queensland cooperate on daylight saving).

This decision, agreed to by all Labor and Liberal members, created ructions throughout Queensland. It came to a head following the end of the 1990/91 period of daylight saving and has been boiling since. Many Labor members outside the S/E corner, particularly those newly elected, became fearful of losing their seats by what is called "The backlash in the bush", where people are vehemently opposed to Mr Goss' "Summer Time".

A worried Premier Goss appointed a "Rural and Northern Task Force" to study "all concerns" of people in the bush. Its members travelled extensively around Queensland and were appalled at the resistance to daylight saving. It was obvious that not only some Labor seats could be lost but the Goss Government itself was in dire peril.

With his Deputy, Tom Burns, the Premier did a quick trip around the State trying to salvage something, but it only confirmed the opinions of his R&NTF which by now, had Caucus most concerned. It was time for Mr Goss to imitate Mr Ahearn and do a "back flip".

Mr Burns, the R&NTF members and other Labor stalwarts were urging the Premier to hold a Referendum on the issue (to get them off the hook?) but he persistently refused.

However, on 30 September 1991, Mr Goss finally climbed down. He announced he would ask Caucus to decide whether to hold a Referendum on "Daylight Saving" new February. He admitted "arrogance" in deciding last year to make daylight saving permanent, saying he had misjudged the depth of public opposition. (He never even considered it!) It was a humiliating admission!

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3 Obtainable from GOPRINT, 371 Vulture St, Woolloongabba, Brisbane 4102
4 *id.*
5 *id.*
(The Weekend Australian, October 26/27, 1991, recorded: "The decision which flew in the face of everything Mr Goss had previously said, was acknowledgment of his Government's biggest mistake - to take country areas for granted when it introduced daylight saving last year.")

Caucus dutifully went through the motions of "making the decision" they had made the week previous. Legislation will be raised to hold a Referendum on this issue on a date to be fixed, probably next February. It will ask the simple question (which read more like an opinion pool) "ARE YOU IN FAVOUR OF DAYLIGHT SAVING?". YES or NO.

To "save money", the traditional "For" and "Against" cases will not be sent out this time. Instead, these will be placed in newspapers etc. (But it is not stated yet who will prepare these cases). I am suspicious!

Amazingly, this Referendum has the wholehearted support and approval of ALL Party leaders, their Parties; factions; members and advisers. Following so closely on the Fitzgerald Report "Lock Stock and Barrel" enthusiasm, this remarkable unanimity occurring twice in two years is unprecedented. Lots of people are suspicious!

Disregarding the bitterly fought political battles of the 1989 election, all are now colluding in a massive propaganda campaign to convince the electorate that now, "Daylight Saving" is NOT a political issue. All spout as one: "This is not a Political issue". The, in chorus, they follow-up with the latest emotive catchphrase: "It is a quality of life issue", (what isn't?) ostentatiously adding: "We must give the people the chance to have their say", while most carefully avoid expressing their own preference.

When the result is known, again all will spout as one: "Well! The people have decided. We all must accept their verdict with good grace, and now we should all get on with the job". Meaning, of course: "You can't blame us. You've got to put up with it". But many electors will refuse to put up with it. They will continue to blame their politicians as before and rifts will not go away.

An increasing number of Queenslanders believe the $5 million could be put to much better use. They say the Referendum is a ploy, a costly smokescreen behind which our timid politicians will try to hide, hopefully emerging unscathed when the result is known, with their seats, power, privileges, influence and affluence intact.

Some practical members have belatedly recognised that "Daylight Saving" is a geographical issue, but not political party or any member has had the courage or the knowledge to put forward a motion based on this. I believe arrogance is widespread but also - factually not nastily - that ignorance of the fundamentals is the reason, and these are still not being learned.

This Referendum should be withdrawn and Queensland should revere to Easter Standard Time while the whole matter is thoroughly investigated and the various option listed, discussed openly and publicised. Then, and only then, should the main options be put to the electorate in a Referendum to mark their preferences by members.

**QUEENSLAND 3**

"A Referendum to extend Parliamentary Term from 3 to 4 Years"
Brimming with confidence following their landslide victory in December 1989, after 32 years in the Opposition wilderness, ALP strategists were determined to extend the future term of Queensland Parliaments from three to four years, and brought down legislation to achieve this. (Omitted was a clause specifying that under a four-year term, a Government must serve a minimum of three years before calling an election).

**THE CONSTITUTION (DURATION OF LEGISLATIVE ASSEMBLY) ACT (No. 96 of 1990)** received Royal Assent was proclaimed on 12 December 1990. The Referendum was to be held on 23 March 1991, in conjunction with Local Council elections throughout Queensland.

From the start is was dogged by controversy, possibly due to more arrogance, or over-confidence because the Bill was supported by the Liberals. On a technicality, the Government decided to put only YES case to each elector. This shocked and antagonised many fair-minded voters who preferred to see both sides of any argument. "Whatever happened to your promise of fair and open democratic Government?" they asked.

Opposition and National Party leader Mr R. Cooper claimed this blatant one-sided approach was illegal and took the issue to Court, which upheld the case of the plaintiff and ordered the Government to present both sides of the argument to all electors according to the Constitution Act.

The Government was forced to back-down, and the QUEENSLAND STATE REFERENDUM 1991 PAMPHLET contained both arguments was distributed to each elector. Premier Goss sent a personal letter to each voter urging a YES vote (printed at ALP expense) but it did not overcome the original set-back.

The Local Council elections - held on the same day - listed their candidates alphabetically, but the Referendum pamphlet reversed this principle by putting the YES case first.

Mr Goss soon realised his Referendum was in big trouble (the NO vote being boosted by the backlash against his permanent Summer Time Act), so he undertook a rush trip around the State to try and drum-up much needed support. It was all to no avail as the majority of voters in the Referendum voted NO to a four-year term. Queensland Parliaments will stay on a three-year maximum term! It had been a waste of $5 million of public money, an expensive way to learn!

All the arguments "For" and "Against" are too extensive to quote here. Instead, I enclose an official pamphlet which I hope your Committee will find helpful.

**WESTERN AUSTRALIA**

"Referendum Decisions on Daylight Saving or Summer Time Overthrown by State Legislation"

"Daylight Saving has been promoted for years by the Western Australian State Labour Party but the necessary legislation has always been defeated by the conservative forces".

[Weekend Australian, October 26-27, 1991]
Some years ago, the Government of Western Australia passed legislation to hold a Trial of Daylight Saving followed by a Referendum which they confidently expected to result in a YES vote leading to daylight saving becoming permanent there. The majority of electors voted NO, preferring to stay on their standard time.

But the Government was not going to allow a NO vote to frustrate their plans. Subsequently, they introduced legislation to hold a second trial, to be followed by a second Referendum on the issue at which they hoped the electors would "get the message": the Government wanted it passed! The electors hoped the Government would get their message when they again voted NO, insisting on staying on standard time. And there is stayed from 1984 to 1991, despite some failed attempts by the Government to legislate for daylight saving (probably at the request of Mr Hawke) which were rejected in the Legislative Council.

The balance of power in the Legislative Council changed early in 1991 when Mr Reg Davies left the Liberals and put forward his own private Bill on daylight saving. In June, the Liberal opposition announced they would support it providing certain conditions were met. The minority Labor Government could hardly believe its luck and an acceptable Bill was negotiated. The legislation was introduced on Tuesday 5 November when most Australians were concentrating on a horse race. The Bill passed quickly. (Almost as fast as Let's Elope!).

The upshot was that yet another trial of daylight saving - the third - was imposed, to commence on 12 days later on 17 November 1991 (this time a shortened version ending sometime in January) to be followed by REFERENDUM 3. The Weekend Australian article (above) states: "If a summer trial is approved by a subsequent referendum, the change will be permanent".

Does all this means that in Western Australia:

REFERENDUMS APPROVED ALWAYS BECOME PERMANENT, while

REFERENDUMS REJECTED MUST BE REPEATED UNTIL THEY ARE APPROVED?

Little wonder the finance of Western Australia are in such a mess.

TASMANIA

"Federal Legislation Overturns the Result of a Tasmania Referendum"

In the mid-1980's, Tasmania planned a hydro-electric power station on the Franklin River, which became highly controversial. The State Government brought down legislation to hold a Referendum to decide the issue. This resulted in a majority YES vote approving the building of the power station.

The Federal Government stepped in and legislated to prevent it. Opponents protested that they did not have jurisdiction under State Rights and accused them of hypocrisy. "What you are really up to" they complained "is doing deals for the Greenie vote".

Prime Minister Hawke claimed the Federal Government did have the right under the External Affairs sub-section of the Australian Constitution (National Parks and World Heritage). Australia's High Court narrowly upheld this view by four votes to three.
TASMANIA DOES NOT HAVE ITS HYDRO-ELECTRIC POWER STATION.

CANBERRA

"Federal Legislation Overturns the Result of a Canberra Referendum"

In a city-wide Referendum, citizens of Canberra voted NOT to have a Local Council.

The Hawke Federal Government, in the late 1980's, overturned this democratic decision by legislating to impose a Local Council to govern Canberrans.

CANBERRA IS NOW GOVERNED BY A LOCAL COUNCIL

FEDERAL GOVERNMENT 1

"In a Nationwide Referendum Held on 3 September 1988, the Australian Electorate, by Two to One Majority, Rejected the Federal Government's Proposed Four Laws to Change the Australian Constitution".

(Estimated cost to taxpayers: approximately $50 million)

Earlier, the then Attorney-General, Mr Nigel Bowen, frustrated by rejection of previous Referendums said, "There will be no more Referendums". Yet on 3 September 1988, the people were asked to vote YES or NO on another four in one group.

Abbreviations of the questions are:

1. 4-year maximum terms for members in both Houses of Federal Parliament.
2. Fair and democratic parliamentary elections throughout Australia.
3. To recognise local government.
4. Trial by jury, religious freedom, fair terms for property acquired.

The arguments "for" and "against" have been well debated and publicised and are well known. Summarising, it was seen by the great majority of electors as a blatant grab for power by the ALP towards their stated goal of abolishing the States and concentrating all power in Canberra.

I add two points regarding Question 2:

A. "Fairness and democracy in elections, like charity, should start at home". The ALP in Queensland certainly does not practice this (and I wonder if the other parties do). Candidates for parliamentary elections must obtain over 60% of the votes of branch delegates to gain selection. E.g.: In the scramble to gain selection for the safe Federal Labor seat of Oxley (following Mr Hayden's elevation to Governor-General), the State ALP member for Ipswich Mr D.J. Hamill received 58% of the votes, while his main opponent, Mr L. Scott, only managed about 34%. The ALP electoral college and others intervened and minority Mr Scott was declared the candidate and was duly elected to Federal Parliament in a by-election.
This "unfairness" and "lack of democracy" in the ALP must be known by the Opposition parties, but I am puzzled that not a word about it was printed in the NO case for Question 2 in the YES/NO booklet. What have the Opposition parties got to hide? What are their pre-selection procedures? Will they stand the test of "fairness and democracy"? (one local Union leader was quoted as admitting candidates for election in his union must obtain 75% of votes to be elected).

B. "One vote one value" is often touted as the ideal, and border "gerrymanders" condemned. These emotive catchphrases ignore the reality that some rural electorates in Queensland, Western Australia and probably the Northern Territory, are bigger than Victoria. How can one person properly represent such a vast area? Of course he cannot and does not. The ideal of "one vote one value" is an illusion - a delusion, as realistically, the person elected obeys the dictates of his Party chiefs, not the views of those who elected him. After an election, electors votes are worthless because they do not even get a vote or consideration.

There are many lessons here for Northern Territory advocates of Citizen's Initiated Referendums. Not least is that too many factors to be voted on in one go will probably result in NO votes for them all. One at a time is the ideal. Much slower, but one may be approved.

FEDERAL GOVERNMENT 2

"After ALP ambitions to centralise more power in Canberra were set-back by the rejection of their four Referendums in 1988, the Federal Government has now switched tactics to achieve that aim through the ploy of Private Members Bills."

A (Labor) Private Member's Bill now before the Senate, will, if passed, give to the Federal Government power to control time zones and summer time in Australia and its external Territories from Canberra. It will override all previous State and Territory legislation and Referendums on these issues. The stated intention is to impose "uniform time" throughout Australia.


Mr R.F. Edwards, Deputy Speaker in the House of Representatives and ALP member for Stirling, WA, with the full backing of the Hawke Labor Government, introduced his Bill to the Federal Parliament on 18 April 1991. With the support of the Labor majority, it passed the House and all preliminary stages and was sent to the Senate.

Here, it is stalled. The ALP has refrained from introducing the Bill because they know it will be defeated. All Opposition Senators - Liberal, National and Democrat who have the majority - have vowed to reject it, mainly on the grounds that it is an attach on State Rights.

There could be another reason for holding back this Bill: ALP strategists would have been kept fully informed of the moves in Western Australia to hold a third trial of "Summer Time" this year, and decided to wait to see the outcome (see p. 8).
Do people in the Northern Territory realise that in the 1991/91 summer, their region is the only part of Australia still on standard time, "out of uniformity" and liable to pressure from Canberra to comply?

Should the above Bill pass and become law, the Northern Territory will be forced by Federal legislation to adopt the "uniformity" of daylight saving, summer time, or whatever else it might be called, by advancing their clocks on hour on a date to be fixed. If this occur, will people in Darwin, e.g. realise that on 9 February, in the heat and high humidity, the afternoon will be 4 hours and 2 minutes longer than the morning, by the clock?

Should the 1992 Referendums in Queensland and Western Australia result in NO majorities, and Mr Edwards' Bill becomes law, then the democratic decision of the people will be overridden yet again and Federal law will impose the "uniformity of time" (daylight saving/summer time) on those States too. (Then there will be more ructions!)

UNITED KINGDOM - Mrs Thatcher

Enclosed, press cutting shows how ever the redoubtable "Iron Lady" has changed her mind and now supports Referendums. (She is out of office!)


BE ENCOURAGED!

EPILOGUE

My submission has concentrated on historical facts associated with some Referendums in Australia. These show clearly the ALP is the biggest culprit in their use and abuse. Shortcomings of Liberals and Nationals have also been recorded. Below is a summary of the divided stances of all major Parties on the divisive issue of "Daylight Saving".
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<th>Parliament Members</th>
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<td>Few For</td>
<td>Most Against</td>
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</tbody>
</table>

This submission and the above table proves the urgent need for Citizens' Initiated Referendums throughout Australia. I acknowledge the task of changing Federal and State Constitutions to achieve this is enormous. Political Parties will not relinquish any of their powers easily. They will point to the high cost of CIRs (never a concern when they raise them). Proponents of CIRs should insist they will save money as the country will only need about half the present Members and their staffs. (Guaranteed to infuriate politicians to reject CIRs)

I have been impressed by the pioneering work done in Switzerland on CIRs and the results obtained. No doubt, you will have contacted them for held and advice on how to proceed to success, also how to avoid the pitfalls and some mistakes made there.

All Referendums, particularly those raised by Citizens, must be: very carefully worded, unambiguous, clear-cut, and if passed, authorise their legislators to carry out the decision exactly as intended.

Initially, Citizens Initiated Referendums should be concentrated on those contentious and divisive issues which politicians avoid like the plague. Introduce them one at a time.

[Some enclosures to this Submission have not been included in this Volume.]

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6 The Federal Bill (p. 11) if passed, will apply to all States. Tabled are those areas in the Tropic.
Mr Rick Gray  
Executive Officer  
Committee on Constitutional Development  
GPO Box 3721  
DARWIN NT 0801

Dear Mr Gray

CITIZENS' INITIATED REFERENDUMS

Their introduction carries my total recommendation. My friends and I who are very long in the tooth (or who have no teeth left) are doing our best to leave the very best system of government for future generations ere we shuffle off this mortal coil. If I achieve nothing else during my lifetime my life will not have been totally misspent and I shall die happy. I do hope I shall not have to emulate Methuselah in order to see CIR firmly established in all three levels of Government in Australia.

Unlike us, the State of Northern Territory will be young, virile and vigorous. Its people deserve the best. CIR is the best. The Swiss, in a tiny land locked country, devoid of natural resources, enjoy the highest per capita incomes in the world, peace and happiness. The Italians have also adopted CIR with the most astonishing results. Previously abject poverty was so rife that their people could hardly wait to get out and move to Australia or anywhere. Now the tide has turned and people flock to this tiny country that already supports 60 million people, thanks to a happy motivated workforce. When we talk to our friends in Italy on the telephone and tell them that we are suffering a recession, they assure us they are not. They say, why not do the same as they did?

The reason is, of course, that we have party politics and politicians. Is it just possible that, hidden away in the remoteness of Northern Territory, lurks Statesmen who care more about their children and grandchildren than they about their precious parties? Dare we hope? I believe in miracles.

Percy Adams

PS Enclosed is a copy of Australian Recovery Movement News.

[The enclosure to this Submission has not been included in this Volume.]
On behalf of the Committee of the Voters Action Association, I would like to provide the following information on Citizen Initiated Referendums. This late submission on Citizen Initiated Referendums or C.I.R. is in response to your advertisement in the Australian Newspaper of 10th October 1991. We apologise for not meeting the closing date of Friday 15 of November 1991. Unfortunately the current high level of political activity in this part of the word prevented us from preparing an input on time.

CITIZEN INITIATED REFERENDUMS or C.I.R.?

What is C.I.R.? The C.I.R. consists of three parts:–

A. THE VOTERS VETO. This means that, if say 2% of the electorate signed a petition within a specified time, this then would compel a binding referendum on whether a particular law or proposed law should be vetoed.

B. THE RIGHT TO INITIATE A LAW on presentation of a petition signed by, say, 5% of the electorate.

C. THE RIGHT OF RECALL OF A MEMBER OF PARLIAMENT. This would require say 10-15% of the electorate to sign a petition, and then the person in question would have to stand down and another election take place.

In all three parts of C.I.R. the whole of the electorate have the final decision. This gives the people the final check on government actions.
EFFECT OF C.I.R.

What might we expect when we have C.I.R. in Australia? For a start all governments would have to carefully consider the introduction of controversial laws. Some recent examples would be the I.D. card, the Bill of Rights, Gun laws and others.

CRITICISMS OF C.I.R.

C.I.R. has been criticised on the basis of Stability, Cost, Administrative time and Voter apathy. These criticisms can be answered as follows -

A. STABILITY. The critics of C.I.R., including some MPs argue against it. If MPs only realised it, C.I.R. would be a great stabilising factor for them. It would mean that a politician or a government need not be voted out of office merely because he/she or that party had promoted some unpopular law. The law could be challenged under C.I.R. and the people would decide at a referendum. C.I.R. would strengthen the lot of the honest politician. It would mean that there would be little point in pressure groups trying to bulldoze certain laws through. No member of the government could guarantee that a law would not be challenged under C.I.R.

B. COST. What would it cost? If we had four referendums per year it would cost an estimated $2.50 per head per year. If we had one referendum per year, or if the referendum was held the same day as a normal election the cost would be much less.

C. ADMINISTRATIVE TIME. What about delays in Legislation becoming law? Is any law so important that it can't wait an extra six months to come into effect? Fifty thousand new laws came into existence in Australia in the last ten years. This process needs slowing down. Many MPs vote on laws without understanding them properly.

D. VOTER APATHY. What about voter apathy? Experience in those countries which have C.I.R. suggests that apathy dissipates when people realise that they have a say. Opinion polls in the countries with C.I.R. show that support for it is strongest in places where it operates.

FURTHER DESCRIPTIVE INFORMATION

I have attached for your information two items on this subject. They are:


VOTERS ACTION ASSOCIATION

Our own Association is firmly committed to the introduction of C.I.R. in Australia. We will be standing or will be assisting with standing a candidate at the next Victorian State Election. C.I.R. will be a prominent part of the policy platform of that candidate. We are not alone in our endeavours. All over the country organisations are springing up that are committed to C.I.R. Examples being:
- The Citizens Initiative and Referendum Council of Australia.
- Gippsland Region Save Australia Co-Alition Vic.
- North Sydney Council (Ted Mack System) NSW.
- Gippsland West Citizens Electoral Council, Vic.
- Voters Veto, Toowoomba, Qld.
- Electors Veto Association, Drysdale, Vic.
- Etc.

FURTHER LEGAL INFORMATION

If you require more detailed and legal information on this subject I would recommend the following:

A. "The Peoples Law" by Geoffrey de Q Walker, published by:
The Centre for Independent Studies
575 Pacific Highway (PO Box 92)
St Leonards
NSW 2065
PH: 02 438 4377
FAX: 02 439 7310

B. Unfortunately the Monograph "The Peoples Law" above, takes some reading. It may be easier therefore to start with

"A Synopsis of The Peoples Law" prepared by:
National Recovery Council
Lot 3
Beresford Drive
Samford
Queensland 4520

Also available from

Conservative Bookshop
461 Ann Street
Brisbane
Queensland, 4000

FEEDBACK

I hope that the information provided is of some use to your Committee. If you want further information do not hesitate to contact our organisation. Our committee would appreciate being informed of the decision you finally make concerning the use of Citizens Initiated Referenda.

Yours faithfully

A.C. RYAN (Secretary)
Attached:

A. Why not a say for the Australian People.
B. Public Participation and Direct Democracy in North Sydney Municipality.

[The enclosures to this Submission have not been included in this Volume.]
Mr Rick Gray  
Executive Officer  
Sessional Committee on Constitutional Development  
GPO Box 3721  
DARWIN NT 0801  

Dear Mr Gray  

I am writing in response to your correspondence of 22 October 1991 requesting comments on Discussion Paper No. 3 - Citizens' Initiated Referendums.  

As discussed with Mr Peter Thornton, I shall outline the general comments provided by various officers, and attach a copy of a paper prepared by the Alice Springs Region which deals with the subject in greater detail.  

The responses from within the Office were divided on the subject, however, the balance swayed towards favouring the initiative. The main basis of support being that the current political processes in the Northern Territory are perceived to encourage apathy and alienation. The referendum initiative is therefore seen as a counter balance. It was also stated that any successful petition for a referendum should contain signatures from signatures from at least 20% of the common electoral roll, or a simple majority of local government councils.  

The Alice Springs submission addresses changes to the constitution, restrictions on repeating unsuccessful initiatives, cost of referendums, and suggestions on the time span required for collection of signatures. A copy is attached for your information.  

I trust this information will be of assistance to you. If you have any queries, you may contact Mr Peter Thornton on 89 5173.  

Yours sincerely  

GRAHAM PHEGAN  
A/Chief Executive Officer
I refer to your minute of 13 November 1991 requesting comment on Citizens' Initiated Referendums.

A staff meeting was convened to discuss the subject matter and after going through the discussion paper debate was centred on the four topics listed at page twenty-two with reference to the questions posed on page twenty.

**CONSTITUTIONAL CHANGE/LEGISLATIVE CHANGE OR VETO**

Both of these subjects were discussed as one and the following comments made:

1. Only persons on current electoral roll should be able to sign petitions or vote at a referendum.

2. 15-20% of eligible persons to sign a petition if the requirement is for a referendum to be held, or 55% of eligible persons if the proposal is required to be enacted.

3. It was considered that if a formal petition format was followed then random sampling of signatories would be the most appropriate. However, it was generally felt that formal type petitions could be subject to manipulation and that some type of computer based system should be possible whereby eligibility and decision gathering could be implemented at the same time. Or, alternatively using the same system as currently in use for elections except that the ballot paper would be yes or no.

4. The suggestions on the time span required for the collection of signatures ranged from less than toto more than thirty days. Referring to three above it can be seen that the exercise could be completed in the vary short term (ie pose the question and set the date for attendance (not compulsory) to signify acceptance or rejection).

5. Each issue should be kept separate one from the other, though allowance should be made for possible multiple yes/no answers if required for a specific issue.
6 Change to Constitution or legislation should only be amended or enacted by referendum after initiative is passed. An alternative as in two above is to set a high requirement for voter turnout and approval for an initiative to be directly acted upon.

7 Any restriction on repeating unsuccessful initiatives should be confined to the life of the existing government.

8 The initial stages of any initiative should be through the Attorney-General's Department who could advise on wording, existing legislation etc. They should not however have the right of veto.

9 An initiative once proposed becomes the property of the public and should only be withdrawn through application by the initiator through the High Court.

10 Opinion was split over the cost of such initiatives, some felt it should lay with the tax-payer while others felt that original initiators should bear the cost.

**GOVERNMENT POLICY CHANGE**

The general consensus was that government policy should not be subject to referendum but best left as election issues.

**RECALL OF ELECTED AND APPOINTED PUBLIC OFFICIALS**

Some discussion arose around political appointments but it was generally agreed that such a system could be open to abuse and therefore if it was implemented some strong safeguards would need to be put into place.

**GENERAL**

The consensus of opinion seemed to be that there is a place for Citizens' Initiated Referendums in a new constitution.

A point was raised that perhaps the principle of Citizen's Initiated Referendums could be in the constitution and backed up by specific legislation.

It was also noted that a form of Citizen Referendum already exists in the Local Government Act relative to the creation of a Community Government Council.

Some concern was expressed that popular opinion does not necessarily equate with the best decision. It was also stated that some issues underpinning community "standard/ethics" should not be subject to a popularity poll, for example the introduction of death sentence etc.

ROBYN LESLEY
SUBMISSION NO: 87
RAPRORO

65 Calvert St
COLAC VIC 3250

7/1/92

PLEASE NOTE: THIS SUBMISSION IS THE SAME AS SUBMISSION NO:65
PRESENTED BY MR HORST PFEIFER
The Constitution of a Sovereign State is the Law of the People over the Parliament. It sets out the powers that an elected government may exercise in governing for the "Peace, Order and Good Government" of the people.

The people rightfully expect the elected Government to obey the Constitution and not go outside of its allowed powers just as the Parliament expects the people to obey its laws. In all of this the sovereignty of the people as a whole should be dominant to the elected government who are servants of the people (at least in theory if not in practice).

Unfortunately there are many instances of Constitutions not being obeyed and the people having no redress to pull the Parliament into gear unless you happen to have a few million dollars to take them to the High Court. This is not good enough - any citizen should be able to point out a disobedience to the Constitution and remedial action should be taken forthwith. The good example should come from the government. They expect the citizens to obey their laws, then we rightfully expect them to obey our laws over them in the Constitution. For example: in the Australian Constitution the "No conflict of interest" Section 44(1) has been disobeyed on many occasions, especially more so since the Australian Act of 1985 (?) has made Australian citizens who have dual citizenship rights with the UK which was declared a "Foreign Power" under the above Act and hence makes such people, as well as many others, in breech of the Constitution at 44(1), which states:

"Any person who:

1. Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power;

Shall be incapable of being chosen or of sitting as a Senator or a Member of the House of Representatives."

The penalties are severe but they have never been applied.

Many Hansard references of the Senate and House of Representatives prove conclusively that members of both Houses know they are in breech of the Constitution yet they will not bring it to a head.
The implications of the breach are horrific - it means clearly that the Australian Parliament has not been properly constituted, the laws are hence invalid and we have a constitutional crisis. The High Court to its shame has not faced up to this question. The solution is not that difficult but it demands that the politicians "come clean" to the people of Australia.

The solution certainly is not to get rid of this "No conflict of Interest" section 44(1). A person with dual citizenship could become Minister for Defence and find himself or herself at war with the other country of his/her dual citizenship - a highly undesirable situation.

I will leave my suggested solution to 44(1) to another occasion.

All constitutions have mechanisms to allow for changes to be made by way of referenda. The greatest weakness of the Australian Constitution is that only the elected government has the right to frame the questions to put to the people if they put any questions at all. The latest illegal trick is to by-pass the Constitution by getting the States at government to government level to swap powers without the people having a say in it - totally ultra vires - out of power.

If you accept that the Constitution is the People's Law over the Parliament, then it is fair and reasonable that the citizens should have a right to frame the questions to be put to the people at referenda - this is democracy.

Obviously only sensible, well thought out questions should be put to the people and the cost of the exercise is important as well but to a lesser degree. The right of citizens to initiate (start off) a referenda is known as Citizens Initiated Referenda or CIR for short.

In considering CIR attention needs to be given to how questions are admitted to the list of questions put to the people at referenda.

Step number one could be for a petition of a certain number of eligible voters, say 1,000 people to say they support a particular question.

Step two - the question be worded in correct parliamentary language to fit in with the wording of the Constitution. Once the wording of step two is agreed to be in agreement to the question in step one then step three is for the petition forms to be printed with the correct question/s and if support of say in Australia's case some 200,000 people (eligible voters) is forthcoming in say six months then the question/s must be put to the people. In the Territory's case say 10,000 petitioners may well be enough.

Timing is another consideration - how often should CIR be held? Certainly at election time is sensible for logistical purposes. Another referenda at mid term would be reasonable I feel - two years in the Territory.

CIR does give an added cutting edge to the democratic process. I believe only questions that people genuinely believe are important will have a chance of "getting up", or the people will seek to make it harder to ask questions if the right is abuse.
CIR powers could also be used to veto or attempt to veto what the people believed to be bad legislation. Again CIR powers could be used to counter the abuses of High Court decisions on interpretation of the Constitution.

The High Court ruling of 1983 in which it said the Commonwealth had power over the States through the Foreign Affairs Powers of the Constitution in any matter in which the Federal Government entered into a treaty or convention with a foreign power or foreign body such as the United Nations.

In my view agreements (conventions) signed by Australia with the United Nations which by-pass the States and gives Australia sovereignty away to the United Nations are illegal and would be overturned by the people through CIR once they understood the implications of these Conventions in International Law.

In conclusion anybody who believes that democracy is the fairest system of government, especially when tempered with consideration for minority groups can hardly disagree with the principle of CIR.

It certainly is a topic that should go forward in our constitutional development in the Northern Territory.

Yours faithfully,

Denis COLLINS, MLA

Member for Greatorex
Hon Stove Hatton MLA
Chairman
Constitutional Development Sessional Committee
GPO Box 3146
DARWIN NT 0801

My dear Minister

On behalf of the Darwin City Council, I should be pleased if you would accept the following submission on constitutional development with regard to Citizen Initiated Referendums and Constitutional Recognition of Local Government.

Officers from the Constitutional Development Committee addressed a meeting of the Darwin City Council on 4 December 1991. This allowed Council to be brought up to date with the present situation concerning development of a Constitution for the Northern Territory. Of particular interest to Council was the matter of Citizen Initiated Referendums. Subsequently, Council established a Constitutional Reform Committee to consider a submission to the Sessional Committee.

Council's Constitutional Reform Committee has considered two issues. Firstly the matter of Citizen Initiated Referendums and secondly the matter of Constitutional Recognition of Local Government.

Concerning the matter of Citizen Initiated Referendums, particular attention was paid to the comments raised in the Constitutional Development Sessional Committee's Discussion Paper No.3 - Executive Summary. In this summary, the pertinent arguments in favour and the disadvantages of Citizen Initiated Referendums are highlighted. After some deliberation and discussion by Council, Darwin City Council is of the opinion that the advantages, as outlined in Discussion Paper No. 3 concerning Citizen Initiated Referendums, outweigh the disadvantages as such a procedure is viewed by Council as an important means of community involvement in the process of government provided that such procedure must not impede orderly government by the duly elected authority.

Substantial consideration has also been given to the matter of Constitutional Recognition of Local Government. Council is of the view that appropriate constitutional recognition of local government is
necessary to ensure that local government is validly recognised as a sphere of government as opposed to the third level of government within Australia.

Council supports the principles enunciated in the submission lodged by the Northern Territory Local Government Association to the Sessional Committee in 1984. The following is extracted from that submission.

In any provision for constitutional recognition of local government in the Territory, the Association would be seeking specific enunciation of the following principles:

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

(b) secure financial base;

(c) proper recognition of the elected member role;

(d) protection from dismissal of individual local bodies without public enquiry;

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

Further, Darwin City Council is of the view that two additional attributes need to be included in the Northern Territory Constitution with regard to constitutional recognition of local government.

(a) The system of local government in the Constitution can only be removed by an act of Parliament.

(b) An individual council cannot be dismissed except by an act of Parliament relating to that Council.

Citizen Initiated Referendums provide a framework which ensures and protects the ability of the community to be involved in the process of government, both in terms of consultation and accountability.

Recognition and protection of local government in the Constitution legitimises local government as a sphere of government and adds considerable credibility to its right to participate in the distribution of general taxation revenue from the Federal Government. This then adds to local government's long term financial soundness.

Yours sincerely

ALAN K. MARKHAM
LORD MAYOR
SUBMISSION NO. 90
A MILLAR
C/- Forum for Thinkers
PO Box 777
NORTH SYDNEY 2059

To: Executive Officer, Rick Gray
    Department of the Legislative Assembly
    GPO Box 3721
    DARWIN 0801

Dear Mr Gray

In my opinion no one has any right to give away any property other than that they may own personally and that includes judges, pollies, public servants, councils.

It would seem to me that any persons who gave away property of any kind that did not belong to them would be committing an indictable offence.

What is "Aboriginal Customary Law" and how is it that it is a recent gimmick, not previously recognised and is it appropriate now that aborigines call themselves Kooris.

It appears that many, may be most, koori aborigines are happy to be good Australian citizens, but some want to be stirrers, bludgers, no-hopers, dependent on handouts.

I hope you will find enclosures useful.

A Millar.

I think it would be better if the media dropped the use of the words "BLACK" or "WHITE" and referred to all as Australians.

[I have holidays in Australia - not overseas. Make jobs for Australians - Buy Australian Made. Be good Australians - No cultural cringe].

[The enclosures to this Submission have not been included in this Volume.]
SUBMISSION NO. 91
THE HON. MR JUSTICE D.K. DERRINGTON

Judges' Chambers
Supreme Court
BRISBANE

22nd February, 1993

The Executive Officer,
Sessional Committee on Constitutional Development,
G.P.O. Box 3721
DARWIN QLD 0801

Dear Sir/Madam.

In response to your notice of 11 instant calling for submissions upon the topic, "Recognition of Aboriginal Customary Law", may I make the following suggestions:

1. It is desirable to recognise such customary law as far as might be reasonably possible.

2. A limitation should be observed where any such law seriously conflicts with profoundly held views of the broader Australian community. For example, if slavery or capital punishment were permitted by customary law then they should no longer be recognised.

3. In order to avoid such conflict, the aboriginal communities involved should be invited to consult first in an attempt to reform the customary law in order to avoid conflict where possible.

4. To this effect it is desirable that a serious study be undertaken in order that customary law may be recorded. This will lend to its preservation and application as well as enabling serious discussion of any parts which might be thought to be offensive. Until then, serious discussion must be impeded.

5. Customary law should be imposed only upon those who are willing to submit to it. Consideration must be given to the circumstances in which this will be decided and registered and the control of ancillary matters such as regulations relating to the right of a person to remove himself or herself from that jurisdiction must be worked out.

Yours faithfully

The Hon. Mr Justice D.K. Derrington
The Executive Officer  
Sessional Committee on Constitutional Development  
GPO Box 3721  
DARWIN, NT 0801

Dear Sir/Madam

re: Discussion Paper - Recognition of Aboriginal Customary Law

The attached eight-page comment on Aboriginal Customary Law was a paper prepared for me during the Land Claim hearings in Katherine. I pass it on for consideration by the Law Reform Committee, in their deliberations.

As a person who has spent most of my life involved with Local Government and in the town of Katherine, I make this comment:

Question  Should separate laws be allowed in town?

I say - No; you are dealing with different tribal cultures. Thirty-three different tribes use the town as their regional centre.

Problem  What (whose) culture?

There have been inter-marriages of skin groups, and many tribal customs that pertained to those skin groups have been broken both tribally and traditionally.

Yours faithfully

JAMES B. FORSCUTT

Encl.
ABORIGINAL CUSTOMARY LAW

- Before considering the implications of recognition of Aboriginal Customary Law, it is useful to present a brief, albeit over-simplified, view of the society in which it operated. Adherents to Customary Law were nomadic and tribal; their subsistence was based on hunting and gathering. They had no concepts of urbanization, education, communication and property ownership as we have today.

- Considered to be primitive, Aboriginal society has fared badly and stood up poorly to the onslaught of the white invasion. The resultant change in the structure of the society has meant that traditional ways have been lost. This situation persists and indeed, is likely to increase. With improved communications, schemes such as the remote area television program and the upsurge in public broadcasting will further penetrate Aboriginal culture in outback communities.

- It is with these trends in mind that the then Prime Minister Sir William McMahon expressed the following in Cairns - April 1971:

  *Aboriginal Australians should be assisted as individuals and, if they wish, as groups to hold effective and respected places within one Australian society with equal access to the rights and opportunities it provides and accepting responsibilities towards it. It will be our task ... to move towards the complete enjoyment of normal civil liberties by Aborigines generally.*

- Aborigines now readily accept the need for White Law. Marriages more often than not take place out of mutual consent by both partners rather than because of parental arrangement.

  Many Aborigines, particularly the young and middle-aged, have rejected the more repugnant aspects of their Law.

  As commerce becomes more important in tribal areas for management of shops etc, these people adopt Australian codes of regulation in business practice.

  Communities turn to the N.T. Police for assistance in resolving disturbances and disputes.

  Mr Justice Kriewaldt, in a paper published in the W.A. Law Review, 1960, maintained that Aborigines should be subject to Australian Criminal Law for two reasons:

  1. *because Aborigines are protected under White Criminal Law and,*

  2. *if Aboriginals are "to hold effective and respected places within one Australian society" they should be punished for their crimes.*

- It is possible to identify without any problems, a large and growing number of Aborigines who identify exclusively with Australian Law. These are, in the main, urban Aborigines who have been brought up away from the tribal situation.
The second group consists of Aborigines who live by Australian Law yet continue to practice tribal customs to a greater or lesser extent. This group would include people who have:

1. been dislocated from the 'tribal' situation and come into town, or
2. those who continue to live in communities and live by Australian Law but who retain certain values.

- Clearly the traditional tribal, nomadic, hunting and gathering existence is not in accord with the reality of Aboriginal lifestyle today. With this in mind, Professor Strehlow's objection to the recognition of Customary Law is worth recalling: '...it is too late to recognize customary law because it would mean restoring something that is lost'.

- There are three options open to us for legal recognition of customary law:
  1. any offences and their penalties;
  2. tribal rituals and customs.

  It should be kept in mind that these will vary from area to area.

- It is worthwhile listing several examples:
  1. The Mantutara often killed and ate the second child in a family believing it would provide strength;
  2. Central Australian Aborigines induced abortions often, for the purpose of eating the embryo;
  3. trial by ordeal and ritual circumcision are a part of many tribes;
  4. many offences carry punishments such as death by physical attack or sorcery, illness caused by sorcery, or wounding and battery.

- The concept of marriage is worthy of special mention. Apart from polygamy, Roheim noted, when writing on the tribes of Central Australia:

  'It would appear that no clear linguistic distinction is made between marriage and rape, and even after a marriage has been arranged, the only way the man can bring the woman back to his own camp is by force, this linguistic confusion seems to have some basis in reality.'

  [Children of the Desert]

- Two objections arise immediately:
  1. are there aspects of Customary Law that contravene Australian Law? and
are there aspects of Customary Law that contravene International Law and, in particular, Human Rights Agreements?

- The Universal Declaration of Human Rights (Articles 5), the International Covenant on Civil and Political Rights (Article 7) and the European Convention on Human Rights (Article 3) all state that 'no person may be subject to torture or to cruel, inhuman or degrading punishment or treatment'.

- It can be strongly argued that many aspects of Customary Law amount to torture. The 1975 Declaration of the Protection of All Persons from being subjected to torture and other cruel, inhuman or degrading treatment defines torture thus:

  "... torture means any act by which severe pain or suffering whether physical or mental, is intentionally afflicted... on a person, for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed...."

How then, should one rate trial by ordeal or even the 'less repugnant' custom of ritual circumcision which may not be painless when carried out on youths with a blunt stone? In short, a person's civil liberty should not be infringed nor should his/her rights as a human be violated.

- Where a person considers that his/her rights have been violated under Customary Law, that person should have recourse to Australian Law so that appropriate legal action may be taken. All Australians should have equal protection under the law.

- It will be extremely difficult to determine who participates in Customary Law. For this reason anyone living in a community which accepts Customary Law should have recourse to White Law. To leave a person entirely to the jurisdiction of Tribal Law for no reason other than that he/she may live in a community which accepts Tribal Law, would effectively deny that person of his/her civil and legal rights.

- Some proponents of recognition of Customary Law argue that it would restore authority to Tribal Elders. Surely, such a move would only be resented and would be counter-productive.

  As the Law Reform Commission correctly observed in its discussion paper: "traditional authority is challenged by younger Aborigines and other influences". Given that this is the case, there is little hope that the exercising of authority by Tribal Elders, as prescribed by Customary Law, would be effective.

- One of the biggest dangers of recognition of Customary Law is the effect it will have on youth. If Customary Law is imposed on the young, who already challenge it, and who have "grown up in an environment where Tribal Law plays a subordinate role to that of Australian Law", there is a very real danger that their potential will be stifled by being forced to live under 'a system' with no pertinence to their present and future needs.
- The suggestion is not that the tribal influence has no part to play in the development of an identity for certain young Aborigines. It seeks, rather, to emphasize that the society in which they live has progressed beyond the tribal and the nomadic.

- Young tribal Aborigines are relying on an identifying more with 'white' Australian rules. As mentioned previously, they are challenging increasingly the role of tribal customs in their lives. The more 'European' influence is enhanced by contact with people who belong outside the tribal sphere, ie teachers, policemen, clergy, community advisers etc.

- No-one would deny that this cultural penetration has occurred and that traditional Aboriginal culture has waned; however, it is impossible to quantify just how much Aboriginal culture has suffered. Amongst many urban Aborigines one could likely say 100%, but amongst others it would be difficult to estimate and would vary from individual to individual, from community to community. To recognize Custom or Law would therefore require a valued judgement about the extent to which it is valid.

The danger inherent in legal recognition is that something which is constantly changing will be solidified. If Customary Law is recognized in any way with it, there needs to be some type of inbuilt review mechanism to accommodate to further changes in its influence.

- It can be further argued that Customary Law is not pertinent to today's society. If Customary Law is recognized with a view to maintaining law and order in the various communities, how then will it deal with offences committed when the offender is under the influence of alcohol? For example, in what terms will Customary Law deal with a drunk who calls out the names of dead people? Customary Law won't be able to deal effectively with the problem of alcohol because it never had to contend with it.

- In a paper entitled *Administration of Criminal Justice on Aboriginal Settlements* Professor Misner underlines the fact that both criminal proceedings and tribal proceedings are largely unsuccessful for controlling the alcohol problem on Aboriginal settlements.

- Linguistic and conceptual problems encountered by some Aborigines are often put forward to argue for the recognition of Customary Law. That Aboriginal languages have no qualifying words such as "if", "but", "because" can lead to linguistic confusion. This would be exacerbated because of different cultural concepts, particularly of time and numbers; however, it can be equally argued that this placed unreal emphasis on the extent to which Aborigines do not understand English.

If the situation did arise that a person did not understand proceedings then interpreters should be engaged by the court as is the case when linguistic problems arise with other ethnic groups. If possible the magistrate should call for a community worker who knows the particular case to assist with advice to the defendant and to liaise between the defendant and counsel on areas of difficulty.

Kriewaldt says that sensitivity is needed in sentencing and recommends that the advice of an independent person who knows the community, who knows the case, be sought. This would prevent a useless sentence being handed down and could avoid the problem of dual punishment, i.e., both tribal and a criminal punishment being meted out.

- In addition, courses should be developed so that magistrates, policemen, solicitors, etc., who deal with Aborigines, and in particular Tribal Aborigines, may become more aware of Tribal Laws and the extent to which they operate within a community.

Given the problems such as secrecy in developing such courses, consultation should occur between the communities, elders, church groups and academic institutions proposing to introduce them.

- Finally, I would like to mention that I wrote to no less than 53 Aboriginal communities and organizations in the N.T. seeking their views on recognition of Customary Law. I received only two replies. Perhaps this is a reflection of the concern for recognition held by Aborigines.

CONCLUSIONS:

1. Aboriginal Customary Law should not be given legal recognition;
2. Aboriginal culture has become, and continues to become, more westernized, hence Customary Law is becoming increasingly irrelevant in its application;
3. Most Aborigines accept Australian Law;
4. To recognize Customary Law would mean restoring something that is already lost;
5. There is a danger that recognition of Customary Law will result in stifling the potential of youth;
6. Where Customary Law involves an interference of a person's civil liberties, that person should be given full protection by Australian Law;
7. Sensitivity in sentencing is an effective solution for accommodating Customary Law should the need arise.

Hence, Customary Law should be viewed as a religion, practised by those who so choose without infringement of the rights of others and without contravention of Australian or International Law.
Mr Rick Gray  
The Executive Officer  
Sessional Committee on Constitutional Development,  
G.P.O. Box 3721  
Darwin. N.T. 0801  

Dear Mr Gray

RE: RECOGNITION OF ABORIGINAL CUSTOMARY LAW

Thank you for your letter invitation dated 11th. February, 1993 to participate in the Constitutional development of the Northern Territory.

There are two suggestions I would like to submit for careful consideration by the Committee:

(a) The Commonwealth Constitution Section 51, Subsection xxvi, states: "The people of any race, for whom it is necessary to make special laws."

Seeing as most Aborigines today have been educated under the Australian Education system, and a number of them have been taught trades, while others have their own businesses, or work in various jobs throughout Australia, it is time to abolish the above mentioned Subsection of the Commonwealth Constitution so that all people of Australia, might live as One People, One Nation, under the Constitutional Law and Common Law, which is not only based on Christian Principles, but guarantees freedom and liberties to all Australians regardless of race, colour or creed, and would allow us to live our lives with love, tolerance, compassion, harmony, prosperity and justice.

Aborigines do not require Special Laws. They are a free people like all other Australians. If they break the Law, they should be treated the same as everybody else. If they uphold the Laws of the country, and very many of them do, it indicates that they are capable of living responsible lives.

The political propaganda thrust at Australians re: the Referendum of 1967 gave Australians generally to understand that the Aborigines should be given the vote, and many of us believed that at last the Aborigines would have the chance to stand up and be counted like the rest of us.
But this was not the real purpose behind that Referendum. Instead, those working with the Aborigines seem to have knowingly chosen to assist them to inaugurate policies which support hate, envy and violence, instead of honesty, harmony, prosperity and justice. The long term result of these skilfully misguided policies is that the Aborigines have not progressed along with the rest of the Australian community, but has divided the people.

Another reason why there should be no Special Laws for particular People is because, anyone coming to Australia as a Refugee gets money, a house and assistance in many other ways which Immigrants to this country in most cases do not receive, and white Australians most certainly do not receive. Aborigines receive assistance in different ways to which white Australians are not entitled. The whole matter is one of white racism and all these things have got to stop. Special laws for particular People is not the way.

(b) The Northern Territory Administration should hold a Referendum of the Territorians to establish a State Parliamentary Bank, whereby the Parliament is the Banker, operating upon sound Policy and that the Policy cannot be altered except by Referendum of the Territorians.

Under this kind of banking system, the Northern Territory Administration could create loan finance to Shire Councils, at long term low interest rates, which would assist in giving the Northern Territory a new lease of life by reducing rates, and other charges, and later, assistance could be expanded to incorporate other vacillates like long term, low interest rate finance along the same lines to business people, people on the land and people endeavouring to buy their own homes, which in the long term, would benefit all Territorians.

This Submission is respectfully submitted in good faith for serious consideration.

Yours faithfully

Mrs. Wanda Teakle
Independent Researcher.

P.S. Please find enclosed a copy of "The Chresby Papers - the Constitutional Link for a State Parliamentary Bank.

[The enclosure to this Submission has not been included in this Volume.]
To: Mr Rick Gray

Dear Mr Gray

**Constitutional Development**

As constitutional matters are of such wide concern it is pleasing to read the contributions of Non-Lawyers to your October conference (your letter of 12/11/92).

It is to be hoped that the constitution of the Northern Territory will incorporate a clause couched in the following terms:

"Freedom of religion and of conscience, is recognised as a fundamental freedom".

I feel recent events to the north of Australia give reason for concern.

Yours faithfully

Hewitt Campbell
To: Mr Rick Gray

Dear Mr Gray

Re: Religious Freedom

Further to my letter of 22/2/93, I would like to say, I am thankful for the material you have sent to me from time to time, and for the opportunity to respond. As an Australian I wish to see my country advance and amongst the Nations of the World, the Northern Territory is of course an important part of the Commonwealth. Adequate attention to human rights is the mark of a civilized country; one hopes therefore, the Northern Territory constitution make this kind of provision unequivocally.

As yet, I have not had a reply to my letter of 11/12/92 on the above issue. I would be pleased if you could say if it has reached you.

Yours faithfully

Hewitt Campbell.
The Executive Officer  
Sessional Committee on Constitutional Development  
G.P.O. Box 3721  
DARWIN NT 0801

Dear Sir/Madam,

Recognition of Aboriginal Customary Law

Thank you for your letter of 11/2/93 inviting me to lodge a submission on Discussion Paper No. 4.

Please find enclosed a copy of an article I have written which is to be published in the April edition of the Law Society Journal (NSW). Reference is made to the Discussion Paper, as well as several other sources, in my article. I would be pleased were you to accept the article as my submission to the Committee.

Yours faithfully

John McKenzie
Discussion of this topic tends to be frustrated by definitional questions. The concept of Aboriginal customary law is both complex and dynamic, as it continues to develop over time in response to differing local experiences. Perhaps the most common misconception held by non-Aboriginal people is that whatever customary law is, it only applies to "traditional Aborigines". Given the prior ownership of the land and the dispossession of the Aboriginal people by the invading British forces and civilian population, there is a strong argument to the effect that the unique way of life of those Aboriginal people living in urban situations should be recognised as a part of customary law.

Aboriginal perspectives of customary law tend to focus on custom as practised in particular locations by particular groups of people. Their desire for recognition of customary law revolves around the desire for recognition of the obligations, duties and rights which are inherent in the custom practised by each different group of Aboriginal people. It needs to be stressed that there is no one customary law which is uniformly applicable to all Aboriginal people, although there are common threads to be found in the various local and regional laws, especially in relation to land.

From a non-Aboriginal perspective, the perception of customary law held by many Aboriginal people is a wider system of social control than the concept of law is usually taken to mean. It includes elements which would normally be described as "private law" (e.g.: interpersonal relations and dispute resolution), "public law" (community government), and religious beliefs and practices\(^1\). All of these aspects are inextricably mixed in Aboriginal communities. Whilst ever each particular aspect of this customary law remains unrecognised by the Australian legal system, then as far as the law in force is concerned, it merely represents a form of private belief, custom or practice.

The Australian Law Reform Commission completed its lengthy inquiry into the recognition of Aboriginal customary law with the release of its two-volume report (ALRC 31) in May 1986. Since then there has been no progress made at a federal level with implementation of the Report as a whole, or indeed with any aspect of it - notwithstanding that partial or issue by issue implementation would have been consistent with the overall strategy of the Report. There have been some aspects of the Law Reform Commission's work incorporated either in the law or in practice at state level. The best example is the child placement principle, which has now found fairly wide recognition in Australian child welfare legislation. (The principle relates to the placement of Aboriginal children with members of their own community by state agencies.)

The inaction at the federal level is connection to the stringent objection of the States to federal legislation impinging on matters they see as their preserve, whatever the constitutional position may be. It would seem beyond doubt that the federal government has both the constitutional and political power to impose its own solution, if it had the will to do so. This is especially so since it could do so contingently upon the states not taking equivalent measures

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\(^1\) Discussion Paper No. 4, Sessional Committee on Constitutional Development, Legislative Assembly of the Northern Territory, August 1992, p.9.
themselves, a technique adopted in other areas such as the Sale of Goods (Vienna Convention) Act 1987 (A.C.T.) and counterpart State legislation. In recent correspondence to the Law Society\(^2\), the federal Minister for Aboriginal Affairs, Robert Tickner, outlined the morass of inter-departmental committees and councils into which the question of recognition has fallen. Despite the good intentions of the minister, action has not been forthcoming.

The judgement of the High Court in *Eddie Mabo and Ors v The State of Queensland* (1992) 66 ALJR 408 may give renewed impetus to the calls for recognition of Aboriginal customary law. In his judgement Toohey J. referred to the existence of fiduciary duty owed by the Crown to Aboriginal and Torres Strait Islander people. Such a duty would impact upon not only the resolution of land claims, but also upon questions of the propriety of the authorities' dismissal of Aboriginal customary obligations, duties and rights. It would not be difficult to prove the Crown's failure to act for the benefit of the holders of native title. As Professor Henry Reynolds points out\(^3\), the colonial governors were made aware of the transgressions against the rights of the native people. For example, in February 1850, the Secretary of State, Earl Grey, informed Governor Fitzroy that it was illegal to force the Aborigines off cattle runs and that they had "every right to the protection of the law from such aggressions"\(^4\).

The *Mabo* decision has brought forth commentary, both informed and ill-informed, from disparate groups. The managing director of the Western Mining Corporation, Hugh Morgan, publicly stated soon after the decision that,

"The significance of Aboriginal sovereignty as far as *Mabo* is concerned is that the *Mabo* decision effectively creates recognition of Aboriginal law, as if it were the law of a foreign country.... found to operate within the Commonwealth of Australia"\(^5\).

Such a reading of the judgements goes further than even the most optimistic Aboriginal commentators have so far traversed. However it does serve to raise the issues of self-management and self-determination in terms of the recognition of customary law.

There is a frequently expressed desire of Aboriginal people for local self-management within the framework of the wider community, wherever possible based on links with the land, and with the preservation of customary law\(^6\). There is also considerable Aboriginal support in the Northern Territory for the proposal of autonomous Aboriginal local and regional self-government with direct links with the Commonwealth, and not as part of the Northern Territory\(^7\). The Royal Commission into Aboriginal Deaths in Custody considered these themes to be central to the future relations between Aboriginal and non-Aboriginal Australians:-

"But running through all of the proposals that are made for the elimination of these disadvantages is the proposition that Aboriginal people have for two hundred years been dominated to an extraordinary degree by the non-Aboriginal society and that the

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\(^2\) Letter from The Hon. R. Tickner to the President of the Law Society of NSW, 12 September 1992.


\(^4\) Ibid p.139

\(^5\) Sydney Morning Herald, 13/10/92.

\(^6\) Discussion Paper No. 4, Sessional Committee on Constitutional Development, Legislative Assembly of the Northern Territory, August 1992, p.12

\(^7\) Ibid p.13
disadvantage is the product of that domination. The thrust of this report is that the elimination of disadvantage requires an end of domination and the empowerment of Aboriginal people; that control of their lives, of their communities must be returned to Aboriginal hands.\(^8\)

So as to more clearly understand the possible effects of customary law recognition, it may be useful to briefly outline the major areas of the customary law which were recommended for recognition by the Australian Law Reform Commission (ALRC 31).

1. Recognition of traditional marriage: patterns of traditional marriage continue strongly not only in the Northern Territory, but also in parts of Western Australia, South Australia and Queensland. The Law Reform Commission recommended that parties to traditional Aboriginal marriage should be regarded as married persons for the purposes of Australian law relating to such questions as status of children; adoption, fostering and child welfare laws; distribution of property on death; accident compensation; statutory superannuation scheme; the *Social Security Act 1947* (Cth); spousal compellability and marital communications in the law of evidence and spouse rebates under the *Income Tax Assessment Act 1936* (Cth).

2. Traditional distribution of property: it was recommended that Aboriginal people should be able to apply to have an intestate estate distributed in accordance with the traditions of the deceased's community. Legislation for family provision should allow for applications by persons related by blood, kinship or marriage to a deceased member of an Aboriginal community and who could at the time of death have reasonably expected support from the deceased in accordance with the customary laws of that community.

3. Aboriginal child custody: State intervention in Aboriginal families has been pervasive, making this an extremely sensitive issue for Aboriginal people. It was recommended that an Aboriginal child placement principle should be established by legislation, requiring preference to be given to placements with a parent of the child; a member of the child's extended family; other members of the child's community; and where such placement is not possible, preference should be given to place with families or in institutions for children approved by members of the relevant Aboriginal communities.

4. Criminal law: it was recommended that there be legislative provision for the admissibility of evidence of Aboriginal customary law where issues of provocation or duress are raised in murder prosecutions. Also proposed was the creation of a partial defence to murder, similar to a defence of diminished responsibility, as a direct acknowledgment of the conflicts that can occur between the general legal system and Aboriginal customary laws.

5. Sentencing of Aboriginal offenders: the Commission concluded that Aboriginal customary laws are already taken into consideration by courts in sentencing. Such consideration was to be encouraged, however it was specifically proposed that there be no incorporation by courts in sentencing orders of any customary law penalties or sanctions which are contrary to the general law.

\(^8\) RCIADIC, National Report, para 1.7.6, AGPS 1991.
6. Traditional hunting and fishing rights:- instead of advocating comprehensive federal legislation in this area, the Commission proposed a set of general principles to be adopted by the Commonwealth, State and Territory governments. The principles strive to reach an equitable balance between Aboriginal interests and other legitimate interests, including conservation, the effective management of natural resources, pastoral interests, commercial fishing and tourism. As a matter of general principle, Aboriginal traditional hunting and fishing should take priority over non-traditional activities including commercial and recreational activities, where the traditional activities are carried out for subsistence purposes.

7. Community justice mechanisms:- while the Commission supported and encouraged the local resolution of disputes in Aboriginal communities by unofficial methods, it concluded that there should be no general scheme of Aboriginal courts established in Australia. It set out basic requirements for the establishment or continuation of any special courts or similar official bodies, based on localised community control and preservation of individual rights. The Royal Commission into Aboriginal Deaths in Custody endorsed the Law Reform Commission's stated objective to return control over law and order issues to the grassroots level in Aboriginal communities. To this end, the Royal Commission recommended support for Community Justice Panels, which are small groups of Aboriginal people working as volunteers with the criminal justice agencies to ensure the welfare of their community members in that system.

As can be seen from the above review of the recommendations for the recognition of customary law, there is nothing radical or total failure in the implementation of the recommendations speaks ill of the commitment of the Australian government and general society to any real efforts at reconciliation with Aboriginal people. It is to be hoped that the cause of customary law recognition is assisted by the numerous assessments of the Mabo decision currently taking place. It would be to Australia's shame were the Aboriginal people forced to litigate to secure the rudimentary recognition of their customary obligations, duties and rights which was proposed by the Law Reform Commission some seven years ago.
Recognition of Aboriginal Customary Law

Dear Sir

With my life, and lively imagination, I dare to pray that my thought will be sufficiently considered as to stimulate study and promote discussion. It was several years ago that Michael Kirby invited my response to [an] idea from the Law Reform research work.

I believe it was in 1979 that Andrew Peacock publicly concluded the first International Community Education conference held in Melbourne. A quotation he used was -

Our lives are inextricably linked by the common thread of humanity. If we break that, we are all undone.

My own study has been strengthened by learning from a highly respected anthropologist, whose work was published by the National Socialist Workers’ Party of Germany set a brutal pattern of distortion. His wisdom offered me

Nothing seemed fully explicable unless it could first be analysed within the framework of the total system -George Radcliffe Brown, 1929.
UNITY TO PROTECT DIVERSITY

Common law recognises natural justice and the vital balance between what is and what should be.

Erasmus learnt to recognise that the conscience of a person "must know freedom". His friend, Sir Thomas More, had accepted his own death as a price to pay for that freedom. The spirit of many Europeans has/have claimed that heritage.

Tom Paine gave the words to a new elite in America and France; with those words, the rights of man [kind] were given official recognition. Andrew Marvel wrote a novel called "Billy Budd" which offers constructive lessons concerning the folly of blind justice. From the maturity at sea, the British navy learnt that a sword has two sides and is better kept in a sheath.

Knowing the criminal and knowing the circumstances is essential if justice is to be enacted. Equally vital is the factor of the knowledge possessed by the perpetrator of the crime.

The traditional culture of the Australian aborigine (as I have heard) did put great stress on an adolescent being fully introduced to the laws of mankind. These were laws born of local circumstances. They were also laws for local people within a local culture. Because of a fundamental fact, the laws dealt with the necessary conditions required for common life of commoners.

I do not believe (and Diana Bell would know better than I) that [the] Australian aborigine made laws for a privileged few. They were common laws, commonly held. The laws were designed as appropriate for human beings whose behaviour affected other neighbours. There was a relative isolation from distant neighbours which offered a boundary for their views. This formed a sort of small nationhood.

The aborigine of Terra Australis are certainly the patriots from who we can learn. Those who have inherited love and veneration of the land have a precious sense of value from which we need to learn. Conversely, we Europeans have a fund of knowledge concerning the price to pay for social and political development. From the "oriental" side of the world, Asia & Pacific, we have a greater sensitivity and patience from which to benefit coupled with elements of bleak authoritarianism.

The aborigine, the modern European, the people of developing nations and many in Asia & [the] Pacific know something of the problems of imposed authority. The ruthlessness of the Mighty is easily recognised. That is the Great Reason for the gradual development of democratic processes.

(Those who sincerely believe they have superiority as an intrinsic value can do great damage and loose their own way. Life is for the living and life is a continuum).

It is sad that the Europeans who came to Terra Australis have tended to reflect the folly of those who reject without discernment. A bruise does not cause the whole apple to be bad any more than rot in a tooth necessitates abstraction. Developing the freedom to live a reasonably peaceful life
requires a great deal of common sense. Failure to cultivate patience and understanding causes mutations that have no comfortable place for they exist where they do not belong.

South Africa was an acute example of Europeans from the Netherlands trying to impose their own way within [a] territory new to them. The Boers wanted to belong to the land [and] to possess the land. Conditions are different when the humane attitude tends to serve the land.

By serving the land - by learning the basic needs for public health i.e. clean air, safe water, sewerage and their irrigation, we move towards BEING HUMANS OF some value.

Laws which recognise such a purpose can be written discussed and then adopted through the due process of COMMON LAW.

To assist the extreme needs of South Africa, a British barrister of a liberal family, Lionel Curtis designed an almost perfect constitution. That is the design which could serve as a foundation for legislation appropriate to the Northern Territory of Australia.

When all is considered, it is only with cradle to grave educa that the laws of the land can maintain a reasonable standard of behaviour. The politicians in South Africa and in Katanga were able to take political advantage because the people were not willing (in one case) and able (in Katanga) to prevent political chicanery.

The Legislature must be free from any taint of party political influences. The law has to be upheld by the people if they wish it to be for the people.

Both lessons from Lionel Curtis and from Elders of the Australian aborigine can make truly human life another sample that can be of service to humanity.

I think we have to stop putting our lives and our thoughts into little boxes in order that small minds can keep control. Life is for real

and life is connected...........

To help the minds and feelings of each individual to work in harmony may be a way to develop a more reliable foundation for our institutions. However, the policy directions are being made by people toward the roof of the institutions. It is to their position in the structures of power that we must look for hope of changes.

There is a fundamental humanity that has not yet been totally crushed. That is ready to respond energetically IF the institutions can bend toward the vital values needed by the human race.

Dahrendorf offered a deal of wisdom in recent times. Erasmus was amongst those who opened the eyes and minds of Europeans.

I believe that 500 years of political development took Switzerland to an excellent federal union. To recognise Cantons in Terra Australis would, to my mind, be an very excellent decision.

Nonetheless, the many structures used within the United Kingdom offer an extraordinary variety. The linking of Wales with England left a minimum of autonomy; merely symbolic perhaps.
The Scots safeguard their own education and have several other spheres of command. The Scots have certainly given far more to the U.K. than they have gained by their junior partnership. The Isle of Man and the Channel Isles probably offer samples of the amount of self-regulation that the Australian aborigine deserve to be granted. The feudalism of the Channel Isles would not be a pattern to repeat.

I offer what thoughts I can from a life in which I have learnt quite a lot. It is my wish (my prayer) that my lively thinking can serve a constructive purpose.

Joan Macnee

11-3-93

[ ]: SCCD edit

[ ]: Author's emphasis
Mr Rick Gray,
Executive Officer,
Committee on Constitutional Development,
G.P.O. Box 3721
DARWIN N.T. 0801

Your ref: 18/6.1

Customary Law

Dear Mr. Gray,

I regret that this letter has been so delayed. I have wanted to thank you for your very welcome letter dated 15th March, 1993. I am well on my way to being seventy eight and still unable to put a stop to my involvement with community development. At present, life is using me so well that I cannot keep pace with myself.

I was sorry to see that I had garbled the final paragraph in my letter to you. The letter which accompanied my submission. I have much respect for the senior George Radcliffe-Brown. He was a very fine anthropologist who worked in Papua New Guinea. The writing I sent did, in my haste, run into a muddle with my thoughts about Daisy Bates. That may have occurred to you.

Finally, I need to let you know that I would be willing to appear before the Committee so long as I have not left for the United Kingdom. However, you should know that I am no more than an intelligent volunteer who has kept learning because I care about the human race. My short schooling was excellent and prepared me for a life of responsibility towards others. I need to correct the imbalance between those of us who had some privilege and a sense of social security was recognised by those of us who had a truly good education.

Not so final. I also need to ask you to understand that I am no expert nor a person of paid employment. It would be more useful for me to recommend books that I have found very informative, rather than trying to exchange information personally. Most of my conclusions are based on my understanding of and for people.

Your letter was received by me with much appreciation. It was good to know that my thinking was worthy of the time given by very busy people.

Sincerely
Joan Macnee
SUBMISSION NO. 97
VALARIE CAMPBELL

18 Hilltop Ave
Mr Pritchard 2170
N.S.W.

10 March 93

Discussion Paper No. 4 — The Recognition of Aboriginal Customary law.

In the first place I feel that it would be a good thing for Aboriginal people to be able to practice their customary laws; Language, social, cultural, and religious customs. In hunting, there has to be some exceptions, such as the turning onto their backs large turtles where only one leg at a time is cut off for cooking. This is a cruel practice and aboriginals should be bound by the (cruelties to animals Act). Also the conservation of certain animals, fish, turtles, birds, etc which are seriously decreasing should also be observed by aboriginals - (Laws of Conservation)

In the case of spearing - as in pay back - this form of punishment should be excluded from the new constitution.

Because of the secret nature of A.C. Laws and because it is largely unwritten, I feel that it would best be administered by the tribes' elders. And because the various tribes possess different customs, laws even languages etc - there should be (flexibility)!. Therefore the various aboriginal communities should exercise the laws through its leaders or elders etc.!

In the case of murder, serious violence, car stealing, robbery etc., involving either whites or aboriginals, then the law of the land should override the customary laws. Perhaps also the Aboriginal legal services could liaise with the individual tribes in administering the customary laws or the Aboriginal Medical service - but not the multicultural groups.

The administration of customary laws must not place Aboriginals in conflict with whites, nor should the laws be a forerunner to other ethnic groups, minorities, establishing this customary laws to the same degree, because this could cause resentment in the wider community and weaken the authority of the law of the land. (The diversity would be confusing).

The question arises. Will the tribal Aboriginals practising customary law in various tribes become trapped and locked into a past way of living, even though that living is being practiced today? If these laws were written into the new Constitution could there be a danger of conflict if certain members move out of their tribal living and move more into the wider community?

The Customary laws should apply in certain Territories. But if a tribal member has moved into the wider community and is living under the western culture and benefiting from this and they do not live or practice their tribal law, then customary laws should not benefit them!

I am aware of the Mabo Court Case and that you wish or intend to implement land rights in the new N.T. Constitution. But, I say no to this being written into the Constitution. They have been given
vast areas of land already. And we anglo-Saxons feel that the tribes need vast areas for food living etc. - but those who work or receive social benefits etc - who are living alongside the white man, should not be allowed lengthy court cases at the expense of working Australians to make lawyers etc rich, to prove that they own land! This could cause increasing bitterness and wasted money. I saw on T.V. recently an aboriginal working hard to improve his large area of land. He worked with the help of his wife, then two other aboriginals have laid claim to the most developed areas of it. Is this fair after all the work he has put into it??

Aboriginals themselves are migrants as well as those who came after. Even though they came 40,000,000 years ago. They couldn't put foot on every inch of this great continent!!?

As for police and judiciary bodies having better relations with Aboriginals. This could be achieved partially by having a lot more aboriginal police. We need a lot more! And also I believe in conferences between the two. Also picnics, dances, social events between the two cultures which are already in practice, I believe should remain of benefit!. Perhaps a special annual award could be presented to an aboriginal person whose leadership in benefiting social relations, work relations, etc between the wider community and the aboriginal community may be of inspiration?

And just before I finish here, I believe that aboriginals should have clean running water and houses built to suit their needs. They should be educated by one of the tribes' members (or white nurses etc.) to feed and care for their children properly. This caring is important. and lastly, because of the difference and outlook between the cultures white Australians are all branded as racist - this is not true! The contribution white Australia has made to aboriginals must be represented and must be acknowledged. Aboriginals should also help themselves instead of blaming the white people for all problems. Because there will always be problems not due to racism!

Valerie Campbell

That is another thing - we need aboriginal nurses! and more them!

My submission may not be of much help. But I thank you for giving me the opportunity to make it. And I would be interested in any further material on any of the subjects and particularly aboriginal problems information, etc.

Thank you.

Valarie Campbell
A Citizen's Initiated Referendum could represent the process by which the ordinary citizen may have a more democratic say in issues which affect them. The Government and its affiliated bodies may become too distant and elitist from the people who put them into power. So a citizen's Initiated Referendum in some form could be the answer.

I feel the committee should be an ad-hoc one appointed by the Government. Coming together when the need arises from time to time. Made up of persons within the government and also persons outside which represent the people as truly as is possible!. It should accept submissions and conduct public hearings. It could also report on references from the parliament as well. It could report recommendations for change. Alternately it could advise that proposals are not appropriate for change. The ad-hoc committee could present the submissions from the people to the Government. In this way the government is informed of the peoples will to which it must take into consideration. At the same time it must keep in focus the good of the country as a whole. But the powers to govern must be left to the Parliament.

Any proposal to change the constitution must represent about 60% of the population. The submission should be presented to the ad hoc Committee which could come together after being informed either by the Parliament (and or) the public of the need to take submissions and for those submissions to be presented.

The same principles must apply for legislation veto: Important submissions should reflect the majority of people having the same views!

8. A. Any person 18 years old and over who is on the electoral roll may sign.

   B. It depends on the subject and the importance perhaps 60% of peoples signatures could be required.

   C. They must sign a submission (statement) or a declaration stating their dissatisfaction with the present government etc.

   D. Signatures must be signed and witnessed by a person above reproach. Perhaps a justice of the peace! With positive identification of the person who is to sign. This
may be difficult. Or perhaps a motor registry personal may witness the signature and the drivers licence can be proof of identification!

E. At the time of a general election.

F. No, not necessarily.

G. Only if there is a majority wanting it, 75%.

H. Again if a majority wish it, say 75%.

I. This depends on the issue and the circumstance. In some cases yes!.

J. In some cases the ad-hoc committee could advise that the proposals are not appropriate for change and therefore advise that the initiative be withdrawn accordingly.

K. Yes. In some instances.

The best time for a Citizen Initiated Referendum to be offered (especially in the case of a Constitutional change to veto legislation) would be at the time of a general election. But if time is urgent, then the Governor General should be able to decide to hold a special referendum (as they do in California).

Thank you for taking my submission. I am sorry but I am really not sure what to say about how to implement these proposals in great detail. I will have to leave this to others.

I also apologise for being late sending in my submissions and for not doing them all but I have had a very sick mother and also a very ill mother-in-law. So I have not been able to complete all the subjects.

Sincerely

Mrs Valerie Campbell
Brief submission to Committee on Constitutional Development, Legislative Assembly of the Northern Territory.

CONSTITUTIONAL RECOGNITION OF ABORIGINAL LAW.

Agenda Item One: Brotherhood.

Aboriginal people stand in relationship to non-Aboriginal people as Elder Sibling stands to Younger Sibling. They are our Elder Brothers and Sisters. Respect for the First People must form the central motif of our actual lived practices and written constitution.

The discussion paper on "Recognition of Aboriginal Customary Law" considers the question of whether Aboriginal customary law should be constitutionally recognised in some way in the Northern Territory.

The correct answer is "Yes - fully recognised, and about time too."

And it must be said at the outset, having taken this step, that the First Law of Aboriginal People is a living form of wisdom which can not be captured by writing it down. Even the best Western minds do not understand this law.

The written Northern Territory Constitution presently being contemplated by Anglo-Australians is culturally inappropriate for Aboriginal life. It should not be forcefully imposed upon them. That would be tantamount to cultural genocide.

The proposed Constitution must not be yet another exercise in cultural imperialism by Europeans living in Aboriginal country, but an agreement on the part of newly arrived people to live in partnership and co-operation with First People.

The Constitution, in other words, could include an undertaking on the part of those who purport to live by the law of the written word to regulate their behaviour to comply with the dictates of First Law, as modified for them.

We have ample evidence that when First Law is prevented from operating the complex systems of life being to rapidly run wild. This is not merely co-incidental.
The people framing the Constitution would be well advised, if they seek to restore balance to life, to reverse their perspective. They need to consider ways of making up for the century of abuse of First Law. For example, working out a way by which existing written laws could be subjected to ratification by Aboriginal people.

Fundamentally, however, the Western mind must recognise that First People cannot be separated from their living country without massive trauma to both. Full compensation is necessary.

An undertaking could be also made to the effect that, subject to the agreement of First People and in return for payments to First People for the use of their cultural property, non-Aboriginal people in the Northern Territory will respect the people and country by learning the appropriate local Aboriginal language and Dreaming laws.

To have real effect, any provisions in a written constitution should be subject to ratification by both peoples and, if accepted, subject to realistic review processes at regular intervals. All documents and proceedings must be made available in the first languages of Aboriginal People and in the everyday languages of other people.

Bruce Reyburn

Lionel Murphy Scholar 1990 - Awarded for study of ways of improving dialogue between the two Australian systems of law.
Mr Rick Gray,
Executive Officer,
Legislative Assembly of the Northern Territory,
Committee on Constitutional Development,
GPO Box 3721,
DARWIN NT 0801

Your Ref: 18/6/1

Dear Mr Gray,

RE: RECOGNITION OF ABORIGINAL CUSTOMARY LAW

I thank you for your letter of 7th April, 1993 which I have read with interest.

I believe that Aboriginals and Non-Aboriginals are all Australians and that the same law should apply to everyone. I therefore, do not believe that Aboriginal customary law should be constitutionally recognised in the Northern Territory or elsewhere.

It is also my view that if the Northern Territory were to become a State that it should have the same Legislative competence over land matters as that enjoyed by existing States of the Commonwealth.

Should the situation be otherwise then the Northern Territory would not enjoy the full Statehood of the original states.

I am interested in being kept informed on aspects of Constitutional development in the Northern Territory.

Yours sincerely,

PETER SLIPPER MP
Federal Member for Fisher
Mr Rick Gray,  
Executive Officer,  
Sessional Committee on Constitutional Development,  
G.P.O. Box 3721,  
DARWIN NT 0801

Dear Mr Gray,

re: CONSTITUTIONAL RECOGNITION OF ABORIGINAL CUSTOMARY LAW

We refer to the Constitutional Development Sessional Committee's discussion paper (no.4) on "Recognition of Aboriginal Customary Law", and your invitation for submissions. The paper was of considerable interest to the Yirrkala people and we wish to inform you that we strongly support constitutional and other official recognition of our law. This includes recognition by way of Commonwealth legislation, but we realise that this is not within your jurisdiction.

As you are aware we have been working for many years for official recognition of our law. In 1975 we wrote to Dr Nugget Coombs of the Council for Aboriginal Affairs and specifically demanded action by the Government in this regard, and as a result that Council recommended, and the then Minister for Aboriginal Affairs approved that "the Government accept in principle the proposals from the Aboriginal Councils at Yirrkala for the control of Aboriginal offenses arising from the abuse of drink".

Department of Aboriginal Affairs Officers subsequently held extensive consultations with us, but the desired response to our proposals did not result. We believe that this was at least partly because the matter of general recognition of Aboriginal customary law was, at that time, referred to the Australian Law Reform Commission.

Between 1977 and 1987 the Law Reform Commission consulted us with our proposals, and Dr Nugget Coombs and Dr Nancy Williams assisted us in informing and advising the Law Reform Commission regarding our needs and specific requirements. For example in 1983, in consultation with us, Dr Coombs wrote a paper called "The Yirrkala Proposals for the Control of Law and
Order" (ANU CRES). Whilst in 1993 we would need to revise what we considered appropriate in 1983, our fundamental need to have our law officially recognised, and our fundamental need to be able to settle our own disputes, remains valid and equally compelling.

We are aware that in 1987 the Law Reform Commission's final report on the Aboriginal Customary Law reference recommended (832) "that the Northern Territory authorities investigate through local discussion and consultation whether the Yirrkala community still seeks implementation of the scheme; and if so that the scheme be implemented for a sufficient trial period (at least three years). Likewise we are aware that nothing of substance has eventuated as a result of this, or any of the other favourable Law Reform Commission recommendations. We agree with Mc Rae, Nettheim and Beacroft when they state in their book Aboriginal Legal Issues (p 232) that ".....it is regrettable that the (Yirrkala) scheme has not been implemented already ....."

We are also conscious of the fact that the Royal Commission into Aboriginal Deaths in Custody (1991) recommended (Rec 219) "That the Government report back to Aboriginal people on progress with dealing with the Law Reform Commission report on recognition of customary law". But so far as our proposals are concerned, we are not aware of any positive action being taken as a result of this recommendation.

It was therefore of great interest to us when we received advice of the Northern Territory Legislative Assembly's consideration of constitutional recognition of Aboriginal customary law, and of the Northern Territory Attorney General's Alternative Dispute Resolution (ADR) reference to the Law Reform Committee. We sincerely hope that these initiatives will succeed where the others have failed.

ISSUES RAISED IN DISCUSSION PAPER

We refer to the specific issues you have invited and summarised on page one of the Discussion Paper. In order for us to comment fully on all of these issues we would need to have further discussions with our people and our advisers. The following comments therefore are preliminary, and submitted in order to give you some idea of the way we feel.

1. Should Aboriginal customary law be legally recognised in the Northern Territory?

Yes, because so long as our law is not officially recognised our culture is being undermined, and our general well-being compromised. Our law is an integral part of our culture and is as important to us as our land and our language.

We also believe that official recognition of our law would be consistent with the policies of Aboriginal self-management, self sufficiency and self determination. Furthermore we feel that such recognition would be conducive to reconciliation and should be a primary Aboriginal affairs objective for both the Territory and the Federal Governments.

2. Should any recognition be given Constitutional force in the Northern Territory constitution?
Yes, but in our opinion this objective should not prevent recognition of customary law in current Northern Territory legal form. However, it is our opinion that the stronger the legal recognition of our law, the better.

3. Should the recognition be by way of non-enforceable preamble to that constitution?

No.

From our point of view this form of recognition is not strong enough to satisfy our aspirations for more effective law and order in our community, or for a system that is able to enforce certain aspects of our law.

4. Alternatively, should any such recognition be in the form of an enforceable source of law?

Yes.

As can be seen from our previous proposals, we have a clear demand for certain aspects to be enforceable.

5. If recognised as an enforceable source of law, should there be an exclusion of customary law that is inconsistent with fundamental human rights?

Underlying our previous proposals was our belief that Balanda and Yolngu law must be complimentary; we would therefore not wish to enforce customary law that appears inconsistent with fundamental human rights. From our viewpoint, recognition of Aboriginal Law is not necessarily recognition of all law as it existed at some time in the past; but rather a recognition of customary law as it is currently understood, desired and applied by our people.

6. Should any recognition be limited to Aboriginal people who still have a traditional lifestyle?

This is a question for individual communities.

7. Should any recognition be limited geographically to areas under the jurisdiction or control of appropriate Aboriginal institutions?

Our final views as to what we consider appropriate in the regard, would be subject to community consultation and discussion. Our previous proposals envisaged jurisdiction within our own community.

8. Should any recognition be subject to any over-riding statute law? If so should it be subject to appropriate constitutional guarantees of customary rights?

In this regard we consider it premature to comment because our main thrust at this stage is towards recognition in a general sense. Our main aim is directed towards an adequate form of meaningful recognition of customary law, and a recognition that is in accordance with our aspirations. It is also toward a recognition of customary law that can be satisfactorily implemented and administered.
In our view the means by which that is legislatively achieved is something that should be dealt with after recognition of customary law is agreed to in principle and administered.

9. If customary law is recognised how should it be applied and enforced? By the existing general courts, by a new system of Aboriginal courts, or by some other flexible scheme designed in consultation with each Aboriginal community? Alternatively should it be left to traditional methods of enforcement?

Our final views as to what we could consider appropriate in this regard, would be subject to further community consultation and discussion. In our previous proposals it was envisaged that our customary law would be applied and enforced by our own people in a manner consistent with the supporting legislation.

We envisaged maximum participation by our own people, and developed our proposals in a manner appropriate at the time. We considered it essential that our law be officially recognised so that it could be subject to application and enforcement, and so that it would remain strong. If our law was able to function adequately without official recognition, the need to develop our proposals would not have arisen.

10. Whether or not customary law is generally recognised should there be some ongoing study to consider further legislative incorporation of selected aspects of customary law by reference, or the adjustment of the general law to take into account selected aspects of customary law?

Our final views as to what we would consider appropriate in this regard, would be subject to further community consultation and discussion.

Generally speaking we would support the introduction and maintenance of whatever legislation adequately reflected the expressed needs of our communities as ascertained after appropriate consultation. Similarly, we would support the introduction and maintenance of any strategy that ensured that the law remained in a state consistant with our needs and aspirations.

Yours faithfully

BAKAMUMU MARIKA
Chairman,
Yirrkala Dhanbul Community Association.

WALI WUNUNGMURRA
Senior Project Officer,
Northern Land Council

23rd. April 1993
On this matter ask for: Ms Toni Vine Bromley In reply please quote: 93/C0357 TVB:af

11 June 1993

Mr Rick Gray
Executive Officer
Legislative Assembly of the Northern Territory
Committee on Constitutional Development
GPO Box 3721
DARWIN NT 0801

Dear Sir

On behalf of the Lord Mayor, I am writing in response to your request for submission on the discussion paper 'Recognition of Aboriginal Customary Law' in the development of a Northern Territory constitution.

Although the discussion paper invites comment on a diverse range of legal issues involved in this subject, comments within this submission relate to the broad matter of whether customary law should be recognised within the constitutional development of the Northern Territory Statehood.

In consideration of the various issues raised within the discussion paper it is believed that Aboriginal customary law should be recognised and enforced as a flexibly designed alternative to western law and in consultation with relevant traditional Aboriginal communities.

Within the historical context of the current area of self government and determination and given the numbers of Aboriginal people in the Northern Territory who continue to value and seek identity, and strength in their traditional lifestyles and culture, it is considered that Aboriginal culture demands formal recognition. Non recognition of a significant proportion of the Northern Territory's population and their values would be to deny certain liberties and be seen as highly unjust.

Recognition, in the form of a preamble to the constitution, as identified as an option in the discussion paper, would be highly compatible with the Federal Government's bi-partisan approach to the process of reconciliation and ensure that the Northern Territory is in an advanced position as part of this process.

The difficulties involved in acknowledging the status of customary law as a source of law and how such laws are to be applied and enforced are clearly very legalistic concepts. It is agreed though,
that indigenous peoples rights need to be balanced against other fundamental human rights as well as be determined in a manner that promotes harmonious relations between all Territorians.

In developing the law, an integrated but flexible approach for dispute resolution needs to be developed which will meet both the needs of particular Aboriginal communities as well as the need of the wider community for justice.

Within the law, mandatory consultation should be developed between the judiciary and appropriate senior traditional custodians of Aboriginal law having regard to the cultural and locational up bringing of victims or perpetrators.

While recognition of customary law will not address many cross cultural issues in the Northern Territory, it is considered that the constitution as a document of the highest order should articulate community values of justice, equality, and respect for differences between the people it governs. The constitution for the new state of the Northern Territory will be I'm sure, progressive and setting the scene for our future harmonious development and growth.

This submission represents the views of the Council officers and does not necessarily reflect the opinions of elected members.

Yours sincerely

TONI VINE BROMLEY
COMMUNITY SERVICES DEVELOPMENT OFFICER
Dear Sir,

CONSTITUTIONAL RECOGNITION OF ABORIGINAL CUSTOMARY LAW
IN THE NORTHERN TERRITORY

1. INTRODUCTION

1.1 I refer to the Constitutional Development Sessional Committee's Discussion Paper (No. 4) on "Recognition of Aboriginal Customary Law", and your invitation for submissions. The paper was of considerable interest to the Commission, and the initiatives being taken by the Northern Territory Legislative Assembly and the Northern Territory Government in this regard are fully supported.

1.2 In this submission I propose firstly to address those customary law recognition issues you have identified (p. 1, discussion paper), and secondly to comment on arguments put to the Australian Law Reform Commission opposing recognition of Aboriginal customary law (p. 25, discussion paper).

1.3 I believe that the long-standing absence of meaningful official recognition of Aboriginal (customary) law, has had a detrimental effect on all facets of Aboriginal community development in the Northern Territory, and has substantially contributed to many of the social problems and varying degrees of lawlessness present today. Similarly, I accept that official recognition of Aboriginal customary law and associated reforms would be of major benefit, not only to the Aboriginal communities affected, but to the entire population of the Northern Territory.
2. ISSUES RAISED IN DISCUSSION PAPER

2.1 In order for me to comment fully on all of the issues raised, there would be a need for the Commission (ATSIC) to conduct further consultations and receive further input from relevant Aboriginal sources. This response therefore, is preliminary and summarises my current understanding of the relevant issues. My comments should be considered along with, and subject to, views expressed in other submissions from Aboriginal people, communities, and organisations in the Northern Territory.

(i) Should Aboriginal customary law be legally recognised in the Northern Territory?

2.2 The Commission accepts that customary law is an integral and inseparable part of Aboriginal culture. It is clear that failure by successive Federal and Territory governments to officially recognise customary law has resulted in erosion of Aboriginal cultures. The Commission regards this as unacceptable and supports the view expressed by many Territory Aboriginal communities that as long as Aboriginal law is not officially recognised Aboriginal culture is being undermined and general Aboriginal well-being compromised. It is similarly agreed that Aboriginal law, as an integral part of Aboriginal culture, is as important to Aboriginal people as their traditional lands and languages.

2.3 I also agree that official recognition of Aboriginal customary law is consistent with the concepts of (Aboriginal) self-management, self-sufficiency, and self-determination, and conducive to reconciliation.

2.4 However, in the Commission's view it needs also to be emphasised that recognition of Aboriginal customary law and meaningful Aboriginal participation in the processes of law and justice is not only an issue of Aboriginal pride, heritage, and custom. In the Territory Aboriginal community situation, it is also an issue of survival and vital practical significance. The arrival of European and other non-Aboriginal people in Australia, and the adverse repercussions on Aboriginal land and life, deprived Aboriginal communities, among other things, of their customary law and order, and replaced it with an inadequate, unjust and bewildering system. Notwithstanding improvements over recent years, many Northern Territory Aboriginal communities still do not enjoy the protection of the law, peace and good order of the standard enjoyed by the Australian community at large. This situation has had a negative influence in all areas of Aboriginal political, social and economic development.

2.5 In terms of recognition of customary law, it is appreciated that Aboriginal customary legal systems in the Northern Territory are complex, diverse and may even be non-existent in certain areas. I therefore accept that any official recognition would have to take this variability into account. I believe however, that there are common themes underlying this widespread Aboriginal desire (where it is present), which stem from a need for some form of official recognition of customary law, and a need for more appropriate Aboriginal participation in the processes of law and order.

2.6 As indicated in your discussion paper, there has been a long history in the Northern Territory of various Aboriginal groups seeking these kinds of reforms. In response, various schemes have been tried including Magistrate's advisers, police orderlies, police aides, voluntary Aboriginal community patrols, and police warden schemes. Some of these have been successful (eg
Julalikari patrols at Tennant Creek, and the Ngukurr police warden scheme), and demonstrate that providing Aboriginal participation and recognition needs are taken into account, Aboriginal communities are capable of dealing with their own law and order problems and settling their own disputes.

2.7 It is the Commission view however, that a major problem with many of these schemes is that they do not go far enough. In most instances the real power and responsibility has remained with existing police and court institutions. Among other things, this has rendered Aboriginal input and participation minimal and has enabled underlying problems to continue. Such problems include a lack of essential Aboriginal input into the processes involved, a lack of understanding of Aboriginal custom and culture by some police and law officers, and the creation of law and order vacuums in some Aboriginal communities (aggravated by relative inaccessibility of police officers, and magistrates). Moreover, with regard to some court hearings, there is the feeling (rightly or wrongly) in some communities, that cases are dealt with in a context of discordant and inappropriate law, rather than in a context of anticipated justice for the community and the individuals concerned.

2.8 Additionally, in Northern Territory terms, I believe that the unique Aboriginal land situation, and the preponderance of widely dispersed discrete traditional communities, makes official recognition of customary law in legal and practical terms a reasonable proposition.

2.9 With respect to the Australian Law Reform Commission's customary law report, I am of the opinion that notwithstanding that Commission's less than all-embracing support for official recognition of Aboriginal customary law, their recommendations are consistent with a positive acceptance of the concept of recognition in the Northern Territory situation.

2.10 For example in recommending against the establishment of new and separate legal structures there is clearly qualification applicable to the Northern Territory situation (Report No 31 (195-196)):

"...As far as possible Aboriginal customary laws should be recognised by existing judicial and administrative authorities, avoiding the creation of new and separate legal structures unless the need for these is clearly demonstrated..."

2.11 I believe that in terms of official recognition of Aboriginal customary law in the Northern Territory, the need for new and possibly separate legal structures can be clearly demonstrated in many Aboriginal communities.

2.12 Further indication that the Law Reform Commission appreciated the need in the Northern Territory for official customary law recognition is contained in para 832 of their final report, which recommends in relation to the Yirrkala customary law proposals:

"that the Northern Territory authorities investigate through local discussion and consultation whether the Yirrkala community still seeks implementation of the scheme; and if so that the scheme be implemented for a sufficient trial period (at least three years)".
2.13 In the light of this recommendation, I agree with the Yirrkala people, and authors McRae, Nettheim and Beacroft (Aboriginal Legal Issues (p 232)), that it is regrettable that the Yirrkala scheme has still to be implemented.

2.14 I am also conscious of the fact that the Royal Commission into Aboriginal Deaths in Custody (1991) recommended (Rec 219):

"that the Government report back to Aboriginal people on progress in dealing with the Law Reform Commission report on recognition of customary law",

and that the initiatives you have taken with regard to consideration of constitutional recognition of Aboriginal customary law, and alternate dispute resolution (ADR), are consistent with the above Commissions' recommendations.

2.15 Notwithstanding the above-mentioned Law Reform Commission's recommendations, I feel they may have been too conservative in this regard, and that your recent initiatives may well develop more appropriate recommendations. If this transpires, I trust that timely implementation of such recommendations would follow.

(ii) Should any such recognition be given constitutional Force in the Northern Territory constitution?

2.16 Provided that such legal recognition is in accordance with relevant Aboriginal needs and aspirations, ATSIC believes that Aboriginal customary law should be legally recognised in the Northern Territory, and that the form of this legal recognition should be as strong as practicable.

2.17 From a Northern Territory Aboriginal point of view constitutional recognition of customary law is preferable to lesser official recognition for a number of important reasons. Firstly such recognition is commensurate with the fact that the Northern Territory Aboriginal population comprises the Territory's original citizens with a unique spiritual, physical and cultural attachment to the Territory. Secondly, nearly one quarter of the Northern Territory population is Aboriginal. Since most members of that population recognise forms of customary law, it follows that customary law is de facto one of the main sources of law in the Northern Territory. Constitutional recognition of customary law would therefore be appropriate acknowledgment of this important reality. Finally, constitutional recognition would be, in my view, the most appropriate avenue of reconciliation.

2.18 However, I also recognise that the need in the Northern Territory for this kind of reform is long over-due in some communities, and that its introduction should not necessarily have to wait until a Northern Territory state is established, and its constitution becomes law. I believe that recognition under existing Northern Territory governmental and legislative arrangements should (after necessary consultation and agreement) be introduced as soon as practicable, and that constitutional recognition should follow when available.

(iii) Should the recognition be by way of a non-enforceable preamble to that constitution?

2.19 It is clear from demands already expressed by some Northern Territory Aboriginal communities that there is desire by some groups to be able to enforce some customary law. For
instance this may be the case with customary law that covers areas of behaviour dealt with in the general law as summary offences (eg insulting language or assault). The Yirrkala proposals are an example.

2.20 It is therefore my preliminary view that a non-enforceable constitutional preamble may not be sufficient to cover existing Aboriginal aspirations for customary law recognition.

(iv) **Alternatively, should any such recognition be in the form of an enforceable source of law?**

2.21 As explained above I feel that demands so far expressed indicate that at least some groups require some enforcement provisions for at least some customary laws, and that there is therefore a need for the law to reflect this.

(v) **If recognised as an enforceable source of law, should there be an exclusion of customary law that is inconsistent with fundamental human rights?**

2.22 It is my experience that Northern Territory Aboriginal groups desiring recognition of customary law and participation in the processes of law and order, feel that their customary law and the general law are complementary and that the two laws can work together harmoniously. My opinion at this stage therefore, is that there would not be Aboriginal opposition to exclusion of enforcement of customary law that is considered inconsistent with fundamental human rights.

2.23 I agree that recognition of Aboriginal customary law is not recognition of all customary law as it existed at some time in the past, but rather a recognition of customary law as it is currently understood, desired and applied by a particular community or group of people. However I would also accept that there needs to be more consultation and discussion with Aboriginal communities on this matter.

(vi) **Should any recognition be limited to Aboriginal people who still have a traditional lifestyle?**

2.24 It is my experience that demands for customary law reform have tended to originate from so-called "traditional communities". However, the Aboriginal town patrols at Katherine and Tennant Creek are an indication that any legal recognition of customary law will also need to provide for this kind of situation. I agree that many Territory Aboriginal urban dwellers retain their traditional values and lifestyles.

2.25 Customary law recognition legislation should also reflect both the need for Aboriginal communities and groups to choose whether they wish to access the legislation (ie apply its provisions to their community), and the degree to which they wish customary law to apply to them. This may seem difficult to provide for in the legal sense, but I agree that experience in some overseas countries indicates that suitably drafted legislation can in fact satisfactorily provide for this type of situation. (I note that you have covered this topic in your discussion paper).
(vii) Should any recognition be limited geographically to areas under the jurisdiction or control of appropriate Aboriginal institutions?

2.26 Without the precise knowledge of individual community needs in this regard it is too early to respond adequately to this question.

2.27 However demands by communities so far do indicate that customary law is seen as only applicable within particular traditional communities and lands, and the Yirrkala proposals are an example of this approach.

2.28 On this matter, I accept that there also needs to be more consultation and discussion with Aboriginal communities.

(viii) Should any recognition be subject to any over-riding statute law? If so should it be subject to appropriate constitutional guarantees of customary rights?

2.29 As indicated above, it would be my preliminary view that recognition of Aboriginal customary law in the Northern Territory should be accorded the highest legal status possible, and that constitutional guarantees of customary rights would appear to be appropriate (see paras 2.17-18).

2.30 However, I do feel this legal question can only be answered satisfactorily after full consultation with involved communities and groups. My main interest at this stage is towards promotion of meaningful recognition in a general sense.

2.31 I feel that this type of issue may best be dealt with after recognition of customary law is agreed to in principle by the Northern Territory Government.

(ix) If customary law is recognised how should it be applied and enforced? By the existing general courts, by a new system of Aboriginal courts, or by some other flexible scheme designed in consultation with each Aboriginal community? Alternatively should it be left to traditional methods of enforcement?

2.32 Department of Aboriginal Affairs (DAA) consultations in the 1970s with the Yirrkala people on their customary law proposals revealed that the Yirrkala people were flexible, and willing to consider adopting any one of a number of models provided it satisfactorily met their underlying need for meaningful recognition and participation. The options agreed on in 1976 included a draft Aboriginal Courts Act (which was drafted jointly with Yirrkala), and a proposal to utilise existing Northern Territory law such as the justices and police offences legislation (appointment of appropriately chosen Yirrkala nominees as Justices of the Peace and special constables).

2.33 Thus if the Yirrkala consultations are any indication, customary law would best be applied and enforced by Aboriginal people themselves in accordance with the relevant legislation. In Territory-wide terms, it is clear at this stage that flexibility would remain a major consideration, and that any legislation recognising customary law should be such that all communities desiring participation can tailor that participation to their own needs.
2.34 Once again, however, I feel that this type of issue may best be dealt with after recognition of customary law is agreed to in principle by the Northern Territory Government, and that my final views on this issue would be subject to further community consultation and discussion. It is my impression that in Territory Aboriginal eyes, the most important aspects are the principles of recognition and participation, and that the final shape these reforms take is of lesser immediate importance, and open to negotiation.

2.35 In summary, I would support the introduction and maintenance of legislation that adequately reflects the expressed needs of relevant Northern Territory Aboriginal communities as ascertained after appropriate consultation.

(x) Whether or not customary law is generally recognised should there be some ongoing study to consider further legislative incorporation of selected aspects of customary law by reference, or the adjustment of the general law to take into account selected aspects of customary law?

2.36 My final views as to what I would consider appropriate in this regard, would be subject to further community consultation and discussion.

2.37 As indicated above, I would support the introduction and maintenance of whatever legislation adequately reflected the expressed needs of NT Aboriginal communities as ascertained after appropriate consultation. Similarly I would support the introduction and maintenance of any strategy that ensured that the law remained in a state consistent with those needs and aspirations.

3. ARGUMENTS AGAINST RECOGNITION OF ABORIGINAL CUSTOMARY LAW

3.1 With reference to your summary (pp 24-25) of the Law Reform Commission's for-and-against customary law arguments, I wish to confirm that I support those arguments in favour, and have the following comments to make concerning those arguments against:

(i) A Court cannot recognise those aspects of Aboriginal laws which are secret and about which it cannot be informed.

3.2 According to my information there is general consensus among involved Aboriginal groups that Balanda (white) and Yolngu (Aboriginal) law are complementary and can harmoniously work together. I am of the view that if in fact there were problems, then consultation, negotiation and agreement between relevant Aboriginal people and the Northern Territory Government would satisfactorily resolve such matters (see also 3.7).

(ii) Recognition should be restricted to Aborigines living a traditional life-style, and should not extend to fringe dwellers or urban Aborigines.

3.3 I believe that all Aboriginal communities deserve and possess the right to peace and good order in their communities. Similarly I believe that all Aboriginal communities deserve and possess the right to have their customary law officially recognised, and to participate in their own dispute settlement, and the processes of law and order. Experience with Aboriginal town patrols in Tennant Creek and Katherine indicates that Aboriginal participation in law and order functions brings considerable improvement in standards of law-enforcement and social welfare in urban Aboriginal
situations. The benefits of such Aboriginal participation flow to the whole community and in my view need to be promoted and expanded.

(iii) Difficulties in definitions and formulating proposals for recognition make recognition impossible.

3.4 As you have pointed out in your paper, there are several examples of overseas countries successfully implementing recognition of customary law legislation. In my view this problem can be overcome by adequate consultation in the formulation stage and in adequate legal drafting of supporting legislation.

(iv) It is too late to recognise Aboriginal customary law because they have ceased to exist in any meaningful form...

3.5 I agree with your view that this is not the case, and agree with your comments that there are strong arguments against this position. In fact it is well accepted that most Northern Territory Aboriginal communities have "meaningful customary law". I would reiterate however that I agree that customary law is not static (see para 2.23).

(v) Recognition in the form of the codification of Aboriginal customary law or similar methods of direct enforcement by means of the general law, would entail the loss of control of Aborigines over their law and traditions.

3.6 I tend to agree that enforcement and codification of customary law under the general law would not be desirable because of lack of provision for Aboriginal participation. It is my view that in order for official recognition of customary law to succeed, there is an indispensable need for maximum Aboriginal participation in its administration.

3.7 I also see no valid reason for assuming that codification of Aboriginal customary law (apart from those non-secret customary laws covering criminal offences) is a necessary part of recognition of customary law. In any case, it is my view that consultation, negotiation and agreement between the Northern Territory Government and relevant Aboriginal communities would enable official recognition of customary law to be established without risk of the above problem developing.

3.8 Experience in other countries that have legal systems recognising customary law supports this view.

(vi) Aboriginal women may benefit from the abandonment of certain Aboriginal traditions, particularly those that discriminate against women.

3.9 I agree that abandonment of Aboriginal traditions that discriminate against women is desirable.

3.10 However, I would once again emphasise that I am informed that Territory Aboriginal groups seeking customary law recognition, recognise that customary law should be complementary to Balanda law. Additionally, in my view, it would be essential that drafting of supporting legislation be preceded by consultation, negotiation and agreement with the communities involved, and that these
processes would naturally include Aboriginal women. The 1983 Yirrkala proposals are a good example.

3.11 The reforms sought by Aboriginal communities in this regard would also be of considerable benefit to Aboriginal women and children, because it is they who often bear the brunt of the social problems caused by inadequate law and order situations in many Aboriginal communities.

3.12 Again I would emphasise that I agree that customary law is not static (see para 2.23).

(vii) Recognition would lead to the acceptance of certain punishments which infringe against basic human rights.

3.13 I would again reiterate the comments above relating to Balanda and Yolngu law being considered by relevant Aboriginal groups to be complementary, and the necessary consultation process preceding legislation.

3.14 I do not accept that relevant Aboriginal groups consider punishments that are against basic human rights to be an integral (or even necessary) part of official recognition of customary law, or of the processes of law and order.

(viii) Recognition would go against the notion that there should be one law for all Australians.

3.15 Notwithstanding the apparent wisdom of such a view, I cannot, in the light of Aboriginal and non-Aboriginal cultural realities in the Territory, accept this notion as being valid. In my view, there are other more important factors that must be simultaneously considered.

3.16 These factors include the right of Aboriginal Territorians to retain their culture and traditions, the right to enjoy peace, protection of the law, and good order, and the right to be governed by laws that serve both Aboriginal needs and justice itself. In my opinion, the case (both morally and legally) for official recognition of Aboriginal customary law is as valid as the recent Australian High Court recognition of (Aboriginal) native land title (Eddie Mabo and Ors v The State of Queensland, (1992) 66 ALJR 408). Similarly I regard the notion that Aboriginal law should be ignored because of an esoteric "one-law" principle, is as invalid as it is ethnocentric.

3.17 From an Aboriginal viewpoint, there is more validity in the argument that if there should be one law for all Australians, then it should be appropriate Aboriginal law. However, Aboriginal people recognise that most non-Aboriginal Australians do not live under, comprehend or practice Aboriginal culture, and have a right to be governed by laws that serve their needs, including their concepts of justice.

3.18 As your discussion paper points out, Australian law already contains numerous examples, at all levels, of special provision for Aboriginal and Torres Strait Islander people. Clearly therefore, the issue is not whether there should be one law for all Australians, but rather what special law for Aboriginal and Torres Strait Islander people is most appropriate, and what form that special law should take.

4. CONCLUSION
4.1 Should you require further elaboration or support for the views I have expressed herein, I would be pleased to arrange for ATSIC representatives or other advisers to discuss those matters with you, or to respond in writing. The Commission has accorded a high priority to official recognition of Aboriginal customary law and trusts that the initiatives the Northern Territory authorities have taken in this regard, result in appropriate and timely reforms.

Yours faithfully

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3 June 1993

Our Ref: ABOR3004

Mr Rick Gray
Executive Officer
Sessional Committee on Constitutional Development
GPO Box 3721
DARWIN NT 0801

Dear Mr Gray

Recognition of Aboriginal Customary Law

In its Discussion Paper No. 4, the Northern Territory's Sessional Committee on Constitutional Development ("the Committee") recognises that it is not sufficient to merely acknowledge, in a constitution or otherwise, the status of customary law as a source of law. It considers that, in determining the form of any such recognition in the Northern Territory, a number of consequential issues must also be considered. These include:

"(i) whether all aspects of customary law should be recognised, or whether some exceptions are necessary or desirable;

(ii) who should be bound by customary law as so recognised;

(iii) whether customary law as so recognised should apply throughout the Territory or only in specified areas; and as a corollary, whether it should only be applied in areas under the jurisdiction or control of appropriate Aboriginal institutions;

(iv) the interrelationship and priorities between customary law as so recognised and the other sources of law in the Territory; Chief Justice's Chambers, Supreme Court of Western Australia

(v) how should customary law as so recognised be enforced and by what institutions."

(Paper, p44)
Clearly the recognition of Aboriginal customary law is a complicated one. The Australian Law Reform Commission ("the Commission") in its Report on the Recognition of Aboriginal Customary Laws (Report No. 31, 1986) concluded that the arguments for recognition were more persuasive than the arguments against recognition. I agree with this conclusion. It is important to recognise Aboriginal customary laws for many reasons including:

- the reality of the influence of customary law on the lives of Aboriginal peoples living a traditional or partly traditional lifestyle;
- the potential for injustice which is likely to arise if customary law is not recognised (including the non-recognition of customary law marriages and the failure to take into account customary law duties in mitigation of common law offences);
- the desire of many Aboriginal persons to have customary law recognised and the compensation for past wrongs that recognition may offer.

In my view it is necessary that recognition of customary laws be effected by legislation. The common law cannot be expected to provide a co-ordinated, consistent recognition of customary law. Due to the inherent complexity of the application of customary law, it is my view that any constitutional recognition of it should be limited and general in nature. I suspect that the application of customary law will require a degree of flexibility which may not be available if the formal recognition of it is constitutionally entrenched. As it is my understanding that customary laws vary in their content and application between Aboriginal peoples and communities, any legislative recognition of them is likely to require the retention of a high degree of flexibility in interpretation and the grant of relatively extensive discretions to decision making authorities. It may be necessary to attend to legislative recognition of customary law on a piecemeal basis.

I wish to briefly address the 5 points raised by the Committee and quoted above.

1. In my view not all aspects of customary law should be recognised. Customary laws which conflict with developing international principles regarding human rights should not be recognised. I recognise that a conflict between a customary law and a human rights principle which should result in a non-recognition of the customary law may not be easy to identify. For example, as is noted by the Committee, a spearing inflicted in accordance with customary law may be seen as offending against the individual's right not to be subject to "cruel, inhuman or degrading treatment or punishment". However, if the speared person, being an Aboriginal person living a traditional lifestyle, thereby avoids a sentence of imprisonment which may otherwise have been imposed under the general law (for whatever "crime" he was speared for), the spearing may in fact be the less cruel punishment. As against that there is a very grave difficulty in the general law taking full account of customary law in the context of the criminal law and sentencing. For example, should a "pay-back" spearing be regarded as justified or excused by law in the context of assault or homicide? In a recent case in Western Australia a woman convicted of manslaughter received a light sentence because the killing was set against a background of sustained physical abuse by the deceased. On her release the woman was liable to tribal punishment in the form of a beating. This was arranged to be done by the tribal community under controlled conditions. The police found out and intervened before it happened, thus preventing what would have
been an assault or more serious offence under the general law while preventing the application of a punishment under customary law. The woman is now in "exile" from her community for her protection. The fear is that eventually the punishment may be administered in uncontrolled conditions, by someone affected by alcohol, for example, which may cause her greater harm than the controlled tribal punishment would have done. The position is also that the families of the woman and the deceased remain in a situation of conflict which would have been resolved by the administration of punishment.

2. The question of who should be bound by customary law is also difficult. While many people may consider it unjust that the general law has been imposed upon Aboriginal peoples generally, it would be pointless to compound this injustice by now imposing customary law upon persons who have no or only limited understanding of it and no desire to be subjected to it. Consequently, it may be obvious to state that customary law should only apply to persons living a "customary" lifestyle. However, it may not be simple to identify whether or not customary law should apply to particular persons, assuming those persons choose to be subject to it. It will be a question of fact in any given case whether a person considers himself to be subject to customary law and whether he lives a lifestyle consistent with the application of customary law to that person. Safeguards must be devised that at least reduce the possibility of "forum shopping" between the general law and customary law. A geographical application of customary law may alleviate some of these problems, though it may also give rise to others.

3. As the Committee notes (Paper, pp46-7), a geographical application of customary law may avoid problems of demarcation of any application of customary law to particular persons or classes of persons. However, it may also result in injustice to some persons. It is conceivable that some Aboriginal persons may wish to live in a geographical location which is subject to customary law without themselves being subject to customary law. Consequently, geographical application of customary law may pose as many difficulties as any other application of it. Another problem would be whether or not customary law applying to a particular place would apply to visitors to that place. The visitors may not be aware of the customary law of the place and may not even be entitled to know the customary law of the place. One solution may be to enable Aboriginal organisations responsible for particular geographic locations to determine for their members whether or not customary law is to apply to them in the relevant place. Perhaps, depending on the nature of the organisations' title to the lands in question, the organisations could also determine if visitors to the lands are to be subject to customary law. I am aware of the problems of Aboriginal organisations in attempting to take a representative role for all relevant Aborigines in a particular situation.

4. In relation to the relationship of customary law and the general law, I agree with the Committee (Paper, p47) that customary law should be applied consistently with the Commonwealth Constitution. In my view customary law must also remain subject to the supremacy of Parliament. If necessary it could be provided that customary law, in so far as it applies under the statute which applies it, is not to be derogated from except by express words in a statute. This places an admittedly limited form of restriction on Parliament, while not denying Parliament the flexibility it will require to meet differing and changing
circumstances. The common law is capable of expansion to encompass customary law. However it may be necessary for Parliament to express a legislative intention that customary law is to be judicially recognised as part of the common law.

5. In relation to how customary law should be enforced and by whom, it is my view that it would be generally inappropriate for it to be enforced or interpreted by non-Aboriginal persons. In addition to the fact that some customary law is secret (and it would be a breach of the customary law to reveal it to a person who is not entitled to know it), non-Aboriginal persons generally do not have the background or commitment to customary law to do it "justice" in its application. There may, of course, be exceptions to this rule. I query whether a British style court system is appropriate for the purposes of, or even capable of, enforcing or applying customary law. If customary law is to be applied, should it not be applied in a customary way? Customary enforcement of customary law would seem to be appropriate in circumstances which involve only Aboriginal persons who are all subject to the same customary law. Difficulties will arise where legislation or the common law conflicts with or covers the same field as customary law and where a non-Aboriginal person is in conflict with an Aboriginal person.

Consideration should be given to whether or not it is possible to give meaningful effect to customary law or if the European influence has been so pervasive that the essential tenets of customary law, including the strict religious views and the authority of tribal elders, have been undermined to such an extent that any application of customary law would be merely a token gesture.

In any event, the recognition, application and enforcement of customary law give rise to a multitude of problems. It may be necessary to adopt an approach similar to one of the approaches utilised by the Commission in its Report. That is, to examine discreet areas of customary law and consider their individual recognition, application and enforcement and the relationship of the customary law to general law in these processes. That approach will pose difficulties in respect of secret customary laws. I am cognisant of the Committee's hesitancy to adopt this "functional" approach (Paper, p29) as it considers that the approach may not be appropriate for the Northern Territory and its Aboriginal peoples who live a traditional lifestyle. However, it may nevertheless be the case that the functional approach is appropriate to Aboriginal peoples in the Northern Territory who do not live a wholly traditional lifestyle. I agree that the current legislative approach of the Northern Territory whereby it legislates selectively in respect of customary law can continue as an ongoing process in association with a general recognition of customary law.

In my opinion it is essential that there be extensive consultation with Aboriginal peoples from a variety of communities in order to ascertain how Aborigines perceive that Aboriginal customary law can be applied in a contemporary context and in co-existence with the general law.

Yours sincerely,

David Malcolm
Chief Justice of Western Australia
SUBMISSION NO. 104
NORTHERN REGIONAL COUNCIL OF CONGRESS
7 of The Uniting Church in Australia
Incorporating
ABORIGINAL RESOURCE & DEVELOPMENT SERVICES INC.

30 July 1993

The Executive Officer
Mr R Gray
Sessional Committee on Constitutional Development
GPO Box 3721
DARWIN NT 0801

Dear Rick

RE:- DISCUSSION PAPER NO. 4
RECOGNITION OF ABORIGINAL CUSTOMARY LAW

Our Executive Officer has asked us to express his appreciation for the opportunity to present some comments on the above discussion paper.

You will note from our introduction we have not attempted to answer all the questions raised and have confined ourselves to the Executive Summary. Further, we indicate that what we present is only a very small portion of a complex legal, political and economic structure that exists within Aboriginal society, and is embodied in Aboriginal Customary Law.

We would be happy to appear before the Committee to answer in more detail the many questions which your discussion paper raises for us from our research.

The research we have been carrying out must continue and should your committee deem it appropriate we would be happy to negotiate a contractual arrangement which would meet your requirements and assist ARDS to continue with this vital work.

Rev. Dr. Djiniyini Gondarra
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Rev. Wall Fejo
Associate Executive Officer
N.R.C.S./A.R.D.S.
U.A.I.C.C., U.C.A.
Your committee's job is a demanding one, however it is critical if the Constitutional process is to properly serve the interests of all the citizens of the Northern Territory. For too long Aboriginal people have been protected by, and subject to, a foreign law and rule of Government. You have the opportunity to determine a process which will give recognition to Aboriginal Customary Law in a way that will assist good government as described in Section 51 of *The Constitution of the Commonwealth of Australia*

Yours sincerely,

Stuart J McMillan
Consultant
ARDs
SESSIONAL COMMITTEE ON CONSTITUTIONAL DEVELOPMENT  
DISCUSSION PAPER NUMBER 4  
RECOGNITION OF ABORIGINAL CUSTOMARY LAW  
LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY  
20TH AUGUST 1992

Preamble

The following submission has been prepared by Aboriginal Resource and Development Services Inc. (ARDS), an Aboriginal organisation which is headed by the Rev Dr Djiniyini Gondarra.

The ARDS team has carried out research over an extended period of years using a dialogue based methodology and drawing on the life experiences and knowledge of Aboriginal people (Yolnu) within Central and North east Arnhemland. Using dialogue in the people's vernacular, we have explored the economic and political structures underlying Aboriginal law. The following should in no way be seen as a complete document on this issue, or in any way a summary of ARDS work in this area. In fact the material recorded here is just the 'tip of the iceberg'.

Traditional law as we have observed it, is definable but also very complex. To appreciate Aboriginal law more fully, ARDS realises that much more research needs to be done in this area.

There are many questions raised in the Committee's discussion paper. The following comments deal only with the questions raised in the Executive Summary.

WHY RECOGNISE CUSTOMARY LAW? [ref: c (i) of the Executive Summary.]

Yolnu law needs to be recognised. The fact that it has not been recognised by the wider Australian system to date has severely impacted on the entire law, order and social fabric of Yolnu communities.

This impact has resulted in innumerable negative effects, both as direct and indirect results. Some manifestations of this are as follows:-

1. **Confusion about non-Aboriginal (Balanda) law and it's source of power.**

   Yolnu know that Balanda have a law and a constitution, however they do not understand where either derives its power from. The power and underlying law seem to be hidden. The people ask such questions as:-

   How did Balanda law come about? Who has the power to enforce this law? Is Balanda law more powerful than Yolnu law? Is it the Prime Minister or Chief Minister who has the power to enforce the constitution and the law?

   The people say they are 'dhumbal'yun', (confused or mystified) about Balanda law. (See Appendix A).
2. A state of anarchy has been created, resulting from the suppression of Yolnu law by Balanda law.

In the minds and belief system of the people, their own Yolnu law is the only 'real' law and therefore not to recognise Yolnu law is not to acknowledge any law at all in any serious way. As Yolnu recognise only their own law as 'real' law, and as Balanda law neither acknowledges or incorporates Yolnu law, therefore in Yolnu opinion the Balanda law is not seen to be bringing about justice. Rather, Balanda society is seen as relatively lawless and without justice. Only when Balanda law recognises Yolnu law will Yolnu see that justice is being done by the wider laws of Australia. One is reminded of the old saying - 'justice needs not only to be done but to be seen to be done'. Yolnu law has not been recognised, and therefore from the perspective of the people, there is no 'real' law at work in the wider Australian society. This is leading to a state of lawlessness, as evidenced in the young Yolnu people when they challenge the older law people with taunts of:- 'Now we are living in a new world system, a free world, the western world, which is 'rommiriw' (without law) and 'raypirrimiriw' (without any-discipline of mind, body & soul).

3. The structure of good Government is confused in the minds of the, people.

The people see the Federal, Territory and Local Governments as operating under a form of dictatorship instead of under a democratic structure.

The Yolnu have a system of government called 'magayamin' (see Appendix B) which is a democratic political structure with the power vested in the 'rom watanu walal' (law owners). Citizens by selecting their 'rom djagamirr' (i.e. representatives who take care of the law) create good government formed into recognised councils and chambers of law; whereas they perceive the Balanda government as operating under a dictatorship. This may seem almost impossible to believe, however when one stops to consider the historical relationship between Yolnu and Balanda over past years it becomes clearer. Before 1967, all Aboriginal people in Australia lived as 'wards of the state', their conditions being determined by the various State and Commonwealth Welfare Acts. One of the things all these Acts had in common was the dictatorial nature of their political structure. From approximately 1916, Aboriginal people living in the Northern Territory were forced to leave their homelands and come together to live on missions or government settlements, where a superintendent or patrol officer had almost absolute authority over the people. The relationship between the superintendent or patrol officer and the people led Yolnu to believe that the Balanda government political structure was similarly dictatorial in nature. This structure is contrary to traditional Yolnu society as mentioned above. (See Appendix C).

4. The people today are living in increased fear of sorcery.

The fact that traditional penalties for encroachment on the breaking of traditional law have been repressed by Balanda law has meant that many people have turned to the use of 'galka' djama' (sorcery) to ensure 'magaya rom' is achieved (i.e. justice and order are achieved).

Traditionally, sorcery is in itself illegal and anyone caught practicing it leaves themselves open to be punished. However many prosecutors of traditional law have resorted to letting contracts in secret to known 'galka' (sorcerers), so that the law can be satisfied. To carry out the traditional punishment that the law demands, the keepers of the law risk being brought before the Balanda legal
system and imprisoned, whilst the original breaker of the traditional law may not be penalised by Balanda law.

Many old keepers of the law are saying that there is a lot more sorcery used now than was ever used in the old days. They say that people live in fear because of the increased use of sorcery but that traditional punishment cannot be used because the police will arrest the keepers of the law, whilst letting the rebel law breakers go free. (See Appendix D.)

**WHAT ABOUT CONSTITUTIONAL FORCE?** [ref: c (ii)]

In regard to, and as evidenced in Appendix A, it would be premature to say whether there should be constitutional recognition of Aboriginal Customary Law (ACL). As mentioned above, there is much confusion as to the source of non-Aboriginal (Balanda) law or where the power of Balanda constitutions is derived from. Until Yolnu are clear about the bases of constitutional law, the confusion could be compounded by constitutional recognition of ACL. At the same time, the opportunity needs to remain for Yolnu to have their law reinforced by acceptance from the wider Balanda legal structures and part of this acceptance could be inclusion in a new State constitution.

Our work has clearly revealed that the Yolnu legal structure has a parallel legal concept to the western system embodied in 'ranga'. Ranga gives protection and responsibility to citizens and corporate groups. Dialogue around ranga has been used by ARDS with great success, to educate Yolnu groups about the meaning, operation and power of the Federal and/or local community council constitution.

Ranga has a high level of secrecy about it's particular form, it's shape and the deep knowledge of it's law. Each 'bapurru' (clan) has it's own particular rarnga, which is only revealed to outsiders through invitation from that particular bapurru. However whilst the particular form of ranga is highly secret, the general role and existence of ranga is understood by all and it's parallels within constitutional law are able to be discussed openly, within clearly understood boundaries. We believe this level of secrecy should not prevent the constitutional recognition of ACL.

ref:(c) (iii) Recognition by way of a non-enforceable preamble to the Constitution would serve no useful purpose in our opinion and would not address any of the above issues.

ref:(c) (iv) To enforce **ACL** as a source of law should be the aim, however this would have to be intermeshed with the traditional court system which is already in existence (refer Appendix D, pp 3 & 4, Traditional form of Law Courts)

**THE QUESTION OF HUMAN RIGHTS** [ref: c (v)]

Perhaps there should be an exclusion of customary laws that are inconsistent with internationally recognised fundamental human rights, however there would need to be much debate in this area. It needs to be understood that the intrusion of the Balanda legal system ever since the point of first contact, has been inconsistent with what many Yolnu consider to be fundamental to human rights.

However it is acknowledged that there is room for much discussion here, as many Yolnu now see that some forms of punishment used in the past are no longer appropriate. The death penalty for example, is now seen by many Yolnu to be inappropriate punishment; however the old men and law keepers would still want to play a significant role in the determination of appropriate punishments,
that not only satisfy the demands of their traditional law but which also maintain fundamental human rights from the viewpoint of contemporary Yolnu society. The important point they were making was that they, the law keepers, want to play a significant role in the whole range of law and order issues and therefore in the determination of punishment that is both appropriate and also in agreement with Yolnu perceptions of what is required to maintain fundamental human rights and the demands of their law.

So where the traditional punishment involves human rights violations from the perspective of international law, then we believe that Yolnu society would debate the exclusion of certain forms of punishment (dhagir'yun) rather than lose the opportunity of having their law treated seriously by the wider society.

**RECOGNITION FOR WHOM AND HOW?** [ref: c (vi) & (vii)]

Recognition of ACL should only be given to groups of people who see ACL as authentic. To do otherwise is to compound the confusion and consequently the level of lawless behaviour.

ref:(c) (vii) Yes we believe that limiting the recognition of ACL to geographic areas as they relate to the social groupings as mentioned in point (vi) above, would be the only way for ACL to be enforceable. However there may also need to be additional provisions applicable to individual persons living temporarily outside their normal place of residence, who have violated ACL within their social grouping.

ACL clearly establishes where the appropriate jurisdiction and control of ACL lies. This should not be usurped by either Balanda legal structures or institutions, or other Aboriginal structures or institutions.

It should not be assumed that the contemporary 'Aboriginal institutions' that are commonly recognised under Balanda law are also recognised under ACL. In many cases these institutions have been imposed on the people and the same level of confusion and dysfunction therefore exists within these institutions as it does in the wider areas of Balanda law as discussed above.

**STATUTE LAW AND CONSTITUTIONAL CUSTOMARY RIGHTS** (ref: c (viii)]

There will be some areas where N.T. statute law is applicable, however at this time in our investigations, it is not possible to determine all these instances. At the same time any overriding by Territory statute law needs to be kept to a minimum, otherwise it will amount to ACL not being recognised.

There are some instances where Yolnu communities have clearly asked for N.T. statute law to come into effect where there was no appropriate ACL already operating. A clear example of this is the introduction of laws relating to the control of alcohol on Aboriginal land.
ACL SHOULD BE APPLIED AND ENFORCED THROUGH THE TRADITIONAL METHODS [ref: c (ix)]

If ACL was given recognition by the wider Australian legal system, then the methods of application and enforcement would be critical. For it has been at the points of application and enforcement of Balanda law, that most of the denials of the fundamental human rights of Yolnu citizens have occurred. Furthermore, it has been at these points that Yolnu lawkeepers have been disempowered and as a result, where the ACL has suffered most.

As has been discussed Appendices A and B, the ACL is a complete legal system in itself. So for any recognition to be effective, the application and enforcement of ACL would have to be through a 'form' of the traditional Yolnu law courts and legal administrators. This might be the full traditional system, or an innovation of this system incorporated into a new structure (see Appendix D, 'The Traditional Form of Law Courts', pp 3 & 4). It is too early at this point of our research to be able to suggest the forms that the application and enforcement should take, as these will only become clearer after much more dialogue has taken place.

As can be seen from the parallels between aspects of the Balanda and Yolnu legal systems as outlined in appendix D (pp 3 & 4, 'The Traditional form of Law Courts'), the traditional Yolnu legal system was one that appears to satisfy some of the basic Balanda constitutional requirements. However traditional systems have suffered as a result of the lack of recognition by and repression by the Balanda legal system over the past approximate 60 years and this is an area where we must do further research and where more discussion and debate must take place. Regardless of what may become of such further work however, we believe that the application and enforcement of ACL must be based on traditional means as determined by Yolnu society, if it is going to work effectively. The introduction of ACL or some aspects thereof into the wider Australian legal system, can only occur if there is full acceptance under both Balanda and Yolnu legal systems. A crucial step towards arriving at this point will be the commencement of dialogue between representatives of the two systems.

ONGOING STUDY [ref: c(x)]

Whether ACL is recognised generally at this time in Australia's history or not, it is vital that ongoing study take place to further consider the legislative incorporation of selected aspects of ACL or the adjustment of the general law to take selected aspects of ACL into account.

It has become obvious through the experience of A.R.D.S., that the question of the recognition or lack thereof of ACL is directly related to many other 'problems' that Aboriginal communities are experiencing. Areas such as poor health and high morbidity rates, lack of interest in education, substance abuse, lack of economic development and others, could all be improved directly and/or indirectly with the recognition of ACL. At the same time, any such ongoing study will itself inevitably have many positive side effects, as the morale of the whole community is lifted as a consequence of such a process.

In addition to the need for ongoing study, it is essential that the findings of these studies are made dynamic by their being incorporated into the dialogue that must occur between the representatives of the two legal systems. We would both support and want to be supported by others, in carrying
out some of the ongoing study in this area. We believe that without the in-depth study, there can be no honest and really meaningful discussion about these issues between Balanda and Yolnu. Discussions must obviously take place before there will be an effective recognition of ACL in either general or in part. Furthermore, A.R.D.S. strongly believes that any ongoing study must be based on work done in the peoples' vernacular. Firstly because the issues of law and order and the language itself are interrelated and secondly because these issues are far too complex to be discussed in a language other than that in which the Yolnu are fluent and in which the world view of the people and therefore their systems, are entrenched.

A.R.D.S. thanks the Legislative Assembly Committee for the opportunity to submit this response to Discussion Paper No. 4 and hopes our comments are of both benefit and interest to the committee. Due to the lack of time and resources of our organisation, we have not documented the issues we raise in this response paper in the depth that is required for a thorough understanding. Neither have we attempted to respond herein to many other questions raised by the Discussion Paper. If the Committee so desires, we would be prepared to enter into verbal discussions on the contents of our response paper and to attempt to respond to any further questions which the Committee may wish to raise in relation to this subject.

Yours faithfully

Rev. Dr. Djiniyini Gondarra
Executive Officer
APPENDIX A:  CONFUSION BETWEEN CULTURES  DRAFT

A case was brought before the courts in 1970, Milirrpum & Others v Nabalco Pty Ltd & the Commonwealth of Australia. This action was taken by a group of Aboriginal people from North-East Arnhemland to try and stop mining on their land. During the proceedings before Justice Blackburn, the Yolnu (Aboriginal people) tried to prove a legal right to the land by asking for and being granted, a secret audience with Justice Blackburn so they could reveal their sacred ranga. The judge did not fully appreciate the significance of these objects of coloured bird feathers and woven possum fur, though explicitly acknowledging their religious qualities. The old men who broke tradition by revealing these sacred objects, expected that they would be able to prove their constitutional rights to what they claimed to be their estates of land and water, together with their rights to all the resources on and within. They clearly understood ranga as a form of constitution that had been recognised by their citizens and legal structures for thousands of years. So when the court could not and did not recognise the same constitutional significance of the ranga, the old men were shattered.

WHAT IS BAPURRU?

Throughout the reading of the judgement, the term "mata mala" (the recorded spelling) was used. This refers to the group's language group (matha = language; mala = group). The court understood that this term refers to a person's language group, however they failed to connect this to another term raised continually by the Yolnu in the case, "bapurru", which is a person's patrilineal land owning group. It is the bapurru which is constitutionally connected by ranga to ownership of the estate of land, sea and the resources therein and thereon. As a result the court could not recognise an economic connection of the Yolnu to the land and therefore the case was lost. Quoting from the judgement, page 270 "My task is to examine the relationship of the clan to territory associated with it and to decide whether that association is a matter of property. In my view, the clan is not shown to have a significant economic relationship with the land."

RANGA, A TYPE OF CONSTITUTION

It is said throughout Arnhemland that these old men died 'marr miriw'(without credit in their society and in a state of shame), because the revered and fundamental articles of their law were not only revealed to the judge but were treated as having much less than their full significance.

This can be somewhat compared to a Balanda (non-Aboriginal person) attempting to prove their general civil or property rights under the Australian Constitution and the court ruling against them saying it was no longer valid to use the Constitution or Common Law to argue protection of personal rights. The person would lose total faith in the system. They would suffer severely not only because they had lost all rights to their property, but also because their constitutional and Common Law rights were not recognised. If this happened in Balanda society it would lead to a complete breakdown of the Balanda legal system.

Another problem in the Milirrpum case, (as seen from a reading of the case) was that there was no clearly implied or explicit recognition by the Balanda persons involved in the case, that there were
any instruments in traditional Yolnu law that equated to constitutional rights as within the Westminster system for example. Ranga gives these constitutional rights to each bapurru (clan) and these rights continue to be recognised by Yolnu citizens.

Although Yolnu have a clear understanding of their 'constitutional' and therefore their extended legal rights under ranga, they do not have a clear understanding of constitutions as they exist in the Balanda system. This is exemplified by the following story. On a relatively recent occasion when we were working with a group of old Yolnu leaders in their own vernacular, we put a copy of the local council constitution in front of them and asked them what they understood 'constitution' to mean. Their response was that the constitution meant "just talking together". They did not recognise any deeper civil or communal rights and responsibilities contained within that meaning.

The fundamental rights and responsibilities contained in ranga, are those of the 'rom watanu walal' (the owner citizens of the ranga). This establishes the owners' rights and the rights of subsequent generations. (Ranga could perhaps be seen as having similarities to the ancient family crest, which also established rights and ownership of family estates.) Ranga confers certain sovereign rights, such as the right to expel 'mulkuru' (strangers/foreigners) from the estate. It also allows for the ownership of 'gapala' (personal assets), as distinct from the assets of the bapurru (clan). Furthermore, ranga allows for the giving and receiving of contracts between both individuals and corporate groups.

A major factor at the basis of this confusion between the cultures lies in the differences in languages and visual symbols of communication. Balanda society has for centuries used a form of visual symbols to represent particular sounds and with these symbols the language has been recorded as 'writing'. The visual symbols used to represent these sounds however, are not connected to any real objects or events in nature. Whereas Yolnu society has traditionally and still does to a large extent, relied solely on symbols that depict actual objects or events, as opposed to representing merely particular sounds. The 'messagestick' used in Yolnu society is a good example of this. People of different language groups who do not understand the others oral language and who may live hundreds of kilometres apart, are able to understand the meaning of symbols used on a message-stick. Similarly, another group's ranga can be understood by an educated Yolnu person who is skilled in this form of decoding.

The lack of understanding of the other culture's form of communication has been aggravated by the Balanda society either not believing it should, or else not taking seriously the need to meet Yolnu 'half-way' in the form of communication used. Since the time of first contact, Balanda have expected Yolnu to learn how to communicate solely in the English language, despite the fact that English even today is not the second language of most, but often their fourth, fifth, or sixth language; And despite the fact that learning through the written word rather than through oral teaching, is something foreign to the traditional Yolnu culture. This has demanded that Yolnu in most instances, have had to make by far the greater effort in trying to communicate across the cultures.

'Communication' by definition is a two-way process and there can be no communication when one party does not understand the message given by the other. Yet even today, government departments and most academic institutions talk and write of 'communicating' with Yolnu, but are still not recognising and acting on the need for communication to be at least partly in the people's vernacular. It is quite incredible that in the Northern Territory today, business visitors from Japan and Indonesia are readily provided with a translator, whereas Yolnu are not so provided for, even in
such life effecting instances as court cases. There is much emphasis placed in government departments on their perceived need for anthropologists, however the imperative need for linguists, if there is ever to be effective communication with Yolnu without destroying their culture still further, is severely neglected. We believe that it will not be until this need is seriously addressed, that the confusion between the cultures will be broken down.

The confusion between our two cultures that has continued from the time of first contact up until the present, has lead to a failure to recognise the systems of law that exist within the other culture from our own. As a result of various factors, some of which have been outlined above, many Balanda have basically come to the conclusion that Yolnu life is predominantly spiritual and has no legal, political and economic laws. Whereas the majority of Yolnu have assumed that either Balanda life is free and lawless, or else if law does exist then the Yolnu are assuming it does not have a constitutional civil code as strong as ranga.

ARD S INC 1993
MAGAYAMIRR

'Magayamirr' is the name given to a system of Government that exists in Central to North-East Arnhemland. The 'Yolnu' (Aboriginal people of this area) name their system, which is complex, as 'magayamirr'. Magaya has been literally translated as "peace, no trouble, cessation of hostilities" whilst 'mirr' is a suffix which denotes the possessive. So 'magayamirr' means to be with peace, having no trouble, to have a cessation of hostilities. "Magayamirr is like when you walk into a yard where there is no breeze. Everything is still and quiet, with not a leaf or anything moving. Everything is very still and tranquil." - Rev Dr Djiniyini Gondarra.

'Magayamirr nayi ga norra dhukarrnur romdja' translates literally as 'peace and tranquillity lies on the structure(way) of the law'. The name Yolnu give to their system of government (magayamirr) parallels an underlying principle of the Australian system of government, based on that of the Westminster system of government. Section 51 of the Australian Constitution states that the parliament shall-

"have power to make laws for the peace, order and good government of the Commonwealth . "

Magayamirr is a structure that allows for good government within a civilised code, accepted by the citizens. The people see themselves as the 'rom watanu walal' (owners of the law). They are at one with the law and know it protects them and gives them responsibilities as citizens.

The following paragraphs attempt to start to explain the basic structure of the magayamirr structure of government. Much of this material has been collected during what is still the early stages of research and therefore the following should not be taken as an exhaustive commentary on this subject. Indeed, it is only the beginning of what needs to be said to explain the whole system more fully.

RULES AND STRUCTURE OF GOOD GOVERNMENT

In the Westminster system of government, the rules as to how government will operate are laid down and fixed. Two examples of this are the rules of debate and the separation of powers. It is the same with magayamirr. Although some of the rules and procedures are very different between the systems, there are nevertheless points of similarity. One of the main differences is as follows:-

OF ONE MIND

In reaching decisions or making new law, the 'rom djagamirr' (law keepers who are the nominated representatives), must become nayanu wanganydhirr' (that is, all persons must become one with the others in mind, body and spirit). There is no notion of a 'bill' or a 'motion'. Instead, the issue is raised by a principal person in the meeting and then all are allowed to discuss the matter until there is a consensus, a meeting of minds and spirits. This may take days, months, or even years. The

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9 Temporary Gupapuyu Dictionary compiled largely from notes of Beulah Lowe made in the mid 1960s
important thing is that no one person is forced to go along with others and the decision never comes down to just a majority vote.

Some of the similarities between the two systems on the other hand, are as follows:-

DIVISION OF POWERS

1. In both systems, there is a clear division between what is known as the three levels of government - the legislative, the executive and the judicial. The legislative and the executive powers are divided in a general sense into what is known as the 'yothu-yindi' (the same name as adopted by the Yirrkala rock band). The 'yothu' literally means, the child, but in this context is used in a wider sense, and refers to the children of the mother's people (clan). These children are responsible to carry out the executive role of government for their mother's clan. These children call their mother's clan line their 'yindipulu'.

The word 'yindi' literally means 'big', however, again it is used in a wider sense. It refers to the yothu's mother's people (clan) together with the yothu's mother's mother's people and so on. The clan that is the yindi side of the equation, have their own constitutional law (their 'ranga'), which gives them the right to own land and sea, together with all the resources therein. The ranga sets out the same types of rights and responsibilities as contained in a government constitution. However, the ranga is a secret instrument in Yolnu government which is only truly understood by fully educated people. Each 'bapurru' (clan) has their own constitutional authority and can determine and put laws in place ('rom nhirrpan') and empower that law to achieve good government of their bapurru.

The yothu carry out the same sorts of functions for their yindipulu as does the executive arm of the Balanda government in the Westminster system. This power of the yothu is carried to the point that they will even prosecute a member of the yindipulu for violation of the yindipulu law. In addition to carrying out the executive role of government for the mother's people, the yothu also carry out the function of managing the resources of the yindipulu's estate. The individuals of the yindipulu are in turn yothu of their own yindipulu and have the same respective responsibilities, so that in fact all Yolnu play a legislative and executive role.

ESTATE "An 'estate in fee simple' was, and still is, an absolute and unqualified estate inheritance. It is the most extensive inheritance that a man (person) can possess; it is the entire property in the land." Mozley and Whiteley's Law Dictionary, Butterworths, Tenth Edition, 1988. The legal definition of land and our use of it includes all above the soil, water and minerals and all below the soil .

CHAMBER OF LAW

2. Another similarity between the systems is that law can only be created in a proper chamber of law and operate through councils, as determined by particular ranga/constitutions. In the Yolnu system, a chamber of law must be created according to ranga/constitution and law can only be 'rom nhirrpan' (put down and empowered) by the consensus of those in power inside this place. The chamber is then normalised at the end of the proceedings and the law that was put down inside that chamber is then binding on all the people. A similar event occurs in the Australian parliament with the empowering of the houses of parliament. Just as the mace together with particular ceremonial
procedures are used to create a chamber of law in the wider Australian system, similarly symbols of law and particular ceremonial procedures are used in the Yolnu system to create a chamber of law.

Although the above paragraphs provide only a brief outline, we believe it is sufficient to evidence at this point, the existence of a civilised code of government called magayamirr within Yolnu society.

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The following diagrams and dialogue arose consistently on a number of occasions when a particular educational workshop was run with Yolnu (Aboriginal people of Central to North East Arnhemland) on political literacy, to explore the respective Yolnu and Balanda (non-Aboriginal) structures of government. The dialogue has been very much summarised into a question/response form here in English for reasons of brevity and clarity, the questions written here being raised by the educators and the responses are that of Yolnu. (Of course in reality there was much more dialogue, which took place in the people's vernacular, where there were questions given by both groups leading to mutual learning.)

1. Q: If this was a typical 'bapurru' (clan), where would the 'nurru-dhawalanu' (selected leader) stand (in a wider sense)?

2. Resp: The nurru-dhawalanu would stand here with the people.

3. Resp: Not over and above the people

4. And not below people

5. Resp: The leader must be 'one' with the people. They must be 'liya-rambani' (same in mind/thinking with the people).

6. Q: Who gives this authority to the leader?

Resp: The people do.
8. Q: What are some of these symbols of authority that the people give to the leader.
Resp: Clapsticks to call the people form of a sacred dilly bag.

7. Q: Who gives the symbols of authority to the leader?
Resp: The people.

9. Q: What happens if the leader puts themself over and above the people?
10. Resp: The people will pull them down because the authority for the leader to rule comes from the people.

11. Resp: Because we the people know where their authority comes from, we are therefore able to take action to deal with a leader that has overstepped their authority. A leader should be at one mind with the people, never over, above or apart from the people.
12. The people name this system as 'magayamirr'. It is a structure of law that is peaceful and tranquil, with the right people making the decisions. It is a Government for the people and by the people.
13. We then raised with the people why their local government at the community council level was not working. In their search for an answer, we asked the people to draw pictures of the situation that existed in the old mission or government settlement day. Who had the day. Who had the authority and power then?

14. Resp: The superintendent or patrol officer was the 'bungawa' (boss)

15. Was he level with the people or above or below the people?

16. No, he was over and above the people.

17. Q: Who gave the authority to the superintendent or patrol officer? Resp: 'Mulkuru' (strangers/foreigners/outsiders). We don't know who gave it.

18. Q: Who gave the symbols of authority to the superintendent? Resp: 'Mulkuru' (strangers/foreigners/outsiders)
19. Q: What were some of the symbols of authority that were given to the superintendent or patrol officer?

Resp: Gun, whip, bunch of keys, Bible (the response depending on the experience of the people).

20. After much reflection and telling of stories by the people about the two different types of leadership, we asked the people which type of government operates in Australia today. (a) A structure like their magayamirr system, that is, government for the people by the people, or (b) A liya-ganamirr system?

Resp: Almost all responses were that every form of Balamda by government, from the federal is not level down to the local government councils, were of the second type, liya-ganamirr (dictatorships). Only one or two people in each workshop commented that it may be somewhere between the first and second types.

21. Q. What do you call this type of leadership or authority?
Resp: Liya-ganamirr (literally, 'mind itself'. That is, the person's mind/thinking with the peoples. Rather, they act in a dictatorial way as they have no Yolnu constitutional authority or backing (as with dictators).

22. Q. What were some of the symbols of authority that were given to the superintendent or patrol officer?
became clear after reflecting on the historical contact between Yolnu and Balanda and after the Yolnu participants depicted this in diagrams as we talked. What we then became aware of was as follows:-

Before the 1967 referendum which resulted in Aboriginal people being given full citizenship under the Federal Constitution, Aboriginal people had lived as wards of the state under various state and Commonwealth welfare or similar acts. The structure of these acts was autocratic in nature, however as Yolnu were not aware of the underlying constitutional power given to those individuals and bodies that delivered services under these acts, they therefore saw the whole system and it's deliverers as dictatorial in nature. That is, their absolute authority had no constitutional basis. For this reason, Yolnu have for many decades lived under what they have perceived to be dictatorships and as a result, have come to the intellectual conclusion that all Balanda political structures are dictatorial in structure and nature.

Referring again to the workshops, on asking the people who holds the power and has the authority in the Federal Government, the response received was that the Prime Minister was the 'bungawa' (boss), who they said can "do what they like". At the Northern Territory Government level, the answer was the Chief Minister, who can also 'do what they like'. As regards their response to the local Yolnu town council level, there was no certainty in their opinion, because they recognised a few people who could be the bungawa (boss). Was it the chairman, or the vice-chairman, or the town clerk? Or was it the Balanda bookkeeper or secretary? The people were not sure and commented that there was frequently argument between the people in these roles as to whom held the supreme authority.

On the people expressing their uncertainty about who held the supreme authority within their local town councils, we questioned as to whether there was now a full council instead of just one boss like in the superintendent or patrol officer days. 'Oh, but we also had a council in the old days' was their response. That was called the village council. The people told us that under that system, the superintendent or patrol officer would make the decisions and then come and tell the village council what he had decided. The village council would then in turn tell the people. So they saw the role of the current day town councils, as one of listening to the Chairperson, the vice-chairperson, the town clerk and the bookkeeper/secretary, then reporting that to the community.

We then discussed further with the workshop participants the two types of government structure, namely the magayamirr system - a government for the people and by the people - and the liya-ganamirr system - a government structure that is dictatorial in nature. We then needed to start discussing the wider Australian system as it now exists, so as to enable the people to discover what was the truth about the two systems and what was the true political structure now operating in Australia. In some workshops we got to this point, whilst in others that discussion would have to go on later.

The area of work which we refer to here is very significant and in itself is large in content; As a result, in no community that we have worked has this dialogue been carried to anywhere near completion. However although this specific educational process is too lengthy to document here, we stress that this discussion is a vital link to people starting their own investigation of what are the actual political structures in place and discovering through this process what are their individual and corporate rights and responsibilities.
CONCLUSION

The object of this paper has been to show an example of the political confusion that is in the minds of the people. In light of this confusion, it is not difficult to understand why certain things are just 'not working'. At the same time however, we have tried to give the reader a glimpse of the fact that there is a complete political system already existent within Yolnu culture that can be used together with the people's vernacular, as a vehicle for education and clarification of the wider Australian political system.

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APPENDIX D: 'GALKA' DJAMA' (SORCERY) AND IT'S INCREASING USE.

DRAFT

This paper attempts to explain the role that sorcery is playing in the lives of Yolnu (Aboriginal people of Central to North East Arnhemland) and why this activity is on the increase. It also documents our opinion that the use of sorcery and the corresponding fears that it brings to Yolnu could be reduced, if appropriate actions were taken by the wider Australian society through it's government to recognise Aboriginal Customary Law (ACL).

Before commencing with the body of this paper, we wish to make clear that this is not intended as an exhaustive commentary on this subject. For a more general reading we refer the reader to Janice Reid's book, 'Sorcerers and Healing Spirits', A.N.U. Press, 1983. We point out however, that the specific matters raised in this paper are not covered in Reid's book.

SORCERY IS ILLEGAL

Sorcery is itself illegal in Yolnu society and anyone found practicing it leaves themself open to punishment. Throughout history most cultures have practiced the art of sorcery at some time and similarly, it has been known and at times practiced within Aboriginal society, despite the fact that according to Aboriginal customary law it is illegal. Sorcery takes on many forms and these are documented by Reid in the above, Sorcery was traditionally seen as the final solution in instances where the law was not seen as achieving justice and where citizens took the matter into their own hands. In any society there are both law abiding citizens and those who are corrupted by greed or are simply rebellious. So it has also been in Yolnu society and some of these individuals would use sorcery to get their way outside the law. When and if they were found out, they would be severely punished.

Many old Yolnu people are saying that the use of galka' djama (sorcery) and the accompanying fears thereof, are clearly on the increase. This increase seems to be due to two main reasons. Firstly, the old men are saying that sorcery is being used as an alternative to 'dhagir'yun' (to punish), so that the law can be reconciled. Some keepers of the law have turned to contracting out punishment that should be applied by the law, to known 'galka' (sorcerers), though always in secret. They have taken to these drastic and illegal methods due to fear of the Balanda (non-Aboriginal) law. They know that to apply traditional dhagir'yun (to punish) would risk their own arrest by the police whilst the original law breaker would often go free because the wider Australian legal system may not recognise the original violation. Their belief is reinforced by the fact that in many instances in the past when traditional punishment has been applied, the keeper of the law has been brought before the Balanda legal system and imprisoned, whilst the original offenders who were being punished for violations of Yolnu law, were often seen by the Balanda system as victims.

ATTITUDES TOWARDS BALANDA POLICE & PRISON SYSTEMS

From the perspective of Yolnu, Balanda law and it's legal institutions such as the police and prison systems are being used in a way that is not bringing about justice. Many of those who break traditional law are looking to the Balanda system for protection. If a Yolnu person stabs another
Yolnu for example, then the one who committed the crime often runs to the (Balanda system) police for safety. From the viewpoint of Yolnu society, the Balanda legal system is offering protection to the lawbreaker and denying their society the opportunity to apply their own law. In the same way, when young petrol sniffers who continue to break into buildings and destroy property are asked - ‘Why do you keep doing this? Aren't you frightened of the law and being put in prison?’, their response is often that they are not frightened; that they would be pleased if they were sent to prison, where there is plenty of good food, televisions, games to play and so on. Because their relations do not want them sent away, the young sniffers are able to play on this fact and use it as a threat to their relations so that they are able to continue their wrongful behaviour.

Again we see evidence that where the Yolnu keepers of the law are not in control of imposing punishment on lawbreakers, then the whole Yolnu community feels that the maintenance of law and order is out of control. Whereas in traditional Yolnu society, the law keepers aim at imposing punishment in such a way and form so that the law and order of their communities is maintained in the long term, and a code of law is maintained that leads the people to discipline of mind, body and spirit.

However whilst many Yolnu see imprisonment for short periods in a positive way, when someone is jailed for a long term it is an entirely different matter. The high levels of fear and the hopelessness that Yolnu feel when they are serving long term sentences, leads them to despair and in not uncommon cases, to suicide. In most long term cases, the offender would much prefer to be punished by their own people. These specific areas of how Yolnu view the Balanda legal system and it's institutions, are yet other areas that need more indepth research.

**THE TRADITIONAL EQUIVALENT OF INCARCERATION**

Yolnu never had permanent buildings traditionally, which would enable them to incarcerate a person. So they adopted a form of incarceration that suited their social organisational structure - the use of the spear. The spear was used predominantly as punishment in two areas. Firstly for crimes demanding capital punishment (we note here some countries in the western world have used and even continue to use hanging, the electric chair, firing squads, guillotine and chemical injections causing death, as forms of capital punishment). Secondly, spearing of the thigh was used for less serious crimes that nevertheless demanded public humiliation or some form of incarceration of a person. This punishment was highly humiliating and most effective in restraining a person until the wound healed, whilst at the same time providing public education about the law, order and justice.

Use of the spear as punishment has always been seen as conflicting with Balanda law, even before 1967 when Yolnu were not regarded as citizens and covered as such by that law. It was actually these reactions to the use of the spear in earlier years, that resulted in the Yolnu law keepers coming to the conclusion that they would have to find another way of maintaining law and order, that was hidden from the Balanda law enforcers. In the earlier years when missions and settlements were very isolated and the Balanda superintendents' or patrol officers' activities were limited to relatively small areas of land, it was much easier for these punishments to escape the knowledge of the Balanda law. If someone went missing, it was merely said that they had gone on a long hunting trip or to visit relations. Or if someone was to be punished by Yolnu law they could be forced to go on a so-called fishing or hunting trip and thereby could be taken outside communication with the Balanda bosses. As some missions and settlements prohibited certain forms of ceremony, it was
therefore almost expected by Balanda that the Yolnu would 'go bush' occasionally. This also made easier the maintenance of the Yolnu law by the law keepers and therefore the maintenance of their society without the intrusion and prevention by Balanda.

However as the forms of communication improved, these areas became less isolated and together with the more thorough recordkeeping procedures being practiced, this resulted in Yolnu movements being more easily monitored. Correspondingly, it became much more difficult for the keepers of Yolnu law to do their job. The ways they could punish law breakers was reduced more and more, yet at the same time their responsibility to Yolnu law from their perspective was not. So they turned to adopting a form of punishment that even the people see as bad, that is, sorcery. From the peoples' point of view, if the law keepers are prevented from reinforcing the law by punishing offenders, this will inevitably lead to anarchy and a lawless society.

Sorcery is increasing and we believe will continue to do so, until ACL is given recognition and the Yolnu law keepers are given a major role in determining what are culturally appropriate forms of punishment and protection.

THE TRADITIONAL FORM OF LAW COURTS

It is an important fact that the decision to impose punishment was not traditionally made by individuals, 'put rather through the correct chambers of law. Furthermore, that the traditional law courts had many elements that can be compared to the western law courts. This in itself is an important area which needs to be documented more fully, however at this stage we provide a very brief summary of the procedures of the traditional law courts, which nevertheless is sufficient to evidence the similarities:-

a) The accusation that a person has broken the law is made by the executive arm of the government (refer Appendix B) in a similar way to a public prosecutor.

b) A court session or chamber of law is proclaimed and established by the 'nurru-dhawalanu mala' (the selected representatives of the bapurru (clan)). These people are also known as the 'napunga'wuy' ( the middle people ).

c) These nurru-dhawalanu mala will call leaders from a number of specific relationship groups to the accused, to act in that person's defence.

d) The session will commence with the prosecutor making the accusation before the nurru-dhawalanu mala.

e) Then those called to the person's defence will speak. Talking will continue until the nurru-dhawalanu mala know they have the full story. They will then retire to discuss the matter in secret.

f) Once they have reached a decision, they return to the gathering and announce their findings and the punishment/s.

g) The punishment is then carried out by the prosecutor from the executive arm of the government. Alternatively, the prosecutor may contract out the job of punishment to another person.
whom they know is skilled in that area. (Balanda and even Yolnu in recent years have used words like 'payback' to describe the way Yolnu have decided on punishments traditionally. However it is clear from even this minimal insight into the Yolnu legal system, that such terms are a gross oversimplification and this has led to an almost complete misunderstanding of the Yolnu legal system.)

THE NEGATIVE EFFECTS OF SORCERY

The increased use of sorcery is having many negative side-effects. Firstly, as it is still regarded as illegal, it therefore leads to lawlessness. Secondly, it is leading to confusion amongst the people about the cause and effects of many things introduced to Yolnu communities over the last 200 years including disease and sicknesses, new foods, substances of abuse and even technology such as in the form of vehicles. The harmful effects of these introduced things, even to the extent of death by accident, are being confused with punishment in the form of galka' djama (sorcery). This has far reaching and significant effects, particularly in the areas of health and safety in both public and occupational areas. The peoples' confusion about the cause of death or the injury (assuming the galka' to be the cause) leads to them not taking responsibility for sickness, disease, substance abuse, or things like mechanical safety and driving habits. They assume that all deaths are caused by galka' and therefore that control of their own life, health and safety is to that extent out of their hands. This fact alone is rendering many of the educational health programs introduced in these communities as largely ineffective.

A third negative effect results from galka' djama being relatively nondiscriminatory as to whom takes the greatest burden of the punishment. A young man from a particular clan for example, breaks traditional law in such a way that he should receive the capital punishment of death by spearing. Yet this form of punishment can no longer be used. All his clan know he should be punished and are aware that the executive arm of their law might have to contract out the punishment to a galka' (sorcerer). The whole clan is also aware that in order to satisfy the law, if the culprit has returned to a homeland centre or somewhere where it is difficult for the galka' to get him, then the galka' might pick on any member of his close family. So his whole family lives in great fear that they or other loved ones may have to bear his punishment (and the fear in this area is increasing). This also leads to much time and energy being spent on speculation as to whether the galka' is to blame when a family member becomes sick due to disease or substance abuse, or if they're involved in an accident. It is just a matter of time before every family group on a community will have had an incident that they know needs reconciling.

The confusion and fear is compounded even further, due to people assuming that the family which under traditional law should execute the punishment, will have contracted for a galka' to carry that out, whether they have in fact done so or not. Then if someone from the family of the offender becomes sick from disease or substance abuse, or is hurt or killed in an 'accident', it will be assumed that the original executor's family was responsible through letting a contract to the galka'. As sorcery is illegal under Yolnu law, the family of the accused who have had a member take ill or in some way been hurt, can in turn seek to have the law reconciled. This whole process snowballs to a point that every death and even suicide is blamed on galka' djama, whether such activity is going on or not.

JUSTICE MUST BE SEEN TO BE DONE
So for all these reasons, we are reminded of the importance to these people of the principle reflected in the old saying - 'justice needs not only to be done but to also be seen to be done'. The old men are saying that everyone is now living in fear of galka' djama (sorcery) and that this is the direct result of them not having the authority under the wider Australian legal system to apply the appropriate punishment. If Yolnu law keepers were to be consulted and their advice taken as a major factor in determining the punishments of law offenders, then in some instances it may result (though not wanting to pre-empt any debate in this area) that what they perceive to be the most 'culturally appropriate' form of punishment today, is in fact imprisonment. For some of these old men are clearly saying that whilst traditionally the form of capital punishment demanded for very serious crimes was death by spearing, today they speak more of some form of imprisonment. However in many cases not demanding capital punishment traditionally, a culturally appropriate form of punishment may be other than that which would be prescribed by the current Balanda legal system. In making these decisions, the Yolnu law keepers would take into account the non-fearing attitudes of some lawbreakers towards Balanda prisons and on the other hand, the overwhelming sense of hopelessness felt by Yolnu serving long term sentences (refer Appendix D pp 2, 'Attitudes towards Balanda and Prison Systems'). The inherent inadequacy in the wider Australian legal system as it now exists, is that the total control of this area of decision making lies with Balanda.

It is our hope that traditional Yolnu law can be taken seriously and treated with respect, so that justice can be seen by the people to be done and as a consequence, these increasing cycles of fear and lawlessness broken.

ARDS INC 1993
SUBMISSION NO. 105
DENIS COLLINS MLA

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

MEMBER FOR GREATOREX

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8th September, 1993

The Executive Officer,
Committee on Constitutional Development,
Legislative Assembly of the N.T.
G.P.O. Box 3721
DARWIN NT 0801

Dear Mr. Grey,

RE; ABORIGINAL RIGHTS & ISSUES
OPTIONS FOR ENTRENCHMENT

In haste due to a high work load. any constitution that entrenches rights for one group on Racial grounds or any other issue against the rest of the community will be a festering sore and the eventual downfall of the said Constitution.

Constitutions are about preserving the rights of all citizens and limiting the powers of the elected Government and making Parliament accountable to the people.

The place for putting rights into place for minority groups if it exists at all is under law made by Parliament which is under the rule of the Peoples Law for Parliament to obey - the Constitution.

If Aboriginal people understood the purpose of a Constitution they would not ask for such entrenched privileges in any sense of conviction or fairness.

In essence such a demand on request says we don't believe in Democracy, and we are not prepared to abide by the Parliament's decisions. Parliamentarians have to live in the broader community and they are well aware of the need to respond sensibly to pressures from the community.
In my view the desire to entrench minority rights in a Constitution in effect is saying forever and a day these people cannot compete in the broader community. this we know is not true for all aborigines and effort and energy must be spent on helping more to compete in mainstream society.

Yours faithfully,

DENIS COLLINS MLA
INDEPENDENT MEMBER FOR GREATOREX
Mr Rick Gray  
The Executive Officer  
Sessional Committee on Constitutional Development  
Department of the Legislative Assembly  
GPO Box 3721  
Darwin NT 0801

Dear Mr Gray,

ABORIGINAL RIGHTS AND ISSUES - OPTIONS FOR ENTRENCHMENT

I wish to lodge a submission on this discussion paper in the form of two papers entitled - Land Rights and Traditional Hunting Rights. I have attached copies of both of these papers which I wrote last year whilst still a Darwin resident.

Yours sincerely

G E Ryan.
Land Rights

The catch cry of "aboriginal" activists in Australia is "land rights for aborigines" and this has been enshrined as part of all Australian legislations dealing with aborigines. What does it really mean?

It is generally stated that the nomadic food gatherer living in Australia, at the time of the European invasion and settlement, had no concept of the "ownership" of land. Surely each tribe or clan restricted their activity to an area of land and defended this land against encroachment by neighbours. Aborigines today relate to a particular area of land as being "their country". Therefore each tribe or group owned their tribal land. Survival for the nomadic food gatherer depended on the family group or clan working together to harvest the naturally occurring resources for physical sustenance and the various clans depended on other clans of the same tribe for defence and social and spiritual sustenance.

To provide continual sustenance vast areas of land had to be worked over so that each food resource could be harvested at the optimal time. On the other hand agricultural societies produce a greater volume of human food from an area by, basically, creating a favourable habitat and eliminating all competition to food producing species. Thus agriculture allowed families to reduce or forsake their nomadic existence and concentrate on a small areas of land, thus creating the concept of family ownership of land rather than clan or tribal ownership. The critical factor probably being the number of hands and backs needed to harvest sufficient food for family survival.

Therefore at the time of the first European settlement at Port Jackson all of Australia, presumably, was "owned" by tribes or clans of nomadic food gathering aborigines. The invaders were from a partly industrialised but advanced agricultural society. Their concept of land ownership was on a much smaller scale than those that already owned the land and they did not understand the tenancy of the existing occupants. Not that invaders ever give much heed to the life style or the requirements of the invaded. It would be reasonably argued that if the aborigines had been agriculturalists with marked plots of land indicating family ownership, the European invaders would have given existing ownership no greater credence and probably treated the aborigines no differently. The European invasions of North and South America weren't tempered by the fact that much of the area invaded was occupied by agricultural societies who showed obvious signs of tenancy.

Obviously any invaders who started showing sympathy or empathy with the invaded would not be successful invaders or occupiers.

Despite the much documented and euphemistic explanations that the invading Europeans didn't understand the aborigine's "links" with the land (ownership) and the requirements of the aborigines, the undoubted fact is that they didn't care less. The Europeans were invading and taking over the land for their own purposes and if the original occupiers hindered this take over they were dealt with in the most expedient manner. It didn't require an anthropologist to see that the aborigines required the land for sustenance and if they were removed from the land they didn't have any sustenance. Perhaps the invaders didn't understand the relatively sparse populations of aborigines.
was all that the land could support, but this was really the lack of understanding of the infertile nature of Australia's ancient soils. Introduced diseases probably decimated aboriginal populations in many parts of Eastern Australia before the invaders even reached the land they occupied thus giving a false impression of previous population densities, but never the less, the fact is that Australia could only support a relatively low population of nomadic food gatherers.

Subsequently all the agricultural land in Australia was occupied by the invading Europeans. No thought was given to the "rights" of the remnant aborigines as they had no rights. If aboriginal rights had been considered no invasion and settlement would have taken place for, as far as the aborigines were concerned, the whole invasion was wrong.

The remnant, dispossessed aborigines lingered on "reserves" and missions whilst the occupation of the land proceeded.

The allocation of the land to the invaders was not done by democratic means, those with wealth or political favour were "given" parcels of land, some land was sold to settlers of ex-convicts and squatters proclaimed ownership over vast tracts of pastoral land. In an agricultural society land meant wealth but, as is the English tradition, those with wealth gained the bulk of the land. The land grab slowed considerably once all the readily available agricultural and southern pastoral land had been occupied. The more remote and less hospitable parts of the continent's North and Interior still supported tribal aborigines at the end of the 19th Century. Whether European diseases were less virulent in the more arid and more tropical parts of Australia or whether European settlement had a lower impact, more aborigines survived European occupation of these remote areas.

European attitudes towards aborigines changed during the 20th Century. Officially there had always been a duplicity between the philanthropic paternalistic public statements and private condoning of the callous reality of dispossession and genocide. However once aborigines provided no further threat to the European possession and exploitation of agricultural Australia, philanthropy toward the remnants of these original occupants became a popular sentiment. In the Interior and North the aborigines became an essential labour force in the pastoral economy and thus gained economic, if not philanthropic, appreciation.

After total European possession, some of the land perceived as having no economic value was designated "aboriginal land" by various proclamations and statutes. Thus Arnhem Land and vast areas of desert country were officially "given back" to aborigines whose ancestors had exploited these areas as nomadic food gatherers.

Following equal pay for all pastoral workers and improved access to the remote Interior and North of Australia most of the pastoral station aborigines became the fringe dwellers of pastoral towns just as the southern and eastern aborigines had become fringe dwellers of the cities and agricultural towns 100 years before. Many aborigines lived on Reserves, Missions and settlements where they were "looked after" by various organisations, either religious or public servant. In eastern and southern Australia very few full blood aborigines survived but the numbers in the fringe dwelling sub-culture were swelled by part aborigines, rejected by their fellow Australians because of their "aboriginality". Most of these "black" communities remained as little stagnant pools attached to but rarely included on the economic mainstream of the Australian industrial consumer-society. In the
remote areas the settlement dwellers flourished under paternalistic welfare whereas the fringe dwellers languished under, frequently, squalid conditions- outcasts in their own country.

In the 1960's, the burgeoning non-aboriginal urban populations, remote from rural economic dogmas and ignorant of the callous realities of the European invasion and occupation of Australia, developed an affluence induced philanthropy. A paternalistic pity for the remnants of the original owners of Australia developed into a guilt complex over the treatment their ancestors received at the hands of the invading Europeans. It was believed that the wrongs of the past could be righted if only the existing aborigines could be encouraged to once again become the Noble Savages eulogised by popular anthropologists. However the aborigines, along with all Australians, had become addicted to the bounties of the industrial-consumer society. Even the most remote, back to "traditional lands" out-stations required iron buildings, running water, airstrips, schools, regular supplies of food - the comforts and benefits of the industrial society. "Traditional hunting" now included the assistance of high-powered rifles and four-wheel drive vehicles. But most aborigines had not been given the opportunity to become part of the industrial society's discipline of regular pay for regular work.

The political response to this urban pressure was to allocate increasing amounts of Federal funding to "aboriginal" projects. Naturally this included establishing vast bureaucracies to "oversee" the expenditure of these funds. From the bureaucracies came the demand for land for those aboriginal groups that had no de facto rights over any land. Older aborigines could remember that their original economic base was the land and that it was the land that the Europeans had avariciously taken from them. All aborigines could see that, even in the new society, the ownership of land meant wealth. However many did have de facto ownership of large areas of the land on which their ancestors had survived, but no wealth was obtained from this ownership until mining rights and royalties were wrung from Companies prepared to exploit their mineral resources.

What rights do aborigines have to own land?

As Australian citizens they must have the same rights as any other Australians to own land. But as most aboriginal groups have not been directly involved in the industrial society's work for pay ethic most do not have the money to buy land.

Do aborigines have a greater right to own land than other Australians?

They do only if it is accepted that the invasion and occupation of Australia was illegal or immoral. In that case the descendants of the invaded should be compensated for the loss of their economic base, the land. As all of Australia was originally owned by the various tribes of aborigines, all the land, including agricultural and urban areas, should be subject to compensation. It is easy to organise compensation for the aboriginal descendants of those who owned parts of Cape York but what about the descendants of those who owned Botany Bay or the ACT? It is true that there are very few descendants of those that originally owned the now economically important land as this was rabidly occupied by the European invaders with the almost complete extermination of the original occupiers. However those few who can lay claim to being descendants are just as entitled to compensation as the many that may lay claim to areas of Central Australia or the Kimberley.

If land ownership is to be questioned on moral or legal grounds perhaps the whole history of land acquisition since European occupation should be examined.
The loss of "traditional" lands has been blamed for many of the problems facing aborigines today. There is no doubt that the loss of the land used by their ancestors caused major problems for these ancestors as it meant the loss of their resource base and their subsequent extermination. But the land is not the resource base of most aborigines today and their acquisition of land has not, and is not, going to solve their economic or social problems. This is obvious at most of the large communities in vast areas of "traditional land" where social problems are just as great as those plaguing fringe dwellers with no land. The hard fact is that in the industrial society, the ownership of land is worth nothing unless the resources of that land are exploited for profit, and even if they are exploited there is little social benefit to the owners of the land if they are not involved in the exploitation. For the other hard fact of living in the industrial society is that, for most, daily work provides the physical and mental activity and the incentive necessary to be part of the consumer society.

For the nomadic food gatherers the daily work was the physically difficult, unpredictable and dangerous work of making a living off the naturally harvestable resources. The traditional land was the area required by each group, clan, or tribe to survive as nomadic food gatherers. For their descendants the traditional lands have no greater economic value than to any other Australians, unless these descendants are to live in the traditional manner, that is, as nomadic food gatherers. Understandably no groups of aborigines wish to go back to this unpredictably and difficult life style. Subsequently, Government policies of providing all the consumer goods and services of the industrial society to groups of aborigines living on "traditional lands" be they reserves, pastoral excisions, community land or cattle stations, has done nothing but precipitate the cruel destruction of these communities. It is romantic to believe that aborigines leaving squalid fringe settlements to live in new galvanised iron townships in remote areas will somehow overcome their problems in their new environment. This ignores the greatest problem - self motivation. These groups will become permanent welfare mendicants with all their needs supplied and their incentive for living robbed by patronising Government agencies.

Just as survival was the incentive that kept nomadic food gatherers physically and mentally active, work for pay is the incentive that keeps the industrialised citizen physically and mentally active. When a continual supply of food and water was provided to nomadic food gatherers they forsook their nomadic existence on the tribal lands and camped permanently around missions, Government outposts and cattle station homesteads. When a continual supply of food and consumer items are supplied to people in an industrialised society they lose their incentive to work and commit themselves fully to self-destructive indolence.

It is hypocritical for Australian Governments to condemn the incentive robbing socialist Governments of other countries but to then condemn the aborigines to a total welfare ghetto existence.

The main problems for most aborigines are not caused by not owning land or lack of "land rights", they are caused by the fact that they live in a consumer-industrial society but they have been prevented from becoming part of this society. Present Government policies generally do nothing but exacerbate this situation by institutionalising segregation for bureaucratic expediency.

Most non-aboriginal Australians have no "rights" to ancestral land whether it be in Italy, Ireland, South Vietnam or Australia - this lack doesn't create social or psychological problems.
Vietnamese refugees, with no command of the English language or knowledge of the Australian society, have settled in Australia, and succeeded, despite racial prejudice, disorientation, a horrifying past and total lack of financial resources. These Vietnamese-Australians, along with many other immigrants, have been able to establish themselves without any targeted welfare benefits.

The fact is that racially-targeted welfare and "positive discrimination", hinder assimilation and perpetuate sub-cultures.

Most of the land subject to recent land claims is Crown Land or pastoral leases. Remaining Crown Land is such because it has no perceived economic value and pastoral leases are generally marginally economically viable for one-family business ventures. Aboriginal communities established in these remote situations are forever non-viable welfare ghettos. Communities cannot expect the benefits of the industrial society - motor cars, buildings, videos and manufactured clothing - without accepting the negative side of life in such a society - work for pay.

Handing over areas of land to the descendants of the original owners of Australia may ease some of the Anglo-Saxon urban guilt but it won't ease the agonies of today's aborigines.

G E Ryan.
Australia is an industrialised, agricultural country. To increase production of food and fibre vast areas of the land have been converted from natural environment to agricultural and pastoral land. This conversion involved a reduction in the total number of species so that the species which could be harvested for human consumption increased to the level required to facilitate economic harvest.

The wealth and over production from efficient primary production industries has given Australians the privilege and time to develop an aesthetic and scientific appreciation of the natural environment. This appreciation has led to a concern for those native species whose populations have been reduced to facilitate efficient primary production, a growing industrial base and increasing human population. The political response to this concern has been to prevent the reduction of species in certain areas by declaring National Parks, Wilderness Areas, Nature Reserves, National Forests, Marine Parks etc. and to ban, or place limitations on, the killing of individual species extant outside these protected areas.

At the time of the European invasion of Australia the native Australians were nomadic food gatherers, harvesting the natural resources of the land as they became available. Although ensuring social longevity the nomadic food gathering economy provided a difficult and dangerous life style for individuals as it required low technology and low population density. It soon disappeared when confronted with the high technology and population pressures of the new, invading society.

There are no nomadic food gatherer societies in Australia today, in fact our society would not permit any group to live in such a manner as the high mortality rates and low population densities are an anathema to our social values. All aboriginal communities are as dependent on the technical industrial society for food and shelter as any other section of the community. There is no doubt that remote aboriginal communities still hunt and gather sustenance from their surrounding natural environment either for recreation or religious purposes. But these societies are not dependent on these food sources for survival and, indeed, would soon need to reduce the size of their communities if they were.

Aborigines are as much part of Australian society as any other ethnical group, they vote for the same politicians and enjoy the same religious and social freedoms. The fact that their ancestors were displaced by the invading Europeans some 200 years ago should not be cause for separate legislation. Surely a baby of aboriginal descent is no more Australian than a baby whose European ancestry can be traced back to the first fleet or whose parents were Vietnamese boat people. No individual's existence occurs before their birth, or conception.

As part of, and dependent on, the same industrial and agricultural economy, as all other Australians, aborigines need to be subject to the same laws and restrictions.

If it is deemed, by society, that aborigines should have the right to hunt and kill dugong, bustard, crocodile or turtle then all Australians should have the same right. If it is deemed by society
that certain native species require protection to ensure their survival then all Australians, including aborigines, need to be subject to the restrictions required to provide this protection.

Legislation that enshrines differing sets of restrictions on different ethnic groups is racist and no different, in philosophy, from the apartheid legislation of South Africa which our society has condemned. The propensity for Australian politicians to pass legislation that, by paternalistic largesse, separates aboriginal groups from the rest of society suggests that the discredited "Noble Savage" philosophy still provides the basis for the political response to Australia's aborigines. This legislation is both racist and socially divisive and has resulted in increasing racial polarisation and hatred.

G E Ryan.
The Executive Officer,
Sessional Committee on Constitutional Development,
G.P.O., Box, 3721
Darwin,
N.T., 0801.

Dear Mr. Gray,

18/6/1.

Thank you for your call for submissions, dated 22nd September, 1993, on Discussion Paper No. 6, Legislative Assembly of the Northern Territory Sessional Committee on Constitutional Development.

I enclose a copy of the article "The Crown & North Australia" (in Heritage, No. 67).

It will be noticed that page 14 contains the text of the Constitution of North Australia, the Letters Patent dated 6th July, 1863, and refers to the other Letters Patent as to the three degree strip.

I express the view that your Committee should endeavour to petition the Queen to amend these Letters Patent.

A copy of this submission will be sent to the publisher of Heritage.

Yours sincerely,

K.T. Borrow

Enc.
Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith -- To our trusty and well beloved Sir Dominick Daly, Knight greeting: Whereas by an Act passed in the Session of Parliament holden in the fifth and sixth year of Our Reign entitled "An Act for the Government of New South Wales and Van Diemen's Land", it was enacted that it should be lawful for Us by Letters Patent, to be from time to time issued under the Great Seal of Our United Kingdom of Great Britain and Ireland, to define, as to Us should seem meet, the limits of the Colony of New South Wales, and to erect into a separate Colony or Colonies any territories which then were, or were reputed to be, or thereafter might be comprised within the said Colony of New South Wales; and whereas, by an Act passed the Session of Parliament holden in the twenty-fourth and twenty-fifth years of Our Reign, entitled, "An Act to remove doubts respecting the authority of the Legislature of Queensland, and to annex certain territories to the Colony of South Australia, and for other purposes", it was amongst other things provided that it should be lawful for Us, by such Letters Patent as aforesaid, to annex to any Colony which was then or which might thereafter be established on the Continent of Australia and territories which (in the exercise of the powers thereinbefore mentioned) might have been erected into a separate Colony: Provided always that it should be lawful for Us, in such Letters Patent, to reserve such powers of revoking or altering the same as to Us should seem fit, or to declare the period during which such Letters Patent should remain in force, and also on the revocation or other determination of such Letters Patent, again to exercise in respect of the territories referred to therein or any part thereof, all such powers and authority as might have been exercised if the said Letters Patent had never been made: Now know you that We have thought fit, in pursuance of the powers and authorities to Us in that behalf belonging to annex, and We do hereby annex to Our said Colony of South Australia until We think fit to make other disposition thereof, or any part or parts thereof, so much of Our said Colony of New South Wales as lies to the northward of the twenty-sixth parallel of south latitude, and between the one hundred and twenty-ninth and one hundred and thirty-eighth degrees of east longitude, together with the bays and gulfs therein, and all and every the islands adjacent to any part of the mainland within such limits as aforesaid, with the rights, members, and appurtenances; and We do hereby reserve to Us, Our heirs and successors, full power and authority from time to time to revoke, alter, and amend these Our Letters Patent as to Us or them shall seem fit. In witness whereof We have caused these Our Letters to be made Patent. Witness Ourself at Westminster, the sixth day of July, in the twenty-seventh year of our Reign.

By warrant under the Queen's Sign Manual.

(Signed) C. ROMILLY

[True copy. R.D. Ross, Acting Private Secretary]

[Some enclosures to this Submission have not been included in this Volume.]
24 September 1993

Mr Rick Gray  
Chief Executive Officer  
Sessional Committee on Constitutional Development  
GPO Box 3721  
DARWIN 0801

Dear Mr Gray

I would appreciate it if you would forward to my office a copy of the discussion paper on "Aboriginal Rights and Issues - Options for Entrenchment".

It is my view that all citizens of Australia should be equal under the laws of Australia, regardless of race or ethnic origin. Therefore it is my view that all Australians should be treated equally before the law.

It is also my personal attitude that I do not agree with the granting of powers or privileges to any group of Australian citizens relative to another, based on race, the law must equally apply to all citizens.

Yours sincerely

The Hon Ron Bowden JP MLC  
Member for South Eastern Province

Please Address All Correspondence to Electorate Office
28 September 1993

The Executive Officer
Sessional Committee on Constitutional Development
G P O Box 3721
DARWIN NT 0801

Dear Sir/Madam

Aboriginal Rights and Issues
Options for Entrenchment

Thank you for your letter of 21 September regarding a constitution for the Northern Territory.

I am of the view that in the Northern Territory there should be set up an Aboriginal State of government whether it be on the basis of a province or a county to be autonomous within the State of the Northern Territory.

Yours sincerely

GEORGE SEITZ MP
Member for Keilor.
SUBMISSION NO. 110
DEPARTMENT OF CORRECTIONAL SERVICES

Your reference: 18/6/1

In reply please quote: 93/79

The Executive Officer
Sessional Committee on Constitutional Development
GPO Box 3721
DARWIN NT 0801

22 October 1993

RE: RECOGNITION OF ABORIGINAL CUSTOMARY LAW:
A DISCUSSION PAPER

Enclosed is the NT Department of Correctional Services’ response to the discussion paper prepared by the Law Reform Committee's sub-committee on "Recognition of Aboriginal Customary Law".

If you have any queries about the response paper please contact Ms Chris Martins, Policy and Research Officer, 895116.

Yours sincerely

D K OWSTON
"RECOGNITION OF ABORIGINAL CUSTOMARY LAW": A DISCUSSION PAPER
DEPARTMENT OF CORRECTIONAL SERVICES SUBMISSION

1. GENERAL COMMENTS

1.1. This Department strongly supports the wider involvement of Aboriginal communities in all facets of the criminal justice system. This includes dispute resolution, and recognition of the role played by traditional Aboriginal culture in all aspects of dealing with offending behaviour.

1.2. Obviously, prevention is the major aim of reducing the over representation of Aboriginal people in the criminal justice system; especially in prisons, where Aboriginals comprise 75% of the total prison population.

1.3. This submission incorporates Government and Departmental policy.

1.4. The comments in this document have been restricted to those matters of direct relevance to Correctional Services.

1.5. Recently consultants have been engaged by this Department, to review and make recommendations on

   . How Aboriginal communities can have greater involvement in diversionary, assessment and treatment programs for juvenile and adult offenders.

   . How the employment of Aboriginal staff by the Department can be increased.

2. SPECIFIC RESPONSES TO RELEVANT "EXECUTIVE SUMMARY ISSUES" OF DISCUSSION PAPER DOCUMENT

2.1. Should Aboriginal customary law be legally recognised in the Northern Territory?

The Department supports recognition of Aboriginal customary law, as a means of acknowledging the importance of traditional custom in the criminal justice system.

In 1987 the Australian Law Reform Commission's final report on Aboriginal customary law recommended "that the Northern Territory authorities investigate through local discussion and consultation whether (a trial period of customary law) be implemented (at Yirrkala for a trial period" (page 832).

This Department supports such a trial in a participating Aboriginal community, followed by comprehensive evaluation of the scheme at that locality.
A number of key Departmental programs are currently focused on increasing the involvement of Aboriginal people in the justice process, and reducing the over representation of Aboriginal people in custody.

These include:

- the Aboriginal Community Justice Program
- the Aboriginal Community Corrections Officer Program
- the Community Service Order Scheme
- the Juvenile Justice Offender Placement Program

2.6 Should any recognition be limited to Aboriginal people who have a traditional lifestyle?

Recognition should be limited to Aboriginal people who recognise and accept their obligations under customary law.

2.7 Should any recognition be limited geographically to areas under the jurisdiction or control of appropriate Aboriginal institutions?

No. Aboriginal people with traditional views and control mechanisms may live in a variety of different locations, including suburban areas (such as the Bagot Community, Darwin). Extensive consultation with Aboriginal communities would be necessary to establish application of recognition.

2.8 Should any recognition be subject to any overriding Territory statute law? If so, should it be subject to appropriate constitutional guarantees of customary rights?

Recognition should be subject to appropriate constitutional guarantees, and these guarantees should be included in the Territory Constitution. Further, there should be a right of appeal to a higher Court, but not an overriding Territory statute law.

2.9 If customary law is recognised, how should it be applied and enforced? - By the existing general courts, by a new system of Aboriginal courts or by some other flexible scheme designed in consultation with each Aboriginal community? Alternatively should it be left to traditional methods of enforcement?

A suitable alternative system should be provided to the Sentencing Authority, supplementing the present judicial sentencing system, rather than replacing this system. The sanction or punishment for any conviction should be acceptable to the community. This Department does not believe the wider community would accept the imposition of physical violence (for example traditional spearing).
2.10 Whether or not customary law generally is recognised, should there be some ongoing study to consider further legislative incorporation of selected aspects of customary law by reference, or the adjustment of the general law to take into account selected aspects of customary law?

An ongoing study is indicated to assess further aspects of implementing Aboriginal customary law. This study should consider:

- appeal mechanisms
- community support for the scheme (from Aboriginal communities as well as the wider community)
- possible limitation of Aboriginal customary law to certain offence categories
- the views of sentencing authorities on the scheme's success
- the impact of the scheme on communities where it has been used to a significant extent.

3.0 ABORIGINAL PEOPLE AND CONTACT WITH POLICE, THE COURTS AND PRISON.

3.1 As stated previously, Aboriginals consistently make up over 75% of all prisoners and over 60% of all juvenile detainees.

While not defending this unsatisfactory situation it should be noted that an Aboriginal is far less likely to be imprisoned in the Northern Territory than any other jurisdiction with the exception of the ACT (which does not have a sentenced prisoner facility) and Tasmania which has the lowest sentenced prisoner population in Australia. See Attachment "A".

Conscious efforts are being made to reduce the over representation of Aboriginal people in both the adult and juvenile custody systems. These include:

- the community service order fine default program.
- the Aboriginal community Corrections Officer Program.
- the Aboriginal Community Justice Program.
- the Juvenile Offender Placement Program.

The Department acknowledges there is still a long way to go in reducing the over representation of Aboriginal people in custody. However, inroads are being made.

Recently introduced is a Government initiative as part of the review of sentencing project, which includes enshrining in legislation:
imprisonment as the sanction of last resort;

- diversion of less serious offenders from short term imprisonment;

- early release of less serious prisoners, on community supervision orders

This project should help to reduce the over representation of Aboriginals in the prison system.

3.2 RECOMMENDATIONS OF THE ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY

As noted in the Discussion Paper, the Royal Commission considered recognition of Aboriginal customary law. The Commissioner's Report observed the inter-relationship between customary law and the Australian legal system is complex, and that there is a significant proportion of Aboriginal people with "prime allegiance" to traditional values. It has indeed also expressed the view that there need be no conflict between the formal legal system and traditional law in the Aboriginal context.

This Department supports the findings of the Royal Commission in these respects.

4. CONCLUSION

Elements of law making, enforcement, punishment and retribution must be embraced by Aboriginal communities to achieve any real improvement in the Justice process. Until Aboriginal communities are involved in the administration of justice for themselves, and are empowered to participate, improvement will be limited.

[Attachment A to this Submission has not been been included in this Volume.]
31st May, 1994

Mr. R. Gray,
Executive Officer,
Sessional Committee on Constitutional Development,
G.P.O. Box 3721
DARWIN 0801

Dear Mr Gray

Thank you for forwarding to me the information about your Committee.

For some time now I have been of the view that the move towards a Republic in Australia should also be accompanied by a change in the levels of Government. It is my view that there should be two levels, namely Federal and Regional.

This would obviously entail the re-allocation of State boundaries and would no doubt ensure that the Northern Territory was recognised as a Regional Government.

If I can be of any further assistance in this matter, please do not hesitate to contact me.

Yours sincerely,

Garry McIlwaine
Dear Sir,

Thank you for your letter re Constitutional Development and an Australian Republic. I was recently asked to give a talk on the subject “Republic or Monarchy” at my Probus Club, I prepared a printed copy in addition to what I had to say and I enclose a copy for your consideration. As the club is non political I had to be careful to give a balanced version on this controversial matter.

The portion of my paper concerning “Are there dangers for State Government powers?” would also generally speaking apply to the Northern Territory. I trust this paper of mine will assist the Committee in facing up to the issues at stake.

You may use the enclosed material in any way you desire, the more publicity this sort of material gets the better as far as I am concerned.

Best regards to yourself and the Committee.

B. Hannaford.
A REPUBLIC OR A MONARCHY?

Firstly we need to define what we mean by a republic and a monarchy, as just about every person has their own ideas on what these terms mean.

A simple all embracing definition of a republic is - "A republic is a country governed without the aid of a King or Queen." Obviously some republics are good and some bad, it all depends on the form of government adopted in the absence of a ruling King or Queen.

For example America is a republic with a good form of government, on the other hand Iraq is a republic run by a despot Dictator. Both are republics but they have contrasting forms of government.

A simple all embracing definition of a monarchy is - "A country where a King or Queen are recognised as the head of government. In recent times the powers of Kings and Queens as the head of a government is very limited and often largely confined to ceremonial duties.

As with republics the form of government in a monarchy is subject to great variations, some being good and some bad. For example Britain is a monarchy with a good form of government and Saudi Arabia is a monarchy more akin to a dictatorship by a royal family.

Thinking about these things and many others like them, when someone says, "I favour Australia becoming a republic." they should be asked "what sort of republic do you have in mind?"

As the Australian republican proposal relates to abandoning the British system of monarchy it is worthwhile considering just what we propose to abandon.

Very briefly we note from history how the role of Kings and Queens has changed as the centuries rolled by.

At one time a King was a virtual dictator, usually a strong and skilful soldier who led his subjects into battle. Such Kings were able to do as they pleased unrestrained by any system of law as they themselves were the law.

Of course as Lord Acton has so correctly put it, **Power tends to corrupt and absolute power corrupts absolutely.** Well some Kings were corrupt and these had to be restrained by a system of law that placed limitations on what they could and could not do.

The most notable documents that did this were the 'Magna Carta (1215) and the Bill of Rights (1688). As the years rolled by the powers of Kings and Queens were gradually reduced by an increasing number of laws deemed necessary by the people for proper government.

The peoples representatives that brought forward these laws were soon organised as a parliament which in time became mainly responsible for formulating the nations laws.

It should be mentioned that many of the earlier changes for better government were a result of Christian teachings. For example in the century King Alfred the Great declared, **The law of**
England to be the law of God as expressed in the Bible" and declared that "Courts of Law and Kings were subject to this law and could not change it."

Well a form of government and law by the people was being introduced and the powers of Kings and Queens were greatly reduced.

Although Britain does not have an official document called a constitution, earlier documents such as Magna Carta and the Bill of Rights etc. are still in effect and so constitute a de facto constitution.

Our present Queen's powers are very limited. She has, The right to be consulted, to encourage and to warn." - While at first sight this might seem very insignificant, I am sure in fact this is very valuable.

I understand—the Prime Minister normally consults the Queen once a week and as a non party political person of great experience and wisdom She no doubt makes a valuable contribution towards the government of the country.

Perhaps you say, "But the Queen has to finally approve all laws before they take effect." Yes in theory this is so but according to my research since 1714 no British King or Queen has withheld assent to a bill approved by parliament. This royal power once existed and was exercised but certainly not in recent times.

Well that's enough background information about how our monarchy system developed and operates, let's pass on to the Australian issues.

HAS ANY REAL EFFORT BEEN MADE TO DETERMINE IF THE AUSTRALIAN PEOPLE WANT A REPUBLIC?

The quick answer to this is surely NO. There has been no referendum. A Republic Advisory Committee has toured the country subject to a very limited terms of reference, basically on how we CAN become a republic, not IF we want to become a republic.

There has been no real attempt to question the public and find the will of the people on this matter, in fact the reverse has been the case. If the government were truly democratic they would make sure both those favouring a republic and those opposing it got an equal hearing.

While the Republic Advisory Committee has toured all States and Territories at taxpayers expense an opposing group, The Australians for Constitutional Monarchy has been refused any government funding to equally present their views to the public.

The Media have generally adopted a biased pro republic outlook, as I well know having often tried to get pro monarchy letters published. They usually love to publish filings about how a republic is inevitable, it is only a matter of time etc.

Obviously the Republican strategy is to brain wash the public over a period of years and then when most of us are convinced, or those opposing are so weary from a very unequal fight then they will call for a referendum.
WOULD AUSTRALIA BENEFIT BY BECOMING A REPUBLIC?

That is by stating it officially, and by deleting all mentions of the Queen, her representatives or the Crown from our constitution.

Would trade with other countries be improved? I don't see any reason for this to change unless it is trade with the Irish Republic.

Generally speaking trade is only motivated by a ‘good deal’ (good product low price) not the politics of a country. For example we don't like the politics of China but do a lot of trade with them.

Would we benefit economically? Once again generally speaking international money forces are only interested in making a profit, not in republic or monarchy. The value of our dollar and interest rates on over seas loans may well change according to how they perceive our government performance, but not according to if we are a republic or monarchy.

Would we benefit legally? We have already cut our legal ties with the U.K. I don't see how telling this to the world will make any difference.

Those who think our Asian neighbours would suddenly start to love us if we became a republic should remember some of these such as Japan and Malaysia are monarchies and so obviously have nothing against a monarchy.

Surely there are no intentional benefits in becoming a republic and the only Australians who want such a change are a few Socialists and those who hate the British

WHAT ARE THE DANGERS OF BECOMING A REPUBLIC

That is by officially declaring this and changing the constitution to delete all mentions of the Queen, her representatives or the Crown.

When our Federal constitution was first enacted the King/Queen had real powers and could override the Australian Government. These powers have changed but the constitution wording has not changed so clearly IF we want these changes to remain the wording needs to be changed.

Some are saying all we need to do with the Constitution is to change the words Queen, Crown and Governor General into President and the job is done. However anyone who has read the constitution through mentally making these suggested changes as they do so knows this simple system will not work.

Those who have studied the matter carefully realise extensive changes would need to be made and a whole new system of government will probably be the end result.

Those who Jove our present form of government rightly see great danger in the extensive changes needed for us to become a republic, and I sympathise with them.

In order for a constitutional change to be made, a referendum must be held and this is where I see the main danger. At present the government in power has the exclusive right to
chose the referendum wording, no one else has any right to have a different wording submitted to the
voting public.

Unfortunately this may well mean all questions put by the government will be ideologically
biased and not the sort of questions the public would like to be put to the vote. There is a deadly
danger that the voting public won't get a chance to chose from a fair and suitable range of questions.

When the 'Republic Advisory Committee" held their Adelaide meeting I spoke pointing out
this problem. I insisted saying - "at the very least the Opposition and possibly other smaller
parties should be able to provide alternate questions.

Judging by the last Federal Referendum the government can not be trusted, as the
questions put did not follow the 'Constitutional Commissions' recommendations and were
in the main trick questions with hidden meanings having possible devious interpretations
unknown to the general public."

If we become a republic our whole system of government would be changed, it is vitally
important that a comprehensive range of referendum questions representing what the public, rather
than the government of the day want, must be put to the referendum vote.

As most past Federal referendum questions were rejected a perception exists that it is nearly
impossible to get such questions passed, it should be mentioned that generally speaking all the
rejected questions related to giving more powers to the Federal government and the public did not
want that to happen.

A referendum is a wonderful bit of democracy IF the questions put are according to the
public wishes.

Another danger is the need to appoint a new Head of State let's call such a person 'The
President if the President is to take over the role of the Queen and Her representatives as mentioned
in the present constitution he/she will have far reaching powers. The manner of appointment, the
duties, powers and responsibilities of the President will need a great deal of careful consideration
and this MUST be decided by the people and not by the government of the day.

Unless these matters relating to a President are correctly handled there is a great danger we
could finish up as a dictatorship instead of a democracy.

ARE THERE DANGERS FOR STATE GOVERNMENT POWERS ?

A change to a republican constitution would certainly affect the States. The present constitution
goes to great lengths to give the States a great deal of autonomy but in recent decades the Federal
government has steadily undermined this and usurped many of the States former powers.

Usually this is done by money control, (bribery I would call it) "Your State will get a favourable
Federal grant if you do as the Federal government tells you."
Many people in the Federal parliament believe we should abolish State parliaments with the Federal government dealing directly with large regional Councils that have increased powers and responsibilities.

We note the present trend towards Council amalgamations and I believe it is all part of this ultimate plan.

Generally it is best that decisions be made by those closest to the problem or situation and not by some remote Canberra bureaucrat.

Of course our power hungry Federal politicians hate the present constitutions provisions that require a majority of States to approve a referendum question and many such hope to change this to a simple majority of voters Australia wide.

This would be disastrous for the smaller States as N.S.W. and Vic. between them could muster enough votes to decide all referendum questions in their favour. For example if some job providing prosperity enhancing project subject to a referendum needs to be located somewhere in Australia, guess where it would finish up? Yes there are dangers to the States, particularly the smaller States, if any new constitution does not reaffirm the protection they originally had against bullying by the larger States, or the Federal government.

**REASONS TO BECOME A REPUBLIC**

Let's face it, present day Federal government is nothing like it was at Federation, many changes have been made and the Federal constitution has not kept up with these changes.

Over the years parliamentary conventions, theft is practices found to be acceptable have become the norm for how government is to be run.

Because of the extreme difficulty of changing the constitution it has been easier to follow a system of conventions rather than to strictly follow our outdated constitution and this is what has been done.

Under these Conventions the Queen no longer plays any real part in the governing of Australia and could no longer do so even if she wished to.

As the Queen no longer has any real powers over the government of Australia, surely it is reasonable and desirable to stop pretending she does have such powers, and officially becoming a republic.

At one time it was possible to look up to the Royal Family as a role model of goodness and decency but in recent times this is no longer possible, and as a protest against their recent bad behaviour they deserve to be disowned by Australia.

As a republic, with our own flag, Australian Head of State and a new constitution we could be proud of our country in our own right rather than viewing ourselves as some sort of appendage of a European Community supporting Great Britain.
Looking at a political map of the world we note almost all countries are republics, from a world wide viewpoint the overwhelming popular vote is, let's reject Royalty and become a republic.

Like many other things that have gone out of fashion Royalty has had its day and it is time to progress to the better Republican system.

ARE WE ALREADY A DE FACTO REPUBLIC?

My quick answer to this may surprise you, as it is "Yes we are a de facto republic." In 1986 the Queen at Canberra signed the 'Australia Act' which cut our ties with British law. Any allegiance we have to the Queen is now purely voluntary.

The Queen is still in our constitution but She really only has such powers as are given to Her by the Federal and State governments.

Personally I would like the Queen to remain as our official Head of State even although I recognise Her powers are limited as I have already stated.

Recent copies of the 'Australian Constitution' have in the back pages a copy of the 'Australia Act 1986'. Under the heading - 'Termination of power of Parliament of United Kingdom to legislate for Australia.' - I read - "No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend to the Commonwealth, to a State or to a Territory as part of the law of the Commonwealth, of a State or of the Territory."

It is worth mentioning the Australia Act is probably illegal as certain essential conditions were not met before it was presented for signing. Some States needed to have State referendums before they could agree to anything affecting the status of the Queen and this was not done.

Quoting from the Federal government 'Republic Advisory Committee' issues paper I read "It is fair to say that read by itself the Commonwealth Constitution is a poor guide to the manner in which Australia is actually governed and can give a misleading impression of the actual powers of both the Queen and the Governor-General."

Another quote is as follows - "Nowadays Her Majesty's only remaining substantive function in respect of Australia is to appoint and if requested to remove the Governor-General, both of which she does on the advice of the Australian Prime Minister.'" ... "Since 1986 in performing any functions concerning a particular State of Australia she acts on the advice of the State Premier. Prior to that time she acted on the advice of the British Government with respect to State matters."

Clearly we are in a legal sense a de facto republic, with the Prime Minister a de facto President who can tell the Queen what she must do.

IF WE WANT A REPUBLIC

WOULD A CHANGE TO A REPUBLIC BE DIFFICULT?
Yes it would, if it is done in a fair and just manner. I have already mentioned the need for extensive constitutional changes and the need to define the powers and duties of a President. We need to act carefully rather than act in haste as the present trend seems to be.

It took nearly ten years for our several States to agree on the present Federal constitution. If such a change is to be made it must not be done in a hurry, there must be ample time for the public to separately consider and vote on each suggested change. No more of the present trend for 'package deals' where a heap of good and some not so good questions are put as only one question, hoping there are enough good ones to get the bad ones passed as well.

Only a limited number of questions must be put at any given referendum as too many at once will cause confusion with little proper consideration of the issues at stake. I am frightened that a whole new constitution will be presented to the public as a YES/NO package deal with no chance of correcting undesirable portions of the document.

**HOW WOULD A PRESIDENT BE CHOSEN?**

From what I heard at the Republic Advisory Committee Adelaide meeting an overwhelming majority of those present were dead set against a political or ex political person being chosen as President.

Various possibilities present themselves, such as chosen by the government of the day, or elected by the people etc.

I suggest that each political party represented in Federal parliament by five or more members be allowed to nominate a non political candidate. Additionally any group of five or more independents agreeing together also be allowed to nominate a candidate.

Then these nominated people be subject to an election by all Australian voters as one electorate preferably during a normal federal election.

Clearly there is great danger in chosen by the government. or even if all the candidates are chosen by the government, so this must not be allowed to happen.

**WHAT WOULD BE THE POWERS OF A PRESIDENT?**

Clearly the main desirable function of a non party political President would be to act as a sort of Umpire regarding the functioning of the parliamentary system. If the parliament does not stick to the constitutional rules or in some other way breaks the law of the land the President must have the power to overrule the parliament and correct the situation.

However the President must also be bound by a very carefully thought out set of rules as to what he/she is able to do under various situations.

Just as the constitutional provisions need to be decided by the people in a democracy so the powers and duties of a President will also need to be decided by the people, not by the government of the day.
Such a person with real powers is presently desperately needed to oversee our government and call them to order as they have often deliberately ignored the provisions of our present constitution.

THE REQUIREMENTS FOR A SATISFACTORY REPUBLIC.

The constitution, the duties, powers and responsibilities of a President must be chosen by the people. A good democratic republic is impossible if the government of the day are the only ones able to word referendum questions or if 'package deal' groups of questions are permitted.

In a good republic the people through a suitable constitution set the rules and limitations of the parliamentary powers, they decide how the parliament will operate.

Likewise the powers, duties and responsibilities of a President must be decided by the people after a long time of careful consideration.

An Australian republic should not reduce the autonomy of the States as provided in our original constitution. The present trend to centralise all power in Canberra is not a good move and must not be allowed to succeed.

An Australian republic must not be subservient to international laws on domestic matters originated by the United Nations or any other International body.

The Judiciary must be subject to parliament, not be able to make new laws (as they, did for Mabo) and be subject to parliamentary correction by a two thirds plus vote where their decisions are not regarded as satisfactory.

CONCLUSION

The choice between a Republic and a Monarchy must be the choice of the people not a Government or a Prime Minister and it must only be done after a fair and equal presentation of both points of view. If this is not done any republican change will not be to the benefit of Australia.

HISTORIC SOLUTION

If we fail to learn the lessons of history then we are doomed to repeat its mistakes. Early Australian history gives a good example of how to achieve agreement between the then separate colonies (now States) when a Federal constitution was needed.

From 1863 to 1880, Intercolonial Conferences were resorted to in an attempt to set up a Federal system, however although it was generally agreed that this was desirable, agreement between Colonies was never reached.
In 1883 the presence of the French and the Germans in the Pacific and the inability of the separate Colonies to form a united front against them stimulated urgent thoughts of the need for a Federal government.

A Commonwealth Bill of 1891 seeking to unite the Colonies failed because neither the Parliaments or the people would accept its proposals-

At a 1893 Conference at Corowa, Dr. John Quick made a proposal that at last cleared the way for agreement between the several Colonies. He proposed that the people be allowed to chose those who would draft the constitution and that a referendum then be held in each Colony regarding the acceptance of this people's constitutions.

The ten people selected representatives from each Colony did a magnificent job of drafting the Constitution which was subsequently passed in 1899 by all Colonies and with a few minor changes remains as our present Federal constitution.

It should be noted that where all previous attempts to reach agreement with government appointed constitutional committees failed, as soon as democratically elected people's representatives were given the task success was achieved.

Sadly this historic lesson has not been heeded by recent governments and they have persisted in utilising government appointed constitutional committees. The very fact that those selected are government appointed means people are automatically inclined to think the government is up to something and should not be trusted.

Dr. John Quick had the right formula for success and if we are to have a revision of our constitution we must insist on the same method being applied this time. The people, not government appointees must be the ones to frame the new constitution.
Mr Rick Gray  
The Executive Officer  
Sessional Committee on Constitutional Development  
GPO Box 3721  
DARWIN NT 0801  
AUSTRALIA

Dear Mr. Gray,

An Australian Republic?  
Implications for the Northern Territory

We have received an invitation to express views on this matter, and the implications in our submission Chapters 2 and 3 of the enclosed booklet "The Government We Choose" apply equally to Northern Territory as to the rest of Australia.

Yours sincerely  
(Mrs) June Smith  
Secretary

Encl.
EXTRACT FROM "THE GOVERNMENT WE CHOOSE"

Attachment to Submission No. 113

Chapter 2

THE STEALTHY REPUBLICANS

We hear a lot about becoming a republic by painless deletion of Monarchal symbols, but what happens then?

Perhaps we should look more closely; it is so easy to say 'leap into the dark' but where do we land?

In a small book Drawing of a Republic by Brian Buckley (a book sponsored by The Republican Association) I find the stamped signature of Peter Consandine and the stamp of the Republican Party. My copy of this book was part of the republican party campaign in the election of '84. At time of writing this book is still being sold and represents approved Republicanism.

As we might expect there is nothing unusual in the ideas expressed in Dawning of a Republic, at least not so far as "party system" "world government" is concerned. Quote:

"It seems to appear as though our founding fathers had the spirit to make this a unified, independent country, but the forces of evil represented by the old power structure (the white Anglo-Saxon Protestant - WASP - influence) made sure that any change would be slight." [It goes on] ... "Only the most ignorant, absent-minded, could-not-care-less, irresponsible Australian will persist with the myth of the Monarchy" ... [Intemperate arrogant language is common but we notice that they admit that the ideals of our Constitution were good; quote continues.] "These detractors are unfit to be called Australian citizens"... [And note this:] ... "The realists and patriots amongst us are well and truly aware of the trend toward a republic. Every day, in some small way, various changes to the system are made." End quote.

So we see the contemptuous attitude these people have for the great majority of Australians; also (as they openly admit) the sly and secretive methods of gradualism used to manipulate public opinion and frustrate all democratic processes.

A large part of that small book is taken up by a proposed new constitution one sentence of which reads as follows, quote:

"Australia's national principle is that of an indivisible secular, democratic republic with government of the people by the people, for the people" End Quote.

Fine words; if only we had not already noted that their idea of democracy was to make secretive gradual changes and use abusive harassment as the preferred means of achieving their ends.

So how, actually, would we be ruled? Who will create and administer the new republican laws? More importantly: who will see that the fine words of a new constitution are kept to when we know
that the party system now ruling (and begging our approval for change) does not abide by the constitution we have? The form of the constitution is only important if the people understand it and insist that it is kept to.

How can we believe that they really mean to achieve democracy of the people by the people when they bring their system in by stealth, mental harassment and subversion? How can we believe that it is to our benefit WHEN THEY DO NOT DARE expose their program openly and honestly for our approval? How can we believe that they are dedicated to democracy when they deceive us about the democracy THAT IS CONSTITUTIONALLY OURS RIGHT NOW?

Anyone concerned for human freedom and the future of our country can easily find that some of the small secretive changes (as they admit to) are not, by any means, small (in fact some, such as the treacherous "Australia Act", if they were to be democratic and constitutional, would need public explanation followed by public approval through referendum).

So what will be the effect of referendum approval to the proposed 'small change' of changing the name of the head of state from monarchy to president — from Queen to a party elected or appointed, 'Head of State'?

First we lose the force of the Coronation Oath whereby our Monarch swears a legally binding oath to govern in accord with the laws and will of the people. The very oath that makes it possible for Australia (if we care to take up our Constitutional option) to be governed by the people, for the people.

Yes, that's right, our first loss would be our constitutional right to democratically govern ourselves! We would lose all of our common law system that has been established over centuries by the people for the people and which can only be rightly changed by referendum of the people.

Friends, realize this, there is no right to democracy written into our Constitution OTHER THAN through our attachment to our Monarchy. It is the Statute law of England that gives us our common law democratic protections.

The parties have already brought in law to divorce us from the Monarchy but to proceed in safety they need our legal consent. If we give that without insisting our common law protections are set into our Constitution, and with ADEQUATE provisions for enforcement, we become an instant dictatorship and colony of a world government!

Will they give us our full common law protections?

IF TREACHERY WAS NOT THE PLAN then why would they not tell us the true story clearly and in headlines all over the country? Why are critical points kept secret? If they planned to retain our common law protections then why would they conspire to have us sign them away?

What they are actually talking about is a referendum - deletion of the powers of monarchy will mean deletion of all public power over the law-making of our nation.

Confirmation of this is spelled out in Item 4 of the constitution proposed in Dawning of a Republic. In this republican ideal it is written; quote:

"All previous Colonial Validity Acts and the Statute of Westminster Adoption Act and any such acts which gave Constitutional or legal authority to the States and the Federal
Government shall be repealed and all new authority shall be deemed to derive immediately and directly from the Australian Republic Constitution Act. Upon the Proclamation of this act the revised State Constitution Acts will also come into force." E.A.

The writer must have been insecure (or constitutionally immature) because there was really no need to spell it out. Neither party, nor the mass media made that mistake today. Those seeking totalitarian power want it without challenge; they don't give warning.

Ignore the lies! All of our present common law protections are attached to our Monarchy.

It may come as a surprise to some to find that the dictionary meaning of "democracy" is, to all practical purposes, identical to the meaning of "republic". Both represent government of the people by the people. It is also self-evident that both are made impotent and are destroyed when the people's right to choose its representatives is taken over by party system government.

So you see there are serious problems of credibility attached to the plan to create a new republic in Australia. Their claim, that old world forces (those that gave us the right to true democracy) also sabotaged that democracy and prevented us reaping the benefits of a unified independent country, is clear trickery. If it was true, then why the push for a republic? Why not expose the corruption and show us how to use the democracy we already have? Why not just expose the sabotage and inform people of the spirit and letter of our present democratic constitution — the best the world has known!

Yes, that's right! We already have what they pretend they will give us.

Why are they afraid to expose existing law? Is the reason that if they do they will also expose existing treachery?

If you have been trying to believe what they tell you these evasions are a bit of a problem, aren't they?

Quite interesting really! Especially as examination shows the new proposals fail to give us any mechanisms that would protect us from conniving party government. Nothing at all to match the protections we already have if we knew how to use what our present constitution offers.

Who is holding the blindfold over the eyes of the people? Well, the republicans admit being involved. So do they work undercover for that hidden hand of the British Imperialism which they claim is undermining our rights, or is this a separate political grab for power?

Oh! And what about this? They keep saying that we must free ourselves from foreign ties, but we have been a free country since Federation. The Coronation Oath, with our Australian Constitution, gave us our freedom; our ties only offered PROTECTION for that freedom. But the party system HAS signed hundreds of foreign agreements without asking public approval — doubtfully legal and certainly not democratic — these bind us in service to foreign, secretive and well disguised plans.

Be in no doubt — it is the law that they want to escape, not foreign domination.
Chapter 3

OF REPUBLICANS, MONARCHISTS AND DEMOCRACY

An interesting article by Harry Evans (Clerk of the Senate) printed in The Australian (17/5/93) points out that the Australian Constitution is a mixture of monarchy and republic. The strange thing, as he says, is that those advocating a new republic are actually arguing for monarchal powers whereas those in favour of retaining the monarchy are arguing for the republican/democratic aspects of our constitution.

To clarify this it may be said that our Monarch no longer has the dictatorial powers of a true monarchy and those defending our Monarchy are in fact defending a democratic republic with the twist, for the sake of benefits gained from a long heritage, of, what amounts to, a monarchal president.

The position of republicanism is just as confusing. Republics may range from obvious and oppressive one-party dictatorships (such as the recent USSR) to the more sophisticated multi-party parliaments (such as the USA). A true republic is also a democracy but the protections needed to keep it democratic have not yet been demonstrated.

As pointed out earlier, a political system called "the party system" has infiltrated and taken over both monarchy and republic. The party system is having some difficulty in completing the takeover in Australia because of our monarchal traditions and the monarchy v republic debate has been set up as a "red herring" to help overcome this resistance.

So our problem is not to choose between monarchy and republic but to retain, while we still can, our slipping hold on democracy. The importance of this is not just one of life or death for the party system but may well become one of life or death for a majority of world population.

Speaking of "Autocracy" (in principle applying equally to dictatorship systems such as "fascism" or "communism" Franz E Winkler, M.C. points out in Man the bridge between Two Worlds. Quote:

"Autocracy is interchangeable with party dictatorship. Whenever this change occurs there is an excellent reason for it, but not one from which the free world can draw comfort or hope. It simply indicates a new phase on the path towards the old goal. This goal requires three successive stages of leadership.

"First comes the fanatical utopian whose power of conviction inspires the masses to violent action; the revolutionary who destroys the old forms of government and establishes the foundations of a new society. He is replaced by the cold, calculating dictator, usually power drunk and sadistic, who must be ruthless enough to control the aroused masses and eliminate all political foes of the regime. The third stage can follow only when a considerable number of the population are thoroughly indoctrinated and know nothing of the pre-revolutionary ways of life."
"This stage relies on a party machine or 'collective leadership', which can be tried time and again; if and when public unrest reappears, it can be abandoned for a temporary return to the second stage, the individual autocracy. In our opinion collective leadership is more appropriate to the ideology of bolshevism than individual dictatorship and, should it succeed, would make the beginning of the dreadful form of society which Orwell described in his novel '1984'. " End quote.

Mafia-type (family) autocracy is certainly the form of the New World Order, a mixture of fascism and bolshevism being presented to the world in the guise of party system democracy.

In the 'West' we have reached a stage beyond Winkler's comment. In this sophisticated development the party system became a front to delude the people that they have a democratic choice while the actual dictatorial power is held by the families who control the party system.

This is now a consistent feature of modern 'democracies' where arrogance treads a more subtle path to power through "party" sedition. What we see now is more in the Mafia kind of family tradition.

Who will give us our law as a colony of the autocratic world republic? Who else but the mafia-like money manipulators behind the United Nations with whom the parties have already signed hundreds of agreements over all significant aspects of our lives? Although these agreements are undemocratic, so long as the people are willing to accept criminal government these agreements will stand as law.

We, the people, have no powers or rights over those foreign beliefs and laws! Agreements signed by the parties and tying us to unknown people have not even needed go before our parliaments.

Will we sacrifice future generations for a cowardly and passing personal comfort?

WILL FALLING MONARCHY FORCE US TO PARTY DICTATORSHIP?

It is unlikely the British monarchy will completely disappear within the foreseeable future. Most likely its remaining powers will be dissipated to leave the monarchy as little more than a valuable tourist attraction.

Will we have to choose between a fake monarchy and a fake republic?

If we allow media propaganda to trick us into referenda approval for a fake republic, then party dictatorship under foreign law is our reward - we surrender our rights then and there! We will be told different but do not forget — THEY LIE! A decaying monarchy will bring the same result.

Is there an alternative? Can we, the people, face the truth and govern ourselves?

The obvious alternative is to learn to understand, and install, democracy. Democracy is ours to choose, all we need to is adopt selection procedures.

Once we understand our present options we can then make sure we never again become so smug and ignorant as to hand to party mercenaries (or confidence tricksters) the power of government.

Our new form of government — new because we have never taken advantage of our democratic potentials — could be called (as a mark of respect for our heritage) a "Royal Democracy".
The Royal Democracy might differ in that States' Governors be elected; we could attach, to our Constitution, the articles of the common law; Governors could swear the Royal Oath and then combine to exercise Federally the powers of Governor-General. This would solve the problems of both a way ward monarchy and a politically chosen stooge head of State. The Monarchy (which has now become little more than a figure-head) would then become symbolic, or better be attributed to the only true Monarch: God. No other change would be needed once the correct working of democracy was clear to the people.

The party system would be destroyed as a consequence of people attaining democratic maturity and we would find that in law the High Court is not the final authority on what our Constitution means! It is the Constitution that is the law and not what any politician or judge may say of it; only the people have the right to change it or clarify serious uncertainties.

If we enforce our Constitution Australia will become the world's first true democracy.

The advantages are perhaps too great to imagine and are certainly beyond listing. We are being bled in untold ways, not just by taxes and bureaucratic regulation. There is a huge industry of social distress, crime and mental sickness induced by both deliberate and planned deceit with problems compounded by the multiplying effects of false beliefs.
SUBMISSION NO. 114
K.T. BORROW

5, Lockwood Road,
Erindale 5066,
South Australia
Tel. 331 4075

2nd June 1994.

The Executive
Sessional Committee on Constitutional Development,
PO Box 3721
G.P.O.
Darwin 0801
N.T.

Dear Sir

Call for Submissions on Discussion Paper No. 7, of the "Legislative Assembly of the Northern Territory Sessional Committee on Constitutional Development", "An Australian Republic? Implications for the Northern Territory".

On 11th April, 1994, I wrote to the Australian Stock Exchange Ltd., Adelaide, as to the possible effect on North Australia of the establishment on the Australian Continent of one or more Republics & c. A copy of the letter is enclosed.

A letter, dated 10th May, 1994, was received by me from the Senior Director Financial Services as to "Territory Bonds". A copy is enclosed. It is noted that there is no reference to Republics & c.

For your information I enclose:

1. Print of a corrected text of and unpublished article by K T Borrow, "Aspects of the Historical Background to the Australian Explorations of John McDouall Stuart",


As these items prove that the above Assembly has no legal existence, and they have never been contracted, it makes me wonder what would happen if a resident of North Australia called at the Central Office of Her Majesty's Supreme Court, Royal Courts of Justice, London, and issued a Writ of Quo Warranto calling the Assembly to justify itself. I shall send a copy of this letter and enclosures to the Australian Stock Exchange, Adelaide, South Australia.

Yours faithfully

(K.T. Borrow)
Encls.

1. Australian Stock Exchange Ltd., Adelaide, as to the possible effect on North Australia of the establishment on the Australian Continent of one or more Republics & c.

2. Print of a corrected text of and unpublished article by K T Borrow, "Aspects of the Historical Background to the Australian Explorations of John McDouall Stuart",


[The Enclosures to this Submission have not been included in this Volume.]
SUBMISSION NO. 114a

K.T. BORROW

5, Lockwood Road, Erindale 5066, South Australia
Tel. 331 4075

26th June 1994.

The Executive
Sessional Committee on Constitutional Development,
PO Box 3721
G.P.O. Darwin N.T. 0801

Dear Sir

Call for Submissions on Discussion Paper No. 7, of the "Legislative Assembly of the Northern Territory Sessional Committee on Constitutional Development"

A notice as to submissions as to the "Native Title Act, 1993", has appeared in the Advertiser newspaper, Adelaide, South Australia, for 25th June, 1994, p.20.

It will be remembered that the statute 14 Geo., III, ch. 83, known as the "Quebec Act", extinguished the right of the Crown to constitute governments in Colonies. It is mentioned in Martin Wight, "The Development of the Legislative Council. 1606-1945", 1957, p.38. which states that "The Quebec Act is as important in the history of the non-self-governing empire as the Durham Report."

It follows that an Act passed at Westminster will be necessary before a legal colony can be set up in North Australia. Eight years will not be too much to arrange the Parliamentary Reports &c., in London in view of the absence of any Real Property Acts in the Northern Territory and Mount Isa.

No doubt the Commonwealth of Australia hopes to stage a sudden "Boston Tea Party" in the year 2001, after establishing a "Trojan Horse" by legislation, invalid, as to "Native Title" in North Australia.

Yours faithfully

(K.T. Borrow)
8 June 1994

The Executive Officer
Sessional Committee on Constitutional Development
GPO Box 3721
DARWIN NT 0801

Dear Sir

Thank you for your letter in relation to the implications for the Northern Territory of Australia becoming a republic.

I enclose herewith a general paper I have prepared in relation to my views of the republic question.

Although the comments therein are not specific to the Northern Territory it is my view (expressed before the minimalist approach was considered) that, whilst being a staunch monarchist, we are in fact and have been for some time very close to a republic status.

As such I would not see great implications for the Northern Territory, as the Northern Territory has been formulated under the pre-existing monarchist system that I have enunciated and the evolution of the Northern Territory I believe, would continue and should continue in the manner in which it has to date and is anticipated to in the future under the current scheme.

Yours faithfully

John Turner, M.P
National Party Member for Myall Lakes

A National Party Member of Parliament Working for You.
THE EVOLUTION OF THE ROLE OF THE CROWN
AND GOVERNOR GENERAL IN AUSTRALIA

BY JOHN TURNER, MEMBER FOR MYALL LAKES

Many in both Britain and Australia see the Crown as does Richard Tracey:

"The Monarchy has been both a figurehead and a symbol. It also provides a link to the historical and cultural ties that Australia enjoys with Britain. The Institution is above politics and accordingly is more easily able to represent all sections of the nation and can more readily be the subject through which the peoples loyalty to the nation can find expression"\(^{10}\)

Whilst the initial role of the Crown in Australia was in fact very much involved in the politics of Australia the change in the role of the Crown in Australia has been substantial to the level that the Queen's role is now seen even by herself as 'above politics'. In fact the Federal Government is now actively discussing the abandonment of the Crown altogether in Australia. In England the Crown's role has also been largely non political in recent years and has been so perhaps from the time of the civil war after which the role of the Parliament was greatly strengthened.

However, notwithstanding the strength of the British Parliament the Queen, in England, does have, as head of the Executive, substantial powers and duties. Those prerogative powers are now, with rate exceptions such as appointing the Prime Minister, performed by Government Ministers. The

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\(^{10}\) R Tracey A Case for the Constitutional Monarchy Law Institutional Journal v 62 12 Dec 1988 p 1167
Queen who acts primarily on advice of her Ministers has basically three rights in relation to dealing with the Parliament, these are:

'The right to be consulted', the right to encourage and the right to warn'. 11

In Australia there has been an evolution from the autocratic powers given to colonial Governors by the Monarch's commission. There is now an elected Government with a Governor General selected by the elected representatives who could, can and did, without authority from the Queen, dismiss a Parliament.

Although the Australian constitution sets out the role of the Crown and Governor General, those roles have, by the utilisation of convention, steadily changed without the constitution being changed to the extent that the role of the Queen, set out in the constitution, does not relate to her present day role in Australia. The first significant step to the establishment of convention over the constitution in many matters occurred with the removal of the appointment of Governor General from the prerogative of the Crown to the elected Government following the 1930 Imperial Conference. Additionally, there are many basic and accepted terms and positions which exist in Australian Government which are not spelt out in the constitution. These include the Governor General's duty to appoint a Government with the confidence of the House of Representatives, the position of Cabinet and Prime Minister and the duty of the Governor General to act on advice of Ministers.

The use of the Governor General's reserve powers, not possessed by the Queen, are really what sets the role of the Crown in Australia as separate to Britain. The reserve powers were developed from the hybrid nature of our constitution which takes part of the American system and part of the United Kingdom system. Added to this was the founding fathers belief that the black letter law of the constitution should be kept to a minimum. The reason for such a decision may have occurred because of the familiarity that the founding fathers had with responsible government or, because of a tacit leaning to the U.K. system where there is no formal written constitution.

Perhaps the most significant utilisation of reserve powers and one which indicates the Monarch's clear views of the present role of the Governor General in Australia occurred as a result of events on 11 November, 1975.

For a variety of reason, for which many tomes have been written, Sir John Kerr dismissed the Whitlam Government on 11 November 1975 and installed Malcolm Fraser as a caretaker Prime Minister. The event which set the scene for the public abrogation of the Queen's role in Australian Government and confirmed the Governor General's independent role occurred on the 12th November when the Speaker of the House of Representatives Gordon Scholes wrote to the Queen asking her to overrule the Governor General's actions in retaining Fraser as Prime Minister after he had lost a motion of no confidence in the House of Representatives. The reply from the Queen's Secretary said that questions of Australian domestic government were for the Governor General and not for the Queen. The letter said :

The Australian Constitution firmly places the prerogative powers of the Crown in the hands of the Governor General as the representative of the Queen of Australia' and


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The Queen has no part in the decisions which the Governor General must take in accordance with the constitution'¹²

Thus the argument was that in dismissing the Whitlam Government the Governor General had exercised his own powers not those of the Queen under the constitution.

Sir Zelman Cowan reinforced the independent role of the Governor General established by convention when he said:

"In general he (Governor General) acts on the advice of Ministers; there are, however, powers which may be exercised on his own initiative, as the well-known case of 11 November 1975 demonstrates, when the Governor General dismissed the Whitlam Government, and, as Professor Geoffrey Sawer points out, the constitution is framed in terms which give that power specifically to the Governor General so that in respect of the events of 11 November 1975, "the petitions to the Queen asking her to give directions to Sir John Kerr as to his exercise of the power to dismiss Ministers ... were therefore futile as well as demeaning to Australia; on that matter the Queen had no power to give any directions".¹³

Even today's Governor General Bill Hayden has acknowledged the independent role of the Governor General when he said the Queen's involvement in his work was only restricted to him periodically writing despatches to the Queen outlining his views of Australia's political and social scenes; "It's not an obligation. It's a practice - a courtesy".¹⁴

In deed the present Governor General has even expressed apparent republican sentiments with comments that: 'Australia can no longer remain jammed in the jaws of old imperialist vice and ignore Asia'.¹⁵

Acts such as the Statue of Westminster and the Australian Act 1985 have seen a further distancing of Australia from the Crown to the extent Australia is now an independent dominion with the Crown acting solely on the advice of Australian Ministers where Australian issues are concerned. The only powers left to the Queen pursuant to the Australian Act, is that of the appointment or dismissal of Governor Generals which is done on the advice of the Prime Minister of the day.

It is apparent that the role of the Crown in Australia in the political sense, is now practically non existent. The Governor General has taken on a role of his own. The ancillary aspects of dispensing with knighthoods, privy councillors and many other British traditions are established.

With the Governor General thus possessing powers exclusive to the Crown, today's role of the Crown in Britain and Australia are unique and different. Indeed it may be argued that Australia has a Monarchical republic whilst Britain has an institutionalised Monarchy. Whilst the utilisation of the words Monarchical republic are a contradiction in terms, the Collins Dictionary notes:

4 Sir Zelman Cowan, The Monarch and her Principal Representative in Australia, Parliamentarian V 64 Jan 1983 p 1
Republic: 1; a form of Government in which the people or their elected representative possess supreme power. 2 A country in which the head of state is an elected or nominated president.\textsuperscript{16}

If the word 'president' is removed from that definition and replaced with the words 'Governor General', then that definition could well be the description of the present method of Government in Australia developed by convention rather than reliance on the constitution. The Governor General is nominated for his/her position by the Government of the day, a Government of 'elected representatives'.

The fact that the Governor General has reserve powers not possessed by the Queen in relation to Australia further heightens the argument that the nominated Governor General is acting largely as a 'president' might act. As an example of the presidential role, the comments of Sir Paul Hasluck that a Governor General acts on behalf of the Queen via the constitution but not at her behest, might be relevant:

'A number of powers and functions are given to the Governor-General by the ..... Australian Constitution...... . While he acts in the name of the Queen, the powers and functions are exercised by him as part of the duties of the Governor-General of Australia. The point can be illustrated by recounting that he reports to the Queen that he has appointed such and such a person as Prime Minister... or that he has dissolved Parliament, but the Queen is not directly involved in the decision to do these acts. I can think of no occasion in which the Sovereign has intervened in the past or is likely to intervene in the future in the making of such decisions'.\textsuperscript{17}

Colin Howard argues that the system derived from the constitution is not in fact a Monarchy but a Governor-Generalship with prerogative powers now deriving from the constitution rather than from being the Queen's representative. The result is, suggests Howard, that:

'To the extent that the Governor General's powers are written down in the Constitution separately from the reference to his basic status as the Queen's representative, those powers can take on an existence of their own which remains unaffected by developments in the position of the Monarch herself'.\textsuperscript{18}

Australia is now about to yet again go through an examination of the role of the Crown in Australia. A window of opportunity for the republicans both in Australia and Britain came with the failed marriages and intrusions into the Royals' lives, which would se righteous indignation from the press or those people who have gorged themselves on the lurid Royal stories, if their own rights were violated to the extent of the Royals. Republicans such as the one with the oxy moronic name of Sir Richard Kirby, and the Prime Minister, who saw a chance to divert the attention of the public from Australia's economic disaster at the last Federal election by raising the republican issue, have come rushing forth.

\textsuperscript{7} The Collins Australian Dictionary of the English Language, William Collins & Sons Co. Ltd Sydney 1989.
\textsuperscript{9} C Howard ibid p 71
The proponents of the republic debate are basically in two bodies; those who are anti-monarchists for a plethora of reasons which nothing less than a republic will satisfy and those who believe the make up of Australia has changed to the extent that our population do not owe an allegiance to the Queen; ie the multicultural argument.

The supporters of the multiculturalism argument fail to acknowledge that the Queen herself, as Head of the Commonwealth, heads an international organisation with more than 40 member nations which is one of the most significant multicultural and multiracial organisations in the world.

The Prime Minister argues that our new identity is to be found in Asia and that there is no need to retain the Monarchy. However in Asia there are 5 countries operating under a Monarchical system including such trading partners as Japan (which in recent days saw euphoric reactions to the Crown Prince's marriage), Malaysia and Thailand. Canada a country with only 45% of the population of British origin and 29% French together with 23% of other European stock, made a conscious and deliberate decision under the Canada Act 1982 to preserve the Monarchy in a multicultural country. Commenting on the Canada Act J D & I Derbyshire said:

'The Canada Act therefore represented the formal ending of these powers (the five Acts of the British Parliament which the Constitution of Canada was formerly based upon) and the guarantee of Canada's complete independence. Canada has, nevertheless, voluntarily retained the British Monarch as a symbolic head of state and maintained its membership of the Commonwealth'.

Canada has also retained the title of Governor General and Queen of Canada.

The role of the Crown in Australia has changed but many Australians whether of a multicultural background or of English descent feel comfortable with the Monarchy, with a constitution Monarchy.

On 30 August 1988 (a year that saw many popular Royals in Australia) a Morgan Gallup Poll asked:

"To you how important is that we remain a Monarchy or become a republic?".

The total for a Monarchy was 65% and of the 29% who favoured a republic, only 20% believed it was very important or fairly important.

On 1 April 1993 (in a year of considerable debate on the flagging fortunes of the Royals and of a heightened republic debate), a poll was taken by NBN Channel 3. The question asked:

'Should Australia become a republic?'.

Of the 12,000 responses 64% said NO and 36% said YES.
As a prelude to a possible republic the Federal Government recently created a Republic Advisory Committee (perhaps a presumption in itself). Of the Terms of Reference the most significant appears to be Term 4:

"4: How the powers of a new Head of State and their exercise can be made subject to the same conventions and principals which apply to the powers of the Governor General." 23

There is no other reference in the Terms of Reference to powers proposed. It seems therefore that the Federal Government is using as a possible base for a republic the Governor Generalship principle of Colin Howard. But with lateral thinking Term of Reference No. 4 is an acknowledgment by the Federal Government that the Governor General does have conventions and principals that are separate and apart from the Crown's role in Australia and worthy of preservations. Thus why the need for change? Perhaps a question that should have been posed to the Republic Advisory Committee was 'To facilitate a republic does the Australian constitution need to be changed? If so why?'

The Monarchy is the oldest institution in Government. It is highly likely with the marked reluctance of the Australian population to change our constitution, with only 8 referendums out of 42 being successful since Federation, that there will not be a change in our constitution to a republic. With the vast distancing from the Crown that has occurred in Australia by convention and under the constitution there may well not need to be a change but an acceptance of the distinct role of the nominated Governor General by an elected Government and the symbolic role of the Crown within the Australian political and social framework.
Mr R Gray  
The Executive Officer  
Sessional Committee of Constitutional Development  
DARWIN  

Dear Mr Gray  

It was most reassuring to see that Mr Perron was re elected.  

I support the Northern Territory being acknowledged as a state and I have written and suggested the Samuel Griffith Society promote this in their discussions about an Australian Republic. If the Constitution is going to be changed it certainly seems an appropriate time to change the status of the Northern Territory to a state.  

Another important and necessary change is for Citizens Initiated Referendum to be inserted into section 128 of the Australian Constitution or an additional section added to incorporate the concept.  

Could I have a copy of the discussion paper please An Australian Republic - Implications for the Northern Territory.  

Best Wishes.  

Yours sincerely  

E Chapman.
SUBMISSION NO. 117
THE NORTHERN TERRITORY COUNCIL OF GOVERNMENT SCHOOL ORGANISATIONS

GPO Box 1065 DARWIN NT 0801
Telephone: (089) 89 5612

11 August 1994

Executive Officer
Sessional Committee on Constitutional Development
GPO Box 3721
DARWIN NT 0801

Dear Sir,

The Northern Territory Council of government School Organisations has pleasure in submitting the following response to Discussion Paper No 7 "An Australian Republic? Implications for the Northern Territory".

Thank you for the opportunity to comment on this paper.

Yours sincerely

for David Moncrieff
President
The Discussion Paper refers to the fact that the Republic Advisory Committee had identified options within the minimalist model. Although this position may not be necessarily the best option, it may be a suitable starting point for Australia's transition from a monarchical to a republican mode of Government.

The experience of India, which took this approach at the outset (in 1947), has proved that the Westminster system, with a nominal President (appointed by the Prime Minister) can survive. The events of the 1970's and early 1980's demonstrated this when India's democratic processes were put to the test and survived.

Should Australia become a Republic, it would be inappropriate for the Northern Territory to have links, indirect or direct, with the Monarch in Britain. It should therefore have a constitution consistent with an Australian Republic.

If the reason for Australia becoming a republic is to establish a separate identity for itself within the community of nations, it would be wrong and inconsistent for a State within the republic to seek links with a foreign Monarch.

The Northern Territory should follow the Commonwealth lead on the republic issue. The whole question rests with the Australian public. If the population votes for Australia to become a republic, then all states should adopt a republican form of government. Similarly, the idea of "states' rights" taking precedence over the will of the majority of the Australian adult population is dangerous and is not, and should not be supported. (We already have the perilous situation in the present Constitution which makes Constitutional change by referendum difficult to achieve simply because it requires a simple majority as well as a majority of States to support a proposition. The spectre arises of disproportionate representation.)

Under a republican form of Government, neither the Northern Territory nor the other States would need a separate Head of State.

The definition of republic is 'a form of Government in which the people or their elected representatives possess the supreme power.' There seems to be little sense in trading in one non-elected Head of State for another. The need for the change from constitutional monarchy to republic reflects a need for Australians to take control, and responsibility for, their collective future direction. This being the case, the so called 'safety mechanism' of a separate Head of State to take over in 'times of crisis' is contradictory.
The sound basis required for stable life is possible in the Northern Territory once the step is made which acknowledges the obvious - the days of a wilful Anglo-Australian imperialism (with all its obsolete 'precedents') are over.

I would like to draw your Committee's attention to a fundamental flaw in the reasoning contained in Discussion Paper No 6 - Aboriginal Rights and Issues. At Part D "Aboriginal Land" Section 2 'Land Rights' paragraph (1) the paper states:

The Territory is entitled, and should, take its place in the Australian Federation on an equal basis with the existing States.

It then goes on to argue that a future Northern Territory State should be based on the precedents established in the other States. This backward looking argument misses the point completely.

After the High Court found, in 1992, that the common law of Australia could recognise a form of native title, it is the surviving First Peoples of Australia who are entitled to have their rights protected from the inequalities built into the legislation and practices of other Australian States.

The provisions of the 1975 Racial Discrimination Act, and other international obligations to protect the rights of First Peoples to their living countries, must be observed in any Territory Constitution and future State.
FIDUCIARY DUTY OF THE CROWN TO BOTH PEOPLES

It is a prime responsibility of the Northern Territory Government, as an agent of the Commonwealth Government by virtue of the 1978 Self-Government Act, to discharge Australia's international obligations to ensure the protection of the rights of Australia's indigenous peoples. I argue that the Crown's fiduciary duty also extends to protect the reputations and well being of its non-indigenous citizens and residents.

CO-EXISTENCE OF PASTORAL LEASES AND NATIVE TITLE

What is required - if a lasting means of living together is to be found - is an arrangement which treats First Peoples as partners in the life of the country. A creative synthesis of both laws is required.

In place of either/or divisiveness, we need a 'both-and' approach.

For example, it is not a question of whether there is either native title or pastoral leasehold. They both exist in many parts of the Territory.

Constitutional acknowledgment of the co-existence of both native title and pastoral lease would not only be just, the joint management arrangements which would result could provide the means by which stability is reintroduced into life and uncertainty removed.

Similar bi-cultural thinking needs to be brought to the whole question of how life is lived - to the full - in a not-to-distant new Northern Territory.

The existing Australian States and the Commonwealth provide a model of how not to go about it. We need acknowledgments of interdependence and mature responsibility, not formula designed to enable State sanctioned exploitation.

Yours truly
Bruce Reyburn
SUBMISSION NO. 119
MIWATJ REGIONAL COUNCIL

DISCUSSION RE NT CONSTITUTIONAL REFORM

Need to be strong and firm and united and need to ask questions which concern us.

1. Yes, there should be elections, like the ATSIC elections. Must be an Aboriginal voice. Possibly a representative from each region.

2. People should have an unblemished police record and be well respected members of their community.

3. There should be laws regarding Aboriginal Customary law in the Constitution and judges should know about these laws. Must be aware of Black Deaths in Custody. Family law courts - cultural law has to be taken into consideration. Should be Aboriginal magistrates.

4. Confusion about local government and community government. Uncertain about the difference. How does local government and community government fit into the current Constitution?

5. Yes, human rights should be protected and be included in the Constitution.

6. Why has the Chief Minister always attacked the NLC? No, the NT should keep the Land Rights Act of 1976. Want the Land Rights act and the Native Title Act to remain and not be changed under the new Constitution.

7. Yes, rights and privileges of Aboriginal people should be recognised in the new Constitution.

8. Yes. Customary Law should be legally recognised. The rights should be returned to the people to elders to administer their own law. Doesn't have to be the same as the old days, all the elders should get together to discuss how customary laws could be included into the new Constitution. Another opinion is that Aboriginal people have changed a lot just to please balanda laws and courts. Feel it is about time that balanda law started to change to suit yolngu law.

Enforcement - who is going to be responsible to see that the customary law is enforced? Laws could be enforced in an underground customary way which is the ceremonial way of punishing a person in a method which is not necessarily open and obvious. Unspoken things which satisfy the elders but might not be apparent to balanda. Courts have to be able to trust the elders. Aboriginal law should be taught to all law students, they should be assigned to communities where they can be exposed to Aboriginal law. Young men are still being taught discipline by ceremonies. Believe that Aboriginal people should practise their law. Should be recognised. Balanda law is now more powerful than Yolngu law. Believe the yolngu are different to people in other states. Should include the intricate parts of the law. In white man's law, people cannot take the law into own hands. Reconciliation - thinking about adding customary law to the 8 key issues.

Consider: Name change for new State; Change of flag.

*Miwatj Regional Council - Tuesday 16 August.*
NT CONSTITUTIONAL REFORM

ISSUES FOR POSSIBLE DISCUSSION WITH THE COMMITTEE ON CONSTITUTIONAL DEVELOPMENT AT MIWATJ REGIONAL COUNCIL

MEETING WEDNESDAY 17 AUGUST

QUESTIONS TO PROMPT DISCUSSION WITH COMMUNITY MEMBERS

PRIOR TO THE MEETING

1. Should there be special seats for Aboriginal people in the new Parliament and if so how should they be chosen?

2. What should be the rules (qualifications) for people who want to be elected to the new Parliament?

3. Do you think the new Constitution should say something about the Courts and the work of the Judges?

4. In what way do you think local government and community government could be made a part of the new Constitution?

5. Should the new Constitution of the new State say something about protecting the human rights of all people in the Northern Territory?

6. Do you think the new State for the NT should be treated the same as the other States, when dealing with land rights? (Land Rights or Native Title)

7. Do you think that the new Constitution should say something about recognising the rights and privileges of Aboriginal people in the new State?

8. Should Aboriginal Customary Law be legally recognised in the NT? If so, how should it be applied and enforced?

Other Issues which could be considered:

- Reconciliation and Self-determination
- Protection of Sacred Sites and Objects
- Provision in new Constitution as to Aboriginal languages in use in the NT
- Constitutional recognition of the pre-existing circumstances of Aboriginal citizens, including as to their social and cultural customs and practices and guarantee of Aboriginal religious freedom.
Ms Yoga Harichandran
Administrative Assistant
Legislative Assembly of the Northern Territory
Committee on Constitutional Development
G P O Box 3721
DARWIN NT 0801

Dear Ms Harichandran

I refer to your letter of 30 June 1994, your ref. 18/3/6, and wish to submit a number of papers which could be used in your discussion "An Australian Republic? Implications for the Northern Territory".

Yours sincerely

B C RUXTON
State President

encls:

"The Price of Liberty is Eternal vigilance'
PAPER I

PREPARED BY

THE HONOURABLE JOHN HOWARD MP
I am opposed to Australia becoming a republic.

The present system has worked extraordinarily well. It has helped provide Australia with great political and social stability.

It is often forgotten just how few nations in the world have been continuously democratic for the whole of the 20th century. Four of that small number of nations, the United Kingdom, Canada and New Zealand, have the same constitutional monarchy.

It seems to me that Australia at present has the best of both worlds. It is a completely independent country and our head of state is a respected figure well above party politics.

If Australia becomes a republic yet retains its present system of parliamentary government which even staunch advocates of a republic believe should happen, then some device must be found to choose the nominal head of state.

Any such device is bound to involve political partisanship. If the head of state is chosen by the parliament then the views of the Government party will prevail.

If he or she is chosen by some college of respected citizens then inevitably the question will be asked who appoints the college? That in turn can only be elected governments and, of course, means the party with the most seats in the parliament.

Some describe our current situation as Australia being a crowned republic. It is a very good description. Those in the community who do not care for the royal link are not greatly troubled by it. It is not a constant feature of our lives as Australians.

On the other hand, there are millions of Australians of diverse ethnic backgrounds who have genuine affection for the Monarchy and regard the historical continuity which accompanies it as adding something to our nationhood rather than subtracting from it.

One absurd argument thrown up in favour of a republic is that countries in the Asian Pacific area with whom we must develop even closer economic links find it odd that Australia's head of state should live in England.
The reality is that when deciding whether or not to buy our wheat, our coal or our medical services, Asian consumers are far more interested in price, after sale service and delivery times than they are in the domicile of our head of state. I am sure the subject does not even enter their heads!

In any event, I would hate to see Australia change her system of government to match the systems of government which prevail in many other countries - including in Asia with whom we trade. As you would know, a great number of them are undemocratic - even autocratic.

Overall I do not believe the republicans have made a good case although I respect the genuine feelings many of them hold on the subject and the common concern we all share for the future of our country.

Given our many other difficulties at present, I see this as an unnecessarily divisive subject within our community.

15 July 1991
Discussion of the proposal that Australia should become a republic 7.30 report
Thurs: 27 June 1991: (2p)

Reporter: Edward GRIEVE
Speaker: John HOWARD, MP- Shadow Minister for Industrial Relations, Employment and Training
Prof George WINTERTON: Law School, University of NSW
Major subject: Republicanism/PAR/PTY
Minor subject: ALP
Westminster System
Federal Issue
Print item: 01-2170 (MICAH)
Transcript: 82-6346 (ON LINE)
Audiotape: 82-6337 [C91/0844B-1-3] (MICAH)
Videotape: 82-6338 [V91/0433-2-3] (MICAH)

This transcript is taken from a tape recording, and freedom from errors, omissions or misunderstandings cannot be guaranteed.

EDWARD GRIEVE: Now the republic of Australia do we need it? do we want it? In Hobart this week, the ALP decided that we certainly need it, and that the Government should start a 10-year campaign to pursue us that we want it. If the Labor Party gets its way, we'll be declared a republic on 1 January 2001. With us tonight are two people with differing views on the concept. John Howard is the former Leader of the Liberal Party and now the Shadow Minister for Industrial Relations. And Associate Professor George Winterton is a constitutional lawyer and author of the book: Monarchy to Republic - Australian Republican Government. First to you, Mr Howard: What do you think of the ALP proposal?

JOHN HOWARD: Well, I'm not in favour of it. I would not presently favour changing Australia to a republic. My basic position is that we need in this country a ceremonial head of State. I believe in the Westminster system of government where you have a division between the head of State and the head of Government. The present system has served us well. We are for all practical purposes an Independent country. Some people say we are at present a crowned republic, and in some senses we have the best of both worlds. Those people who don't particularly care for the royal link, don't find their daily lives invaded with it. On the other hand, there are millions of Australians who hold the association very dear, and whilst others will disagree with them, what the Labor Party is now embarking upon is a 10-year period of division and the development of enmity and bitterness in the community over an issue which, if it were left alone, would in the fullness of time solve itself in a non-divisive manner.

EDWARD GRIEVE: George Winterton, what do you have to say on this?

GEORGE WINTERTON: Well, picking up Mr Howard's point about the Westminster system of government, that needn't of course change under a republic and most republics of Western Europe do adopt the parliamentary form of executive which, I presume, we would retain. In so far as the ALP is suggesting a public education program, that, of course, is desirable that people should be
informed what the options are and think about the issues; but of course, it will need a constitutional amendment to become a republic and unless all the major parties are agreed, which appears not to be the case, it's not really on the cards.

EDWARD GRIEVE: Do you think that this is really an issue of great importance to the average Australian?

GEORGE WINTERTON: No, I don't think it is, but on the other hand it has some importance of a psychological and symbolic nature. After all, the headship of State is a psychological and symbolic matter, and it’s a matter that Australian should be thinking about. And if it’s true, as Mr Howard suggested, that ultimately we will become a republic, the point is we won’t ultimately ever become a republic unless we adopt a constitutional amendment to achieve that. So at some point we do have to actually, in a sense, bite the bullet and have an amendment.

JOHN HOWARD: Let’s not kid ourselves. When the Labor Party talks about public education campaign, they have in mind spending the taxpayers' money advocating the republican cause. They won't be spending any taxpayers' money advocating the status quo. They won't be giving equal time to the present situation, and I really do violently object, and I’m sure many people in my party and elsewhere will object to the concept that you use taxpayers' money to advocate partisan political causes. My basic view is that the present system, when you cast around the world, it is about as good as you can find, and to that extent my conservative instincts are to ask why change something that has served this country remarkably well and has given us one of the longest, continuous democracies in the World. Most of the continuous democracies in the world are constitutional monarchies, with the exception of the United States. So, we shouldn't be too... indulge too much in self-flagellation about the system that we've had for so long.

EDWARD GRIEVE: So, George Winterton, why should we change?

GEORGE WINTERTON: I'm not saying it's an urgent matter, but the points Mr Howard mentions are, of course, correct, and the system has served us well. But the point, I think, is that if we adopted a parliamentary republic all the essentials of the present system that he's referring to, would remain unchanged. But it may well be that the Labor Party has gone about it in the wrong way, and fact that Mr Howard, a moderate Liberal, is taking this view, suggests to me that bipartisanship is out of the question and therefore a constitutional amendment won't succeed. It would have been better, I think, if the Government had approached the other parties and put forward a public education campaign in a sense, not partisan propaganda exercise, which is perhaps the way it's being made to look because it’s been decided at a party political conference and the Opposition is opposed to it. So, they haven't really gone about it in the right way.

EDWARD GRIEVE: Mr Howard, the basic rationale for the Schacht-Dawkins ALP conference motion was, as they explained it, that while Britain’s future lies in the EC, Australia's destiny and identity are tied to the Asia-Pacific region. What do you say to that?

JOHN HOWARD: Well, I think that's only partly true. The kind of world we’re living in now is, to use that old cliche, it's more shrunk than ever before. Sure, we have a trading destiny in South-East Asia, but we can never, ever deny the fact that we have essentially European roots, and the idea that this Country would ever regard itself as having no association of significance with Europe, which is the fountainhead of our culture, our language, the practise of our religion, and the philosophical
underpinnings of our society. I say that with, you know the greatest of respect to the association we must have with our part of the world. That Dawkins-Schacht rationale is that is the sort of simplistic, faddish description of Australia's destiny which ignores the fact that the world is changing very rapidly. I mean, we don't have a Cold War anymore, and we are in a sense far more of global show now strategically and philosophically than we've been at any time since the end of World War II. So, I wouldn't be too quick to compartmentalise the world in 1991.

EDWARD GRIEVE: George Winterton, the last word.

GEORGE WINTERTON: Well, I think the fact that Britain has joined the European Community is really a red herring. The fact of the matter is that our head of State lives thousands of miles away in another country, and republicans, I think, believe that we need a indigenous head of state living here. Whether Britain joined the European Community or not is really beside the point. The links Mr Howard mentions with Europe, of course, are going to be there. We will remain, presumably, a member of the Commonwealth. The Queen will remain as head of the Commonwealth, I don't think this would in any way cut those links, and I agree with him on those. They're cultural, they're language. They're there in terms of arts and education. I don't think this would change though.

EDWARD GRIEVE: George Winterton, John Howard, thank you very much.
PAPER II

PREPARED BY

BRUCE RUXTON OBE
1. It was the people of Australia, along with our Founding Fathers of Federation, who so unitedly called for the inclusion of the Crown, the Monarchy, in our proposed new federal parliamentary system, just as they already had this in their State Parliaments.

2. It was we Australians who wrote our own Constitution and secured Britain's complete agreement to that, a clear evidence of our national freedom and independence. The fact that our Constitution was then contained in an Imperial Act of the British Parliament in 1900 was simply because this was the only proper legal way in which constitutional power and authority could be passed to Australia and its free and independent existence recognised, and thereby showing at the same time that Britain was divesting itself of such power and authority henceforth.

3. There is no bowing and scraping to our Monarch - she (or he) is not an absolute ruler - Magna Carta, but more especially the real Bill of Rights of 1688 - 9, saw to that. The actual position is that no heir to the British Crown can ascend the Throne unless first taking an oath - not to government political parties, even Parliament or anyone else - but under God that he or she will faithfully devote their life, whether it be long or short, to the SERVICE of their people. That plainly means whatever people have drawn their institutions and basic traditions from England, as the Common Law, and through their institutions and basic traditions from England, as the Common Law, and through their own constitutional and democratic parliaments and Constitutions have of their own accord secured the Queen (or King) as their Head of State. But the Queen (or King) acts solely as a Legal Protector or Constitutional Servant as it were to the whole of the people.

4. Obviously the argument for a republic is the perfect way of attacking our existing Federal (constitution, for it falls apart if you try to take the Crown away from it. What is there then to save our entire common law with all its splendid and freely inherited rights and liberties? Because, after all, it is the Crown which is the direct link to all of these things.

5. Furthermore the Monarchy is stable and perpetual, there is no dispute as to the correct line of succession. On the contrary, a republic with its Presidents drawn by various means are always at the mercy of sordid political campaigns and disruptions of all kinds. The rules can easily be changed by political governments when wielding power in a republic, but a constitutional monarchy such as ours can only act under the authoritative call of the people.

6. There is further dishonesty in the sham call that a republic would give us a separate identity (one we clearly have which they are blind to), because none of those making that call are admitting that there is a powerful move to drag Australia into a so-called Pacific Rim Bloc - a Bloc in which we will surely loose our identity almost completely because our own Parliament government and entire way of life will be subservient to the powerful, centralised government for the whole Asian Bloc (as it would really be rather than 'Pacific').

7. Under the Constitutional Monarchy the institution of the Crown is paramount. It is not hero-worship of some man or woman in England.
The Constitutional Monarchy gives the ordinary citizen an added freedom in that it could act as a safety valve on behalf of the people.

As long as we retain the Crown, the Common Law and the Constitution of the Commonwealth of Australia above our parliamentarians that is our extra freedom. If they ever become under the parliament you have lost the freedom.

For example if a Government or Governor General dismissed a parliament, he does not run away to Buckingham Palace with it, he must give it back to the people of Australia to decide whether, his actions are right or wrong.

In 1975, this actually took place when Sir John Kerr dismissed the Federal Parliament under the powers of the Crown. This meant that a general election had to be called and it was at that general election that the opposition party won a 55 seat majority. The largest majority in the history of our parliament since federation.

In other words the people of Australia confirm the action that was taken that is the reason why the Constitutional Monarchy should remain.

8. Seven out of the eight longest serving democracies of the world are Constitutional Monarchies, the eight is the United States of America which was born out of the same mother the United Kingdom as Australia, New Zealand and Canada, the other three are the Scandinavian Kingdoms of Denmark, Sweden and Norway.
Extract from NEWS WEEKLY, MAY 22, 1993

A Republic — popular choice or rule by elite?

“How would a confidence man or pickpocket survive if he did not drop little boxes of clinking bags into the crowd to hook his victims? Dumb animals are snared with food and men can’t be caught unless they are nibbling at something.”

We would do well to heed Petronius’s warning contained in his Satyricon.

In nibbling at Mr Keating’s particular ‘republican’ bait we are being hooked onto an undemocratic way of life.

Do we want to become a republic or remain a constitutional monarchy?” It all sounds so simple and easy. It seems to be assumed that what Mr Keating means by ‘republic’ is ‘democracy’. However, this is a totally unwarranted and unfounded assumption, one which Mr Keating himself has never made.

In fact his words and actions (i.e. strategies and tactics) indicate that is the last thing he is proposing. Rather, he is offering us a pig in a poke.

He is saying to us: if you want to abolish the monarchy from the ‘Commonwealth Constitution, trust me and my mates to attend to the fine

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details of how you are to be governed by us.

UNDEMOCRATIC MOTIVE

That Mr Keating is not motivated by the spirit of democracy is manifest by the fact that he is refusing to do two most important democratic things.

Firstly, he has refused to countenance that the matter be resolved by a democratically elected People’s Constitutional Convention. Secondly, in advocating that the head of state of his republic be chosen by either the Executive or the Parliament, or a combination of both, he is depriving all citizens of the equal right and equal opportunity to stand for the highest office in the land.

This undemocratic nature of Mr Keating’s agenda is both symbolised and reinforced by his referral of the whole matter to a committee of so called ‘eminent persons’. There could be no better illustration of commitment to an elitist and hierarchical philosophy and way of life that such a proposal, the inverse side of which explicitly means that ordinary folk are not ‘eminent’.

It also explicitly means that the Executive arbitrarily decides — without reference even to Parliament, allegedly the representative institution of the people — who shall decide the agenda for constitutional debate and thus from the outset occupy the commanding heights, albeit in a formidably undemocratic manner.

What the chosen few decide will then be put to a referendum of the people following a massive propaganda campaign conducted by the government, its agencies and agents in unison with those powerful sections of the media which, as recent events have shown, fear arbitrary and punitive government changes to the existing (‘pork-barrel’) licensing, investment and share-holding arrangements.

THE PEOPLE ARE NOT EMINENT

Understanding language and its usage is vital to understanding the nature and directions of political commitments. Thereby, in arbitrarily excluding the whole people from the category ‘eminent’, Mr Keating has flagged his belief that the people are incapable of formulating for themselves — through a democratically elected People’s Constitutional Convention — the terms of reference for constitutional amendments.

This point cannot be overemphasised if we are really, as distinct from only notionally, committed to democracy.

Moreover, in conjunction with Mr Keating’s obdurate refusal to even publicly talk of the constitutional and political supremacy of the people — the quintessence of any modern liberal democracy worthy of the name — it tells us that what he
wants is a self-contained and self-accountable sovereign executive.

His first task in the achievement of this goal is to free the Executive from accountability to the Crown — the nominal sovereign which is to be displaced not by the “public thing” (the original meaning of ‘republic’) but by ‘Il Partito Nostro’; that is, the ruling party.

Why else opt for a head of state appointed by the Executive/Parliament and not one elected by all the people; and, in conjunction with this, why else the refusal to advocate the constitutional enshrinement of the sovereignty of the people along with the necessary corollary of a People’s Constitutional Convention to decide by democratic means the most important questions of exactly how and by whom sovereign authority shall be exercised in a republican Australia? Why also the almost complete lack of talk about constitutional limitations to executive power and checks and balances on its permissible use?

Thereby the real choice confronting us is not that between remaining a ‘constitutional monarchy’ or becoming a ‘republic’ but of deciding whether we want to become sovereign citizens of a democratic Polity or be subjects of either a crowned or uncrowned Executive.

The sooner we face up to that question without fear or favour and without doffing our lids to Mr Keating’s ‘eminent persons’, the better our chances of getting a fully-fledged and constitutionally entrenched democracy.

However, we shall never get it unless we reject absolutely — and loudly and clearly — Mr Keating’s classically elitist line that the will of the people is not what the living people want but what their ‘true’ interests as defined by their so-called ‘betters’ (i.e. eminent persons’) are said to be. There is no other conclusion to be made from what is being put to us from on high.
Four years later, two competing events of Australia’s Bicentennial — the long and fitful festival called to celebrate the beginning of the British colony in New South Wales — still linger in the memory. One was the re-enactment of the arrival of the First Fleet in 1788. The other was the publication of Robert Hughes’ *The Fatal Shore*.

The first was, from its inception, officially discouraged and undefended. The second was launched in Sydney as a major literary event with political leaders and leftist *pomposi* in attendance. Both were popular successes.

As the new First Fleet sailed into Sydney Harbour on a sparkling summer morning in January, the million people who packed the streets shared an intoxicating moment: here was re-enacted the advent of Europe in the last continent, Europe with its imperfections well represented but bearing its promise of modernity, reason, freedom and abundance — the promise which the crowds knew to have been well kept. It was the sort of historic moment that the Prime Minister, R.J.L. Hawke, recaptured a little later in his Anzac Day address at Gallipoli. It touched the heart. But it was not Politically Correct.

The official controllers of the celebrations considered that it ignored the dispossession of the Aborigines and risked turning the Bicentenary into a ‘white wank’. Their financial help was niggardly and reluctant throughout. In the end the enterprise was rescued by a subvention from Coca Cola and other companies.

But *The Fatal Shore*, a history of the foundation of Australia, was Politically Correct in every particular. It was anti-British, anti-colonialist, anti-racist, multi-culturalist and feminist. At the book’s launching, Robert Hughes said it should help the republican cause in Australia. It was, he said, most definitely not about God, country and family. It might also do something, he hoped, to deflate that “12 month erection”, the Bicentennial celebrations. It was a best-seller. If one critic in *The Spectator* (Richard Cobb), found it unreadably vulgar and
expressed the more popular view when she found it "grand and generous" (Jan Morris).

These two happenings of the 1980s, the simultaneous celebration and devaluing of the Australian story, reflect a radical confusion of purposes which has only deepened in the 1990s. "The party's over", Paul Keating, now Prime Minister, declared — but no one knows the way home.

There is no shortage of calls for a return to old values — and not only from almoners trying to cope with the legacies of the 1960s. Even the economists have become Dutch uncles. They readily diagnose the country's economic sickness — reckless overborrowing when the going was good, manic overborrowing when it turned bad, leading to record bankruptcy, unemployment and fraud. But when pressed for basic remedies, the economists smile and advise hardwork, a cut in pay, and more school discipline.

The malaise runs deeper than economic profligacy. Years of multi-culturalist homiletics have also taken their toll. What began as a benign programme to ensure opportunity for Asian immigrants, to excise any Anglo-Saxon sense of superiority and to demystify the British entailment, soon became an official campaign to present the old Australians as contemptible, quasi-totalitarian racists. Some even began to believe it. The new multiculturalist catechism finally parodied itself in an oath of citizenship (the old 'naturalisation') which requires so little English that the citizens swearing it cannot even understand the commination of the old Australia from which they are being saved.

But after the easy early days, when almost every publicist in the land would proclaim a new Australia is now part of Asia, the moment for some second thoughts arrived. In a recent address in Canberra on 'Europe in the Pacific', the philosopher John Passmore asked how we are to adapt to countries whose language may not even have a word for rights. He told of visiting the Borghese Galley in Rome with a cultivated Indonesian who was puzzled by a painting of the Crucifixion. Who is this man? his fried asked. What is the Resurrection? Why are there so many paintings of a woman with a child on her lap? The Indonesian was as ignorant of Mars and Venus, let alone Socrates or Plato, as an Australian would be when confronted with Indonesian puppet plays or Indian sculpture.

The wide publicity which Passmore received was not simply the homage paid to a respected teacher. (Shortly before the address, on the Queen's birthday, an Honour of the Order of Australia was conferred on him). He caught a new and more realistic mood. Even the journalists who now attack the Australian Government for servility towards Indonesia or Malaysia or Japan are beginning to understand power politics.

"I am glad I am not a decision maker", Passmore said at the end of his Canberra address. Where then are Australians to look? Certainly not to the business cities, many of whom are now sitting in prison farms. Nor to the universities which, emmeshed in their jargons, have long since ceased to play a public role.

Nor to the think-tanks. The leftist ones have fallen silent and readily enough concede that they have exhausted their ideas for the moment. The right wing ones have clearly won the argument for the free market, although they have little to say on wider questions. If Sir Les Patterson does not entirely capture the spirit of Australian socialism, Dame Edna is surely the exemplar of Australian conservatism.

The churches offer little leadership. The Anglican church (nominally about 25 per cent of the population in a country about 50 per cent ethnically English) is deeply split over the ordination of women and is already in schism. The Uniting Church, whose constituents 40 years ago held the allegiance of 21 per cent of the population, now claims less than seven per cent. In the biggest church, the Roman Catholic (nominally 26 percent of the population), a liberal bureaucracy acknowledges that it is presiding over a declining communion. The extinction of institutional Christianity has become a practical possibility — although this is a country where sociological inquiries still report a higher degree of religious belief (in God, sin, Heaven, Hell) than is found in Europe. The Australian is not drifting from the Church according to Hal
hostile to the Japanese army in the mountains of New Guinea in 1942.

The story of republicanism in Australia is a long if jerky one. Partly an offshoot of British republicanism and partly a native growth, there are three schools — the nationalists, the dandies and the vernacular republicans. The principal manifesto of the nationalists, which appeared some 60 years ago, is *The Foundations of Culture in Australia* by P.R. Stephensen, a publisher and editor. In the late 1920s he ran the Mandrake Press in Bloomsbury and published *The Paintings of D.H. Lawrence* and *The Confessions of Aleister Crowley*. Lawrence admired his "energy and fearlessness" but thought he lacked "patience" and "submission".

On his return to Australia in 1932, Stephensen threw himself into publishing and promotion of Australian writers, a role for which he is fondly remembered to this day. (He was the first publisher of Patrick White — his 1935 *Ploughman*, a collection of poems). But he also became increasingly preoccupied with the decolonisation of the mind and moved deeper into the nationalist, anti-British, anti-semitic, pro-Japanese maze.

His *Foundations* owed a good deal to Charles Maurras of Action Francaise (although he told me his principal mentor was Georges Sorel). He identified an Australian nation that was suppressed or undermined by British imperialism — as well as American materialism, Jewish and Christian universalism and cultural modernism. But above all his enemy was "the British garrison", with its control of the universities and churches and its influence over servile, anglicised Australians (*Maurras' meteques*). His polemics moved from the dotty to the sinister, as from 1936 his monthly magazine *The Publicist* began sympathetically to explain the programmes of Nazi Germany and Imperial Japan. In 1941 he formed a movement called Australia First, akin to Maurras' France Alone, to keep Australia out of the war and maintain good relations with Japan. In March 1942, soon after the Japanese forces had occupied Singapore, landed in Java, and bombed Darwin and Broome, Stephensen and his collaborators were arrested and interned for the duration.

He never recovered from this disgrace, although after the war, unchanged and as irrepressible as ever, he continued "squandering" his talents (as D.H. Lawrence had seen) until one night in May 1965, at a crowded literary dinner in Sydney, he received a standing ovation and dropped dead.

Stephensen's arguments recur in all the later debates. In the wake, for example, of the Prime Minister's republican flourish, one Marxist stepped forward to denounce "the British garrison" in Australia. Another exalte saw the Queen as a potential foreign agent, a touch Stephensen would have enjoyed. Yet another called on monarchists and all such anti-Australians (*the meteques*) to keep out of the constitutional discussions.
The nationalists are the most zealous of the republicans, but their handicap is that their contempt for ordinary, conservative Australians loses them popular support. The second school, the dandies, prefers to deride the stuffy family values they associate with the Queen and the absurdity of dowdiness of Australian Knights and Dames. Yearning for a trendy Australia, Robert Hughes is their exemplar. Ignore the public, he advised. Don't wait for a change in opinion. Take the republican plunge now. It will free up our bones, he said — a proposal unlikely to recommend itself to an electorate which would prefer to be consulted before having its bones freed up.

The dandies remain influential but the nationalists distrust them. They know that if a republic were established the dandies would be the first to ridicule the republican vulgarians. More significant — and ultimately decisive — is that body of opinion which the poet Les Murray has called the vernacular republic — the ordinary self-governing Australian, the despised family man and householder, who has no heart for the royal 'soap opera' but scorns the pretensions of the dandies and distrusts the impatience of the nationalists. He does not regard the present constitutional arrangements as sacred and finds nothing obnoxious in the general idea of a republic. But if there is to be a change in the constitution he will need a lot of convincing before he votes against a system that has served the country well for generations.

The monarchists have finally realised the importance of the vernacular republicans and of broadening their base. At a recent monarchist rally in Sydney, the platform included representatives of the Aborigines, the ethnic communities and the Labor Party. The meeting began and ended with the singing of "Advance Australia Fair", the national song which, well performed, can bring tears to Australian eyes. Written by an imperialist Scot over a century ago, it has been officially sanitised in recent years to delete references to "true British courage" or the lines; "With all her faults we love her still; Britannia rules the waves"!

The rally was a success; but its real significance lay in the fact that it was held at all. It was the first of its kind in Australian history, itself an acknowledgment of the salience of Mr Keating's intervention. A debate that was traditionally an amusing game is now in earnest.

It is unlikely to be settled in the near future — certainly not by the year 2000, a date which is talismanic among the nationalist republicans. The Australian constitution can only be changed by passing a referendum, and it is certain that any republican referendum in the foreseeable future would be defeated.

Australians almost always vote against changing their constitution, out of a deep-rooted distrust of the political parties that recommend such changes. In 1988 they even voted against a proposal to incorporate freedom of religion in the constitution; since they...
had always enjoyed freedom of religion, they suspected the worst of politicians who wanted to tinker with an established right.

It is for this reason that Mr Keating wants to change the flag to remove the Union Jack. He can do that without a referendum, despite the monarchists’ rage. The nationalists will not be satisfied. The dandies will be pleased. The vernacular republicans will accept it cautiously. But it will do absolutely nothing to settle Australia’s malaise.
MICHAEL KIRBY

A DEFENCE OF THE CONSTITUTIONAL MONARCHY

THE AUSTRALIAN Constitution is one of the six oldest constitutions continuously operating in the world. Those who feel that this is a matter for proper pride and who consider that we should stick with the Commonwealth which the Constitution establishes should not feel afraid to express their views. What a sad day it will be for us if diversity of opinion is discouraged and fear replaces reason.

I support reform of society and its laws. But reform means more than change. It means change for the better. My proposition is that it has not been shown that the establishment of a "Federal Republic of Australia" would be a change for the better. We should not forget that, for the whole modern history of Australia, we have been a monarchy. This indisputable historical fact of our sovereignty is part of what it is to be an Australian. For more than 200 years Australians have had a King or Queen. It has become, and is, part of our society's very nature.

I acknowledge that the debate about our Australian polity is a legitimate one. We may have it, unimpeded by guns or the opprobrium of official orthodoxy, precisely because of our constitutional history, conventions and instrument. I can, of course, understand some of the criticisms of our constitutional monarchy. For example, I acknowledge that in some parts of Asia the concept of Queen Elizabeth II, as Queen of Australia, may be difficult for some to grasp. Yet I have no doubt that there are niceties of the constitutions of the monarchies of Japan, Thailand and Malaysia — not to say of the republics of the region — that we do not fully understand.

No self-respecting country should abandon its history and institutions out of deference for the misunderstandings of its neighbours. No country should alter its constitutional arrangements, if they work well, simply because neighbouring countries do not appreciate its history or understand its independence. Regional comity has not, nor should it, come to this.

I can appreciate that there are difficulties, even in some Australian minds, in seeing Queen Elizabeth II as the Queen of this country. But that, undoubtedly, by law she is, I admit that there has been a failure to educate our young people concerning our Constitution. It is a failure which I deplore. It should be rectified. But change this as we may it must be accepted that, generally in the world, the Queen is seen as the Queen of the United Kingdom. Indeed, it is by that sovereignty that she becomes the Queen of this country, under our Constitution, made by us. This was something
which the Australian people themselves accepted by referenda at Federation. They did so despite arguments advanced most powerfully then in favour of a republic. Of course, when the Queen goes to Europe or to the United States, she will normally be seen as Queen of the United Kingdom. But when she is in Australia, she is undoubtedly our Head of State just as in Canada she is their Head of State, or in New Zealand theirs. At other times in Australia, her functions are carried on, on her behalf, and in her name, by an otherwise completely independent Governor-General appointed under our Constitution and, in the States, by State Governors. For a long time Governors-General and Governors in Australia have been Australians. The true measure of the independence of the office was fully seen in 1975. The Queen herself declined to intervene in our Australian constitutional crisis. It arose, and had to be solved, exclusively within Australia. That was as the Constitution required and as befits an independent country. The Queen respected this.

Yet these matters being said, I accept that there are sincere advocates of various forms of republican government. Intelligent citizens will listen carefully to their arguments. They will remember that no system of government is perfect or unchangeable. In Australia, we should certainly continue our search for the least imperfect form of government. There are various models. But we should not dismiss constitutional monarchy, as it works in our independent country, simply because it is seen as unfashionable by some or because the popular media are going through a phase of disaffection with some members of the Royal Family who, earlier, they covered with fawning attention.

Those who would change the Australian Constitution must, if they are sensitive to their fellow citizens, reflect upon the feelings of those who would keep certain fundamentals unchanged. And they must reckon with the strength of those feelings. To be indifferent to such feelings — in an intolerant pursuit of one's own conception of society — runs the risk of the worst kind of majoritarianism. Paradoxically, democracy works best when it respects the opinion of diverse groups in all parts of the population, not just the majority.

I am willing to concede that in the long run some changes to our constitutional monarchy may occur in Australia. The moves from colonies to dominion and from Commonwealth to a fully independent country continue apace. Our country, like every nation, is on a journey. If Europe is any guide, the journey will probably take us to an enhancement of regional relationships rather than to a retreat into the isolation of the nation-state. And our region, in the coming century of the Pacific, offers us the opportunities of a special relationship with our neighbours if we can harmonise our national role with our geography.

In our relationship with our sovereigns, Australians have been fortunate for most of the modern history of Australia in the high sense of service and duty which those sovereigns have displayed. I concede at once that the recent controversies about some members of the Royal Family — and particularly Prince Charles as heir to our sovereignty — have damaged in some people's minds the cause of constitutional monarchy. In the modern age, it seems, it is necessary for the monarch to be admired at all times. I think all would concede this virtue to Queen Elizabeth II. Some people — based upon taped eaves-dropping of private conversations and snooping photographers — have formed a different view about the Prince and Princess of Wales and other members of the Royal Family. I pass over how such intrusions came about; how they passed into the hands of a voracious media; how suddenly elements in the media turned upon members of the Family; and how intercontinental media interests played off each other like modern brigands. The role of the modern media in manipulating public opinion — even in constitutional fundamentals - must be a source of grave concern to all serious observers. It is virtually impossible to get published in Australia

Much of the rhetoric of republicanism smacks of nineteenth-century nationalism. This rhetoric is completely outdated and unsuitable and we should grow beyond it.
serious opinions in defence of our constitutional system. This is in itself astonishing and disturbing.

But all that is as it may be. We must see recent events in their proper context. Of the Royal Family, only the Queen has any part in Australia’s constitutional arrangements. She enjoys good health. Her mother still happily prospers. The Queen will probably be around for a very long time — well into the next century. The crises of the last year will inevitably fade in public memory. In considering republicanism, Australians will see — in increasingly stark relief — the continuity of the service of their Queen. And they will increasingly begin to ask about the arguments which suggest that this stable constitutional system should be preserved or overthrown.

In my estimation those arguments are of two kinds: arguments from Realpolitik and arguments of principle.

**ARGUMENTS FROM REALPOLITIK**

**B**EFORE WE CHANGE our Constitution, it is essential that we make very sure that the change is undoubtedly for the better. The following considerations must therefore be kept in mind.

First, there is the great practical difficulty of securing constitutional change in Australia, given the provisions of section 128 of the Constitution. In the whole history of our federation there have been sixty-three proposals to change the Constitution. Only twelve have succeeded. We started well enough with the first referendum in 1906 which concerned Senate elections. Six states voted in favour of the change; the popular vote in favour was nearly 83 per cent. In 1910 two proposals were put forward. Only one succeeded and that by a whisker. By 1911 the course of our constitutional history was becoming clearer. Two questions were put. Both were rejected; the favourable vote was less than 40 per cent and only one State favoured the change. Thereafter the history of formal constitutional change in Australia has been one of intense conservatism.

Unless there is concurrence between the major political parties, it would seem that the people will reject proposals for constitutional change. And even the existence of such concurrence is certainly no guarantee of success. In 1977, the proposal of the Fraser Government for simultaneous elections had the strongest bipartisan support. Indeed it won 62.2 per cent of the popular vote nationally. It even accompanied three proposals which were indeed accepted (casual vacancies; territorial representation; and retirement of Federal judges). But the electorate discriminated. The proposal carried in only three States. It was therefore rejected in accordance with the Constitution, as no affirmative majority to the states was secured.

Not all of the rejections of constitutional change have been an exercise of unwisdom. I think it would now be generally accepted that the rejection of the Menzies Government’s referendum in 1951 to dissolve the Australian Communist Party was an important protection of civil liberties in Australia. At the beginning of the campaign which was waged by Dr H.V. Evatt against that referendum, polls showed that 80 per cent of the people favoured the proposal. But when it came to the vote, only three States could be gathered in; only 49.44 per cent of the popular vote was won. Sometimes section 128 of our Constitution has been a wonderful guardian of our freedoms.

Nor are we alone in constitutional caution. In Canada recently, a proposal, settled by the politicians for constitutional changes to meet the demands of the people of Quebec was rejected by the people. The people of Canada affirmed the status quo. One commentator has observed that “the Canadians ended their constitutional odyssey by constituting themselves a people through an affirmation of the constitutional status quo”.


There is an added complication in the Australian case. The States of Australia are also constitutional monarchies. Their separate polities cannot be ignored. The notion that a future Federal Republic of Australia could dragoon a number of States which preferred to remain constitutional monarchies is, as it seems to me, unthinkable. Containing, continuing monarchies within a Federal Republic might be theoretically conceivable but it would certainly be extremely odd. Effectively, this means that a republican form of government could not easily be adopted in Australia without unanimity within all parts of the Australian polity.

The last experiment in constitutional change should also not be forgotten by the proponents of a referendum about becoming a republic. It will be recalled that in 1988, for the bicentenary of European settlement in this country, we were told that we had to accept certain changes and to do so by our two hundredth birthday. The changes concerned parliamentary terms, fair elections, the recognition of local government in our Constitution and the extension of the protection of certain rights and freedoms to the States. Again, at the opening of the campaign, the polls showed overwhelming support for the referendum proposals. But when it came to the vote, not a single one of the proposals passed. Indeed, not a single one gained a majority in a single State. One only gained a majority in one jurisdiction. The proposal for fair and democratic parliamentary elections throughout Australia — so seemingly rational and just — was accepted in the Australian Capital Territory alone. The dismal showing of the voting of the people of Australia reflected their great caution in altering our constitutional instrument. The average vote for the four proposals was approximately 33 per cent in favour and 66 per cent against. If this record of constitutional change does not have lessons for the republicans in Australia, nothing will teach them the realities of Australia's basic constitutional conservatism.

Secondly, as I hope I have already shown, the proposal for a republic, at least at this stage, would not go by the nod. There would be many people who for reasons of principle or other priorities, would fight the referendum. Any referendum that promises more real or apparent power to any politician — even a single one as President — faces an especially rough passage. This can be shown clearly enough by the rejection of the proposals relating to the terms of Senators. These had bipartisan support of the political parties in 1977 and 1984. On each occasion a majority of the people was secured; but not a majority of the States. Every other proposal for constitutional change by referendum in the last fifteen years has failed dismally.

In these circumstances, many would consider that our national energies should be devoted to priorities which would not be so divisive and which would seem to some to be rather more urgent. Priorities such as the reconciliation and proper provision for the Aboriginal people of Australia. The extension of an accessible legal system to our people. The improvement of the operations of Parliament. The provision of new initiatives to reduce unemployment amongst the young and not so young. The assurance of equal opportunity to Australian women and to other groups who suffer discrimination. The provision of proper educational opportunities and fair access to health care and services. The building of a truly multicultural society. The improvement of local government, roads, sewerage and other necessities of government. These are aspects of Australia's national life where things are undoubtedly wrong. They represent areas in which we stand a real chance of forging the national resolve that is necessary to secure positive action. And we need no constitutional changes to gain success in them. To inflict upon our country the wound of a divisive debate about a republican form of government — in a form not yet identified in its particularity — would be grievously damaging to the spirit of the country: at least at this time.

Thirdly, it is important to emphasise that in every legal and real respect Australia is a completely
independent country. Its independence of the legislative power of the Westminster Parliament began long ago. It passed through the Statute of Westminster in 1931. It was finally affirmed when the Queen of Australia personally assented to the *Australia Act* 1986 in Canberra. The United Kingdom Parliament now has no legislative authority whatsoever in respect of Australia. An attempt, even indirectly, to extend the United Kingdom's official secrets legislation to Australia in the celebrated *Spycatcher* litigation failed both in my court and in the High Court of Australia. A similar result ensued in New Zealand. The legislative link — except to the extent that we have retained, by our own decision, great English constitutional and other statutes (such as *Magna Carta*) — is completely and finally severed.

So is the executive link, as the events of 1975 demonstrated. Those events have had their counterparts of Fiji and Grenada where the Queen, being absent, declined in any way to interfere in the independence of action of the local Governor-General. The idea of the United Kingdom or its Ministers advising the Queen of Australia in respect of Australian matters, or in any way interfering in the executive government of Australia, is now unthinkable.

The judicial link with the United Kingdom has also been totally and finally severed. Severing the mental links of some Australian lawyers to the laws pronounced in London is a rather more difficult task. But the High Court of Australia has made it plain that English law is now but one of many sources of comparative law assistance available to Australian courts. It has no special legal authority whatsoever in this country. The common law throughout the world is a great treasure-house upon which we can draw in Australia's independent courts. But we are completely free of legislative, executive, judicial, administrative or any other formal links to the United Kingdom. Suggestions that we are in some way still tied to mother's apron strings are completely false. If such links exist, they reside in history and spirit. Legal links reside only in the minds of the wilfully ignorant or paranoid. It is therefore important to realise that republicans in Australia are not dealing with practical realities of constitutional independence. Their concern is only with a symbolic link in the person of the Queen. It is symbols, not realities, that they want to eradicate — at least that is the position of those of the minimalist persuasion.

Fourthly, republicans do not speak with a single voice. The standard proposal is for a minimalist change to the Australian Constitution — virtually substituting nothing more than a President for the Governor-General. But this does not satisfy the true republicans amongst us. For example, Associate Professor Andrew Fraser has described the Australian Republican Movement as the "Australian closet monarchist movement". According to Professor Fraser they are merely tinkering with names. Their system of government remains fundamentally that of a constitutional monarchy. Nothing much at all changes. For Professor Fraser and his supporters nothing less will do than to root out the notions and approaches of constitutional monarchy and replace them with a thoroughgoing change of the basic form and nature of our Constitution. This must start with securing a completely separate constitutional convention to bypass (or at least complement) the procedures provided under section 128 of the Constitution.  

So far, the vocal republicans appear, for the most part, to have rallied around the minimalist approach. Perhaps that simply shows how abiding and congenial our system of constitutional

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symbols is. According to Professor Fraser it demonstrates the mind-lock of most Australian republicans into constitutional monarchy. The vocal republicans want a constitutional monarchy — with symbols above politics — but without a monarch. Is this all that we are to achieve at the price of dividing our country, diverting our national endeavour from achievable gains and hauling ourselves to the brink of a referendum on a political question where sharp divisions are very likely to result in the continuance of the status quo?

Fifthly, we should keep in mind that our present constitutional arrangement is remarkably inexpensive. It is true that the Queen and members of the Royal Family, when invited, make visits to Australia. That costs Australians something. But we do not pay for their upkeep at other times. We avoid the expensive trappings that typically surround a national Head of State today. Or at least we contain them within decent and very Australian bounds.

Sixthly, there is the personality of the present monarch. Although it is the system which is basically in issue, it is difficult to disentangle, in the proposed debate, the system from the current incumbent. Queen Elizabeth II is a person whose life symbolises duty and service. These are symbolic values of great importance in fast-changing times. They constitute a special impediment to those who would change our system and who need a positive, even overwhelming constitutional affirmation to do so. They reinforce an instinctive view that the citizens of Australia, asked to reject this dutiful woman and enhance the powers of local politicians, will decline to do so.

THE ARGUMENTS OF PRINCIPLE

THERE ARE three arguments of principle for sticking — at least for the foreseeable future — with our present Constitution.

The first is the argument against nationalism. Much of the rhetoric of republicanism smacks of nineteenth-century nationalism. This rhetoric is completely outdated and unsuitable and we should grow beyond it. Since Hiroshima, it behoves intelligent people to abhor nationalism and to seek after international harmony. Our present Head of State is an international one. The idea that we must have a local Head of State, always resident in our midst, is one which derives from an orthodoxy set firm before the age of telecommunications, the jumbo jet and a globalising economy.

Against narrow nationalism Australia's constitutional monarchy presents a tempering force. It is no coincidence that the most temperate of the states of the developed world, in the Organisation for Economic Co-operation and Development, are constitutional monarchies, just as it is no coincidence that more than half of the members of that club of democracy are constitutional monarchies.

Those who harbour a hope of closer relations with New Zealand must also keep in mind the utility of sharing a constitutional monarch with that close neighbour. It seems unlikely, at least in the foreseeable future, that New Zealand will change its basic constitutional arrangements. We should pause before severing such a special link with the country closest to us in history and identity.

The second argument of principle relates to the dangers of ill-judged constitutional change. There is a danger that an elected republican President would conceive that he or she had the separate legitimacy which came from such election or appointment. At the moment there is — and can be — no such legitimacy in the Queen's representatives apart from the popular will. One of the reasons why the events of November 1975 shocked many Australians was precisely because of the perceived lack of popular legitimacy for the Governor-General's Actions. It is this perception which puts a severe brake upon the use by the Governor-General of the prerogative powers. It is a brake I strongly favour. But there is little doubt that, without specific and detailed constitutional amendment, the prerogative powers of the Queen would pass to an elected or appointed President. That this is so has been demonstrated in Pakistan (including recently) and in other countries has merely been replaced by a President.
In short, there is a risk that a local Head of State—especially one enjoying the legitimacy of a vote into office — would assert and exercise reserve powers which would be most unlikely to be used by an appointed Governor-General or State Governor. We have only to watch the spectacle of the contemporary conflict between President Yeltsin and the Congress of People's Deputies in Russia to understand the instability of a political system with two potential heads. Under our present system our Head of State can aspire to no such political role or power. Nor should – or do – her representatives. The same may not be true if we alter the incumbent and the method of determining the incumbency. This is as true of the State Governors as of the Governor-General.

The third reason of principle concerns the utility of our present constitutional compromise. What we have in Australia is a crowned republic. We have the historical symbols of a constitutional system of a thousand years without the trappings of the aristocracy and other features that would be inimical to Australian public life. At the same time we avoid the pretensions to which a home-grown republic could easily succumb: the fleet of stretch limousines, motocycle escorts, streets blocked off as they pass, a “First Lady”. In fact, we have developed in Australia to a mature system in which we are mercifully free of the pomposities that elsewhere accompany local Heads of State. To the complaint that we have no Head of State to travel overseas for us, I would say: we have our Head of Government. It is he or she who should ordinarily do the travelling. I can live quite peacefully with the sombre fact that our Head of Government attracts only a nineteen-gun salute. A mature democracy can easily miss those extra two guns, and a lot more arrogant pretension besides.

Like so many features of British constitutional history (the jury being the prime example) our constitutional arrangements function well, even though originating a quite different purpose. They have evolved to a point where they are fairly well understood. The Queen and her representatives have extremely limited constitutional functions: to be consulted and to caution and warn. Because they are psychologically or even physically removed from political strife, or political dependence, their advice can sometimes be useful. Occasionally they can give the lead to the community where politicians are cautious. It is no accident that the elected President of the republic of the United States of America (Mr Reagan, the Great Communicator) could not bring his lips to mention AIDS in the first four years of his Presidency. During that time our Governor-General founded the AIDS Trust of Australia. Our Governors repeatedly supported AIDS benefits. They went to hospitals and hospices. They spoke amongst citizens about this matter of concern. And so in England did the Queen and members of the Royal Family. Occasionally it is important to have courageous but non-political leadership on matters of sensitivity which politicians – answerable to the ballot box – feel unable to give.

And then there is the element of ceremony and history. In my role as a judge and as a university chancellor I see the deep wellsprings of human need for the ceremonies that mark important occasions in life. This does not mean that we should sanction pomposity or resurrect the idea of a bunyip aristocracy. I deplore that notion. Many may laugh at the investitures; at the openings of school fetes; at the Vice-Regal presence in the country agricultural shows and for community groups. But these are places where our fellow citizens gather, where they seem to feel a need for ceremony and personal recognition.

THE NEED FOR OPEN-MINDEDNESS

The only criterion for deciding upon Australia's constitutional arrangements is what best advantages Australia and its people. We must avoid rejecting something that is old simply because it is old and seems to some to be unfashionable. We must beware the changing winds of fashion – especially in constitutional fundamentals and particularly when shipped up by self-interested and one-sided media campaigns. We must be clear-sighted about the great difficulties of securing a change to our Constitution. We must be sensitive to the divisiveness and sharp differences that any such proposal would bring. In our multicultural society
even the majority ethnicity has a place to be proud of its culture and history. As a mature people, we should be specially cautious about invocations of nationalism more apt to centuries past than to the censure yet to come. We should not be too proud to stay – at least for the present – with a system of government which has served us well. We should measure carefully the advantages of our crowned republic – of our modest ideas about a Head of State. It is a mature country that basically gets by with a Head of State who is usually absent and which refuses to submit to the calls of those who feel the need for a more constant, ever-present symbolic leader. In the words of the poet laureate of a practical people: If it ain't broke, don't fix it."
Extract from "NEWS WEEKLY, MAY 22, 1993

THE REPUBLIC DEBATE

Justice Kirby: say no to "narrow nationalism"

In a recent speech, President of the NSW Court of Appeal Justice Michael Kirby pointed out the dangers associated with 'symbolic' changes to the Australian Constitution.

In fact, Justice Kirby said, legal links between Australia and Britain continue to exist "only in the minds of the wilfully ignorant or paranoid." Republicans "are not dealing with practical realities of constitutional independence. Their concern is only with a symbolic link in the person of the Queen".

Below are edited extracts from his speech, delivered at the University of Sydney last month.

The Australian Constitution is one of the six oldest constitutions continuously operating in the world. Those who feel that this is a matter for proper pride and who consider that we should stick with the Commonwealth which the Constitution establishes should not feel afraid to express their views. What a sad day it will be for us if diversity of opinion is discouraged and fear replaces reason.

I support reform of society and its laws. But reform means more than change. It means change for the better. My proposition is that it has not been shown that the establishment of a "Federal Republic of Australia" would be a change for the better.

We should not forget that, for the whole modern history of Australia, we have been a monarchy. This indisputable historical fact of our sovereignty is part of what it is to be an Australian. Fore more than 200 years Australians have had a King or Queen. It has become, and is part of our society's very nature.

I acknowledge that the debate about our Australian polity is a legitimate one. We may have it, unimpeded by guns or the opprobrium of official orthodoxy, precisely because of our constitutional history, conventions and instrument. I can, of course, understand some of the criticisms of our constitutional monarchy. For example, I acknowledge that in some parts of Asia the concept of Queen Elizabeth II as Queen of Australia, may be difficult for some to grasp.

Yet I have no doubt that there are niceties of the constitutions of the monarchies of Japan, Thailand and Malaysia — not to say of the republics of the region — that we do not fully understand. No self-respecting country should abandon its history and institutions out of deference for the misunderstandings of its neighbours.

There are three arguments of principle for sticking — at least for the foreseeable future — with our present Constitution.

(i) The first is the argument against nationalism. Much of the rhetoric of republicanism smacks of 19th century nationalism. This rhetoric is completely outdated and unsuitable and we should grow beyond it. Since Hiroshima, it behoves intelligent people to abhor nationalism and to seek after international harmony. Our present Head of State is an international one. The idea that we must have a local Head of State, always resident in our midst, is one which derives from an orthodoxy set firm before the age of telecommunications, the jumbo jet and a globalising economy.

Against narrow nationalism Australia's constitutional monarchy presents a tempering force. It is no coincidence that the most temperate of the states of the developed world, in the Organisation for Economic Co-operation and Development, are constitutional monarchies, just as it is no coincidence that more than half of the members of that club of democracy are constitutional monarchies.

Those who harbour a hope of closer relations with New Zealand must also keep in mind the utility of our sharing a constitutional monarch with that close neighbour in our region. It seems unlikely, at least in the foreseeable future, that New Zealand will change its basic constitutional arrangements. We should pause before severing such a special link with the country closest to us in history and identity.

The second argument of principle relates to the dangers of ill-judged constitutional change. There is a danger that an elected republican President would conceive that he or she had the separate legitimacy which came from
such election or appointment. At the moment there is — and can be — no such legitimacy in the Queen's representatives apart from the popular will. One of the reasons why the events of November 1975 shocked many Australians was precisely because of the perceived lack of popular legitimacy for the Governor-General's actions. It is this perception which puts a severe brake upon the use by the Governor-General of the prerogative powers. It is a brake I strongly favour. But there is little doubt that, without specific and detailed constitutional amendment, the prerogative powers of the Queen would pass to an elected or appointed President. That this is so has been demonstrated in Pakistan (including recently) and in other countries where a Governor-General has merely been replaced by a President.

In short, there is a risk that a local Head of State — especially one enjoying the legitimacy of a vote into office — would assert and exercise reserve powers which would be most unlikely to be used by an appointed Governor-General or State Governor. We have only to watch the spectacle of the contemporary conflict between President Yeltsin and the Congress of Peoples Deputies in Russia to understand the instability of a political system with two potential heads. Under our present system our Head of State can aspire to no such political role or power. Nor should — or do — her representatives. The same may not be true if we alter the incumbent and the method of determining the incumbency.

The third reason of principle concerns the utility of our present constitutional compromise. What we have in Australia is a *crowned* republic. We have the historical symbols of a constitutional system of a thousand years without the trappings of the aristocracy and other features that would be inimical to Australian public life. At the same time we avoid the pretensions to which a home-grown republic could easily succumb: the fleet of stretch limousines, motor cycle escorts, streets blocked off as they pass, a "First Lady" etc. In fact, we have developed in Australia to a mature system in which we are mercifully free of the pomposities that elsewhere accompany local Heads of State. To the complaint that we have no Head of State to travel overseas for us, I would say: we have our Head of Government. I can live quite peacefully with the sombre fact that our Head of Government attracts only a 19-gun salute. A mature democracy can easily miss those extra two guns, and a lot more arrogant pretension besides.
THE CROWN AND YOU

The continuing arguments as to whether a "foreign" Queen should be the Queen of Australia is a weak argument, as are most of the other arguments put forward by the Republican Movement within Australia.

These arguments based on the trivial such as "it is about time we grew up", or a similar stupid statement of "cutting Mummy’s apron strings" highlights the insecurity and inferiority complex of the pro-republicans.

It is obvious that ideology plays a majority part within the Republican movement.

The leftist tendencies for most should reveal the underlying factor to rid Australia of the Monarchy.

Queen Elizabeth II of Australia is the nominal Head of State in this country, and our Head of State is not voted into that position because it could show a political bias, but its strength of purpose lies in the hereditary procedures of succession.

The King is dead, long live the King, clearly proves the point.

A tremendous amount of publicity has surrounded Queen Elizabeth and her family over the past few years, but in particularly over the past few months.

Most of it has stemmed from the gutter tabloids, particularly from London.

I doubt if any other family could put up with the stress and strain of their families being dragged through the mud, edition by edition, day by day.

Notwithstanding that much of the publicity has been brought about by very foolish actions, we should all remind ourselves that marriage problems seem to haunt one in three of our marriages, and there is not many families in this country which haven't been affected by this massive problem here in Australia.

Her Majesty, as a person, has devoted her life to her peoples scattered around this earth of ours.

Her daily programme would, in most cases be hard to follow. However, it is important for Australians to understand that the Queen being the nominal Head of the Constitutional Monarchy, represents the Institution of the Crown, and it is that Institution that gives the citizens of Australia that added freedom which, in turn, makes them the most free peoples in the world.

The following facts should be considered very closely before a judgement is made to discontinue the Monarchy represented by Queen Elizabeth:-

1. It was the people of Australia, along with our Founding Fathers of Federation, who so unitedly called for the inclusion of the Crown, the Monarchy, in our proposed new federal parliamentary system, just as they already had this in their State Parliament.
It was we Australians who wrote our own Constitution and secured Britain's complete agreement to that, a clear evidence of our national freedom and independence. The fact that our Constitution was then contained in an Imperial Act of the British Parliament in 1900 was simply because this was the only proper legal way in which constitutional power and authority could be passed to Australia and its free and independent existence recognised, and thereby showing at the same time that Britain was divesting itself of such power and authority henceforth.

There is no bowing and scraping to our Monarch - she (or he) is not an absolute ruler - Magna Carta, but more especially the real Bill of Rights of 1688 - 9, saw to that. The actual position is that no heir to the British Crown can ascend the Throne unless first taking an oath - not to government political parties, even Parliament or anyone else - but under God that he or she will faithfully devote their life, whether it be long or short, to the SERVICE of their people. That plainly means whatever people have drawn their institutions and basic traditions from England, as the Common Law, and through their institutions and basic traditions from England, as the Common Law, and through their own constitutional and democratic parliaments and Constitutions have of their own accord secured the Queen (or King) as their Head of State. But the Queen (or King) acts solely as a Legal Protector or Constitutional Servant as it were to the whole of the people.

Obviously the argument for a republic is the perfect way of attacking our existing Federal Constitution, for it falls apart if you try to take the Crown away from it. What is there then to save our entire common law with all its splendid and freely inherited rights and liberties? Because, after all, it is the Crown which is the direct link to all of these things.

Furthermore the Monarchy is stable and perpetual, there is no dispute as to the correct line of succession. On the contrary, a republic with its Presidents drawn by various means are always at the mercy of sordid political campaigns and disruptions of all kinds. The rules can easily be changed by political governments when wielding power in a republic, but a constitutional monarchy such as ours can only act under the authoritative call of the people.

There is further dishonesty in the sham call that a republic would give us a separate identity (one we clearly have which they are blind to), because none of those making that call are admitting that there is a powerful move to drag Australia into a so-called 'Pacific Rim Bloc' - a Bloc in which we will surely lose our identity almost completely because our own Parliament government and entire way of life will be subservient to the powerful, centralised government for the whole Asian Bloc ('as it would really be rather than 'Pacific').

Under the Constitutional Monarchy the institution of the Crown is paramount. It is not hero-worship of some man or woman in England.

The Constitutional Monarchy gives the ordinary citizen an added freedom in that it could act as a safety valve on behalf of the people.

As long as we retain the Crown, the Common Law and the Constitution of the Commonwealth of Australia above our parliamentarians that is our extra freedom. If they ever become under the parliament you have lost the freedom.
For example if a Governor or Governor-General dismissed a parliament, he does not run away to Buckingham Palace with it, he must give it back to the people of Australia to decide whether his actions are right or wrong.

In 1975, this actually took place when Sir John Kerr dismissed the Federal Parliament under the powers of the Crown. This meant that a general election had to be called and it was at that general election that the opposition party won a 55 seat majority. The largest majority in the history of our parliament since federation.

In other words the people of Australia confirm the action that was taken that is the reason why the Constitutional Monarchy should remain.

8. Seven out of the eight longest serving democracies of the world are Constitutional Monarchies, the eight is the United States of America which was born out of the same mother the United Kingdom as Australia, New Zealand and Canada, the other three are the Scandinavian Kingdoms of Denmark, Sweden and Norway.
People advocating the move to a republic are ignoring some fundamental dangers, according to former chief justice SIR HARRY GIBBS.

There is no weakness in our Constitution that would be cured by making Australia a republic. Australia would not derive any material benefit from abolishing the monarchy. It now seems to be accepted by those who are urging that Australia should become a republic that the only possible advantage of the change would be purely symbolic.

Many of those who have been most vocal in their advocacy for the establishment of a republic seem to be unaware that the proposal raises serious constitutional questions. Their lack of understanding is shared by some sections of the media. The present catch-phrase is that the change should be "minimalist", by which I suppose is meant that the least possible change should be made.

For example, it has been said that the effect of a republic on the State Constitutions could be dealt with after Australia had become a republic. It has even been suggested that some States might retain their relationship with the Queen even if Australia had become a republic.

It is difficult to take seriously the suggestion that Australia should become a republic only in part. The position of the States is a question that will need to be addressed before any proposal to create a republic is submitted to a referendum.

For centuries political thinkers have recognised that ideally a Constitution should achieve two aims which, however, tend to be in conflict. On the one hand the government must have sufficient power to enable it to maintain a stable and ordered society; on the other, the Constitution must impose limits on the power of the government, so it does not degenerate into a despotism.

Today, most constitutional monarchies are free and democratic and most republics are not. While Australia has been a free and stable society continuously since 1901, there are only two republics, Switzerland and the United States, of which the same can be said.

The fact remains that constitutional monarchies have proved in practice to be a more successful form of government than has republicanism.

The governor-general, as the representative of the Queen, is invested with very wide powers. No law can be passed unless the governor-general assents to it. He or she can decide when the Parliament shall sit, and may prorogue the Parliament and dissolve the House of Representatives. In cases of disagreement between the House of Representatives and the Senate, the Governor-general may, in certain circumstances, dissolve both Houses.

The executive power of the Commonwealth is vested in the governor-general and he or she chooses the members of the Executive Council and appoints all ministers of State. He or she is Commander-in-Chief of the armed forces. These powers are given by the Constitution in plain words. There are other powers which the governor-general almost certainly has in addition — for example, the power to declare war or to make peace.

Usually, these powers are exercised by the governor-general on the advice of his or her ministers. The Constitution does not require the governor-
general to act in accordance with such advice. He or she does so in conformity with constitutional conventions. The powers which may be exercised by the governor-general or governor in accordance with his or her own discretionary judgment are known as reserve powers.

A critical question that would arise if Australia were to become a republic is what should be done about the powers which the governor-general and the State governors at present possess. It is important to remember that the constitutional conventions which govern the manner in which these powers are exercised are not laws, and according to the legal authorities which have so far considered the matter they are not enforceable by the courts. The conventions are observed because they are regarded as binding. In England by the Queen and in Australia by her representatives. The reason they are regarded as binding is that a tradition of political impartiality has developed around the monarchy. The Queen’s representatives observe the same tradition, and if they did not they could be instantly removed by the Queen, acting on the advice of her Australian ministers.

Constitutional monarchy provides a subtle and flexible system of checks and balances, without in any way detracting from national independence.

None of the conventions which govern the conduct of the representatives of the Queen has developed in relation to a president and the reason for their existence — political impartiality — would not apply in the case of a president who was politically selected. However, some of those who argue in favour of a republic are reported as saying that the president, however chosen, would be above politics. Since I cannot believe these assertions to the disingenuous, I must conclude that they are surprisingly naive.

If one thing is certain it is that eventually the office, if created would become entirely a political one. That is so whether the president would be directly elected by the people, or chose by an electoral college, or by the members of the Commonwealth Parliament or by representatives of the Commonwealth and State Parliaments.

If the powers now possessed by the governor-general were conferred on a president, and no further change was made to the Constitution, the president would not be bound by the conventions which are observed by the representatives of the monarch.

It would obviously be a most dangerous course to confer on a president the powers which are at present vested in the governor-general. Since, in the absence of some restrictive provisions in the Constitution, the president would be legally free to exercise those powers independently, and would in any case be likely to do so in a political way, the result would be to give immense strength to the executive government.

If we had a president who was given the present powers of the governor-general, the strength of the president and the prime minister in conjunction would well enable them. If they were minded to do so, to proceed on the road to dictatorship.

We find a warning in the political history of India, whose presidency is sometimes suggested as a possible model for ours. In June 1975 Indira Gandhi was found by a court to have committed electoral irregularities. Her position as prime minister was under threat. Without delay, and without first informing Cabinet, she approached the president who, at her request, made a proclamation of internal emergency and by doing so enabled Mrs Gandhi to exercise dictatorial powers. By the next morning many of the Opposition party members had been imprisoned: hundreds more imprisoned later — habeas corpus was suspended.

That is by no means the only example of the way in which a democracy can slide into a dictatorship if the Constitution does not sufficiently curb the power of the executive. Witness Nazi Germany and Mussolini’s Italy.

The framers of the US Constitution recognised that if the president was to have full executive power it would be necessary to limit that power by an intricate arrangement of checks and balances.

It should, however, be kept clearly in mind that the most potentially disastrous of all
possible courses would be to give a president the executive power of the United States presidency without at the same time providing the checks and balances of the US Constitution, which would include greatly increasing the status and power of the Senate.

What is more important for the purposes of the present discussion is that if the powers of the governor-general were to be conferred upon a president, it would be necessary to devise new and effective limits on the president’s power; if they were not conferred on a president, the re-allocation of those powers would mean there would have to be a major constitutional change. In any event, no mere minimal change will be involved.

What then are the possibilities if Australia is to become a republic and the powers of the governor-general are to be re-allocated? Who is to exercise the powers now vested in the office of governor-general?

Clearly, if the government is proceeding on a course which is flagrantly illegal, and the situation is not one which can be resolved effectively by legal proceedings, the reserve power of the governor-general (for governor) to discuss the ministry is one which must be exercised in accordance with a decision made by the representative of Her Majesty, himself or herself, for it would be a futility to have to act in compliance with the wishes of a ministry which was determined to flout the law.

‘Most republics are not stable’

Suppose that, after an election, a prime minister who lacks a majority in the House of Representatives refuses to resign, or a prime minister who has been defeated on a vital vote of no confidence, or has been denied Supply, advises the governor-general that the ministry should be allowed to cling to office. The reserve powers would become meaningless if they could be exercised only in accordance with the advice of a prime minister or premier who was acting in breach of a basic constitutional convention.

Of all the suggestions that have been made as to the manner in which the reserve powers presently exercised by the representative of the constitutional monarch should be exercised under a republic, that which is least likely to prove effective, and most likely to lead to grotesque results in practice, is that the reserve powers should be exercised by the House of Representatives (or Legislative Assembly in the case of a State).

Yet another suggestion is that the Constitution might be amended to provide that the powers of the president should be exercised in accordance with the conventions formerly observable by the representatives of the Queen. That would mean the High Court would have power to decide what those conventions require — some conventions are as yet uncertain — and to enforce their observance.

The boundaries between the three functions of government — legislative, executive and judicial — have already become blurred in Australia, but such a proposal would break down the separation of powers even more.

The suggestion that in certain circumstances it would be the High Court that should decide such questions as whether a prime minister should be appointed or dismissed is probably the most extreme of all the possible solutions that may be suggested. In an emergency the delay and uncertainty that would result from the litigation could paralyse government.

There is a further situation in which the use of the reserve powers could become necessary, and which brings the problems of conversion to a republic clearly into focus. While the Constitution remains as it is at present the situation can arise that the Senate has refused Supply and the Government, with a majority in the House of Representatives, has attempted to govern without Supply. To uphold the Constitution, such a government must be dismissed, and only a governor-general could be relief upon to do it without political bias. Some of those who favour a republic have said they wish to make it impossible nor any president to do what Sir John Kerr did in 1975.

When it comes to be recognised that the establishment of a republic would not remove the possibility of a repetition of the events of 1975, the pressure will grow for
more extensive changes to the Constitution.

Even if no other alterations to the Constitution were expressly made, the very fact of replacing the monarch, whose representatives act in accordance with conventions requiring strict impartiality, with a president, who might well be a centralist by political allegiance as well as personal inclination, would further tilt the balance of power in favour of the Commonwealth and against the States. That would undoubtedly occur if the States were so misguided as to agree that the president should perform the role of the State governors.

I have endeavoured to show, first that there is no defect in our Constitution that would be cured by establishing a republic and that no material benefit would result from the establishment of a republic; second, that it is misleading to speak of a “minimalist” change to a republic — extensive amendments to the Constitution would be necessary to make the change; and third that there are grave possible disadvantages in changing our Constitution to a republican one.

Thomas Jefferson, himself a revolutionary, wrote: “Prudence indeed will dictate that governments long established should not be changed for light and transient causes.” Here not only is there no cause for abandoning our constitutional monarchy, but good cause for retaining it.

This is an edited text of a paper presented by Sir Henry Gibbs at a seminar organised by Australians for Constitutional Monarchy held in Sydney on Friday.
The N.T. has a lower average age of citizens than the other States. This situation can be expected to continue for many years into the future as the population grows.

The minimum voting age of 21 years could be reduced to better reflect the ratio of aged services to the active family and work force.

At federation date (1900) the average age of citizens would have been lower than at present, in part reflecting present day better health care and extension of life expectancy.

The ratio of under 21 to over 21 years of age is extended in this over 21 direction.

By reducing the voting age the ratio will be brought back to the age ratio as at 1900.

Admittedly under 21 may be considered as a bunch of radical young lefties. John Howard's view was somewhat to left in his youth, as was Kerry Packer's in his youth. But so what!! It reflects the unconscious political view of the young.

By the way I'm 68 yrs old.

Unfortunately, I will be overseas at the listed discussion dates.

Yours faithfully

Jack Catling
SUBMISSION NO. 122
MARY V O’HANLON

11 Tyson Street
Ainslie ACT 2602
(06) 2480153.

Sessional Committee on Constitutional Development - Discussion Paper Nos. 8 and 9

As your present Constitution allowed for the passing of the Euthanasia Bill, I could not, as a 79 year old, risk a return as a tourist, such as we undertook for 3 weeks from 11th May to 28th May 1993, for fear of my life.

Please let me know when you change your Constitution so to forbid any further attacks on innocent human life so that we could, as we had hoped, repeat that enjoyable holiday.

Mary V O’Hanlon (Mrs)
The change to a republic will not be the magic-wand which will change everything for the nation to give us more independence and identity as it will force on Australia amputation of its ties/links with its British heritage in conjunction with grafting on Asianisation where the amputation has left a vacuum/void - so that in effect we will have slapped ourselves in the face with our own-hand losing rather than gaining respect for ourselves and respect from our Asian neighbours.

As a nation already divided an Australian Republic will create deeper-divisions and the real-problems which need to be addressed will not be faced - and instead of getting the nation onto its feet will see it end-up falling over onto its face.

The Banana-skin upon which the nation will slip down to third-world-nation status will be if the Northern Territory Government lets the Chamberlains off the hook and allows them to place a memorial with their words on it at Ayers Rock because the Northern Territory will be "on-side" with Republican Dictatorship which will do to this nation what the Chamberlain religio/politico conspiracy did to Azaria at Ayers Rock - betraying the national interest to provide their own - using sacrificial ritual baby murder and this nation's foremost identity symbol to help them do it.

**Division and fear**

WHEN I recently became a naturalised Australian I repeated the immigration officer's words: "From this day forward, under God, I pledge my loyalty to Australia and its people. Whose democratic beliefs I share. Whose rights and liberties I respect and whose laws I will uphold and obey.

The words seemed to have an echo, as though they were more than mere symbols, but what was nagging at my new-found citizenship was
this incessant political diatribe about becoming a republic.

It is creating division and deeper down, a fear, not just of change but of ruthless, hungry, political power.

We must recognise the past served us well and only replace it if our pressing need for change demands it.

There are more urgent problems closer to the people, that need attention from our leaders.

First we need statesmen, not political hacks, who themselves are not free, trammelled by the party, beholden to numbers not people.

When there is talk about a charter of human rights, then we have already lost them.

We are sick of political expediency, tired of platitudes of "J" curves that end up as circles, scornful of politicians crying and in maudlin tones promising impossibility. We do not want new flags, just the emblem of truth, which seems anathema in the hallowed precincts of Canberra.

We want the genuine unemployed to receive government aid but chase out those who abuse the system. We need a true commitment to industrial reform but it must be fair to employee and employer.

The young, the old, all Australia needs a vision. It must contain hope.

We need to address the widening gap between the "haves" and "have nots".

We see how politicians feather their own nests, how the pursuit of power sets aside ordinary people's needs.

They spend our money as though it was theirs. It is time they governed for us.

No change, cosmetic or political, will heal the divisions in Australia. A republic at this time will only widen the division.

Get Australia on its feet. Then let us live up to the promise contained in the citizenship oath.

PETER HOOSDON
Oak Flats

The above are also my own view which I have often expressed throughout my submissions to thirty inquiry(s) over past nine years - these views are supported by my

(1) 330 - page new Azaria inquiry submission to N.T. coroner Mr John Lowndes office - and
(2) Hindmarsh island bridge - Royal Commission submission

and 167 letters of reference from 28 previous inquiries which includes Federal Parliamentary evidence - 1991/1993 print media inquiry(s) - under protection of Parliamentary privilege.

Yours sincerely

Tony Paynter.
EUTHANASIA in the hands of dictatorial-republicans is a convenience-trick which they can use on
the aged whether really ill or not as the aged are the most attached to British heritage and have a
high proportion of Monarchists among them. At the end of the scale Australia leads the Western
industrialised world in teen-suicides - especially rural teen suicides which is a standover on
Australian youth especially rural youth where rural communities are also bastions of monarchism.

[The enclosures and further correspondence relating to this Submission have not been
included in this Volume.]
The Hon Steve Hatton, MLA
Chairman
Sessional Committee on Constitutional Development
Parliament House
State Square
Darwin NT 0800

Dear Mr Hatton

Please find enclosed our written submissions concerning the exposure draft of the proposed constitution published by your committee.

I confirm that the Association will be attending the public hearing in Darwin scheduled at 10.00 am tomorrow and will be represented by Mr John Reeves, Mr Alistair Wyvill, Mr Michael Spargo and myself.

Yours sincerely

TREVOR RILEY QC
President

(*) encl- submission
NORTHERN TERRITORY BAR ASSOCIATION

SUBMISSION ON THE NEW CONSTITUTION FOR THE
NORTHERN TERRITORY

Introduction

The Northern Territory Bar Association ("the NTBA") congratulates the Sessional Committee and its Secretariat on the work they have done, firstly, in bringing the issues concerning the new constitution to the attention of Territorians and, secondly, in drawing the "exposure draft," of the new constitution.

The NTBA has the following submissions to make in respect of the exposure draft. Please note that we are also considering the discussions papers and reports recently published by the Committee (including those concerning the Constitutional Recognition of Local Government, the Constitutional Convention and a Bill of Rights) and shall provide submissions on these matters as soon as possible.

The Exposure Draft Generally

The NTBA considers that the exposure draft should be substantially enlarged to identify some of the more critical questions concerning the content of the proposed constitution and to include specific alternative draft provisions. We respectfully suggest that, in addition to the matters already identified in the draft, the committee consider in greater detail, encourage and sponsor public debate and prepare specific alternative proposals with respect to the following issues.

1. Enlarging the Preamble

Presently the Preamble of the exposure draft is confined to matters of legal history, and tends to reflect a common lawyer's approach to constitutional drafting. Many constitutions (or their equivalents) contain matters of political, religious, philosophical, historical or social significance that are fundamental to a proper understanding of the nature of the body that the constitution creates and the aspirations of those who have created it: see, particularly, the National Goals and Directive Principles in the PNG Constitution, the Constitution of the United States and the Charter of the UN.

No doubt it would be a difficult and complex task to do the same for the Territory constitution. Nevertheless, we believe that Territorians should be specifically encouraged to consider they would prefer an enlarged preamble and if so what it should contain. Many Territorians may favour, for example, the specific recognition of our common aspiration for a tolerant and harmonious multi-cultural community.

2. Fundamental Principles

The exposure draft does not attempt to define expressly the fundamental principles that are to determine the conduct of government. For example, the word "democratic," appears once in the entire document and then only in the preamble (paragraph 15) which, whilst assisting in the interpretation, of substantive provisions does not of itself expressly entrench any right of political
discussion or other democratic ideals in the new constitution. Further, there is no specific reference to the concept of "responsible government" nor is it said that the government or any part thereof is "accountable" to the people of the Northern Territory.

This does not of course mean that such principles do not exist in the constitution. However, it does leave the task of ascertaining and defining such principles to the courts. The High Court has recently recognised that, because the Commonwealth Constitution intends to create a system government that is responsible and accountable implied into the Constitution is the right to "freedom of communication... in relation to public affairs and political discussion..."Australian Capital Television v. The Commonwealth (1992) 177 CLR 106 per Mason J at 138. See also, for example, Nationwide News v. Wills (1992) 177 CLR 1 and Theophanous v. Herald & Weekly Times (1994) 68 ALJR 713. This recognition has been controversial, with some commentators viewing it to be beyond the proper exercise of judicial power.

We consider the content of such fundamental principles, and whether or not they should be expressly included in the constitution, should be the subject of extensive consideration and debate. We would also urge the Committee to draft a provision (as an option for inclusion) that attempts to encapsulate these principles so that the debate may have some focus or starting point.

(a) That Government should be accountable to the people of the Northern Territory,
(b) That the processes of Government should be open;
(c) That there is a right to freedom of communication in relation to public affairs and political discussion;
(d) That there is a right to freedom of participation in relation to public affairs;
(e) That there should be a separation of powers between parliament, the executive and the judiciary (discussed further below);
(f) That universally accepted individual and group rights (e.g, equality of opportunity), the prohibition of discrimination; trial by jury; freedom of speech, religious expression and association; etc) should be recognised and enforced. Some of these issues are covered by the discussion concerning the Bill of Rights. However, consideration should be given to their inclusion in their own right as fundamental principles of the constitution rather than as part of a separate Bill of Rights.

3. **Open and Accountable Government**

One of the objectives of this process of constitutional reform is to create a body politic equivalent to the other Australian States. Reflection on the recent experience of the other States, and particularly the problems they have encountered, is necessary for a proper understanding of the required content of the Territory's new constitution. One of the principle issues raised by such reflection is how best to avoid (or protect Territorians from) corrupt and/or incompetent government.

It should immediately be stated that, in raising such questions, we do not intend any criticism of or to pass adverse comment upon, past and present public figures in the Territory. The fact remains however that this constitution is likely to be in force in the Territory for decades and possibly centuries. In our view, the recent history, of the other States and the results of the various
commissions and inquiries which have been held require Territorians to consider what constitutional protection (if any) should be adopted to ensure our future generations do not have to suffer from the same serious (and expensive) failings seen in some other State governments.

Specific issues for discussion could include the establishment and/or entrenchment of:

(a) an independent public auditor;
(b) a right to freedom of information;
(c) a permanent justice or anti-corruption commission;
(d) a system of bi-partisan parliamentary committees;
(e) an independent electoral commission and enforceable standards of conduct in elections;
(f) enforceable codes of conduct for public figures (disclosure of personal interests, avoiding conflict of duty and interest, etc).

4. Separation of Judicial Power

We note that the draft does not include the entrenchment of the separation of judicial power as a potential alternative to s.6.3. The justification of this, it is said, is that the "strict separation, of powers doctrine" is "not applicable to the States". This would appear to be a reference to decisions like BLF: v. Minister for Industrial Relations (1986) 7 NSWIR 372 and City; of Collingwood v. Victoria [1994] 1 VR 652. We would comment that this principle may be open for reconsideration given the recent decision of the High Court on constitutional implications. Finally, it is arguable that the "strict" separation doctrine is presently applicable to the Territory and has been since the Territory came under Commonwealth judicial power in 1911. Finally, even if a "strict" separation doctrine should not be applicable to the Territory as a State, this does not necessarily mean that Parliament could take away the Supreme Courts jurisdiction altogether, which would appear to be one possible interpretation of s.6.3.

The NTBA considers that the separation of judicial power should be expressly entrenched in the constitution. If there is any concern about the effect of decisions like Brandy v. HREOC (1995) 127 ALR 1, then specific defined exceptions should be considered. To give the legislature apparently unlimited right to deprive the Supreme Court of its jurisdiction is, in our view undesirable. Accordingly, we suggest that the option of entrenching the separation of judicial power, possibly subject to certain specified exceptions, should be expressly raised for discussion and decision in the exposure draft.

5. Other Missing Issues

The NTBA also considers that the exposure draft should record all the alternative possibilities that have been identified in the discussion papers published to date and particularly those raised in the Bill of Rights Paper and the Aboriginal Rights and Issues Paper to ensure that the public debate of these issues is as constructive and as focused as possible.

Conclusion
In summary, the NTBA considers there are a number of important topics that need to be included in the exposure draft. To ensure that the debate is as productive as possible, alternative draft provisions in respect of these questions should be included. It is imperative that public discussion of these matters be as extensive as possible prior to the election and convening of the convention.

The NTBA confirms its support for the work of the Sessional Committee and is prepared to assist the Committee in whatever way we can. For example, we would be happy to assist the Committee in drafting the various alternative provisions to cover the issues we have identified above, should you consider it appropriate.
Dear Mr Gray

I refer to our telephone conversation of Tuesday 18 July concerning the Aboriginal language situation in the NT and the implications this has for our constitutional development.

The Sessional Committee has previously recognised the importance of Aboriginal languages in rural areas of the Territory by engaging interpreters and translators for Aboriginal languages in a series of consultations conducted in 1989.

My submission is attached. It is a personal submission. I am happy to make a presentation to the Committee and answer any questions Committee Members may have. I have enclosed my career summary for the information of the Committee.

My business hours phone number is 993866.

Yours sincerely

Peter J Carroll
Clause 1 in the Preamble of the 'Exposure Draft Northern Territory Constitution' acknowledges that the Northern Territory

"was occupied by various groups of Aboriginal people under an orderly and mutually recognised system of governance and laws by which they lived and defined their relationship between each other, with the land and with their natural and spiritual environment;"

This submission focuses on the importance of language in the definition of these various groups. Each major group spoke their own language. In the different regions the languages of neighbouring groups were related. In many instances Aboriginal people were bilingual, trilingual and multilingual.

In precontact times interaction between groups was regionally oriented, so it is not surprising that there are many different Aboriginal languages spoken in the Territory. In an attachment to this submission, I provide a table of the major Aboriginal languages in the Territory. The table is an adaptation of information provided in 'Aboriginal Languages of the Northern Territory' by Paul Black (published in 1983 by Darwin Community College). The information concerning the use of Aboriginal languages in education programs and at Batchelor College relates to 1994.

Twenty years ago, Aboriginal Leaders of the Kunwinjku people in western Arnhem Land consistently used the word 'nation' to describe themselves and their group. They preferred this term to the more widely used 'tribe'. This choice was deliberate. Other groups in the Territory, for example the Warlpiri have also used the word 'nation' to describe themselves. The use of this term indicates that there are significant differences between the various Aboriginal groups in the Territory notwithstanding their shared Aboriginal heritage.

An Aboriginal 'nation' might be defined as a group of people:

- who live within a specific area,
- who share ceremonies,
- who have family and kinship links that tie them to their land,
- who control access and entry to their land,
- who speak a common language.

There are various estimates of the number of Aboriginal languages at the time of the first fleet. These estimates differ from 200 to 500 and the number varies in accordance with criteria used to define a language and a dialect. A conservative figure is provided by Professor Dixon in 'The Languages of Australia' (Cambridge University Press 1980):

"There were about 200 distinct languages spoken by the Aboriginal tribes of Australia" (page 1).
In the Northern Territory Dr Black referred to 30 languages with more than 100 speakers (page 7). In the attachment provided with this submission, I list 40 major languages I have treated as separate languages some that Dr Black treats as related languages.

The continuing importance of Aboriginal languages in the Northern Territory is confirmed in the national Census data. The Census data for both 1986 and 1991 indicate that an Aboriginal language is spoken in over 70% of Aboriginal homes in the Territory. In rural areas generally, the proportion exceeds 87% and in some ABS statistical local areas (e.g. Daly, East Arnhem, Groote Eylandt, Tanami, Petermann) the figure exceeds 95%.

Given the language situation in the Territory, I recommend that the Sessional Committee:

1. Acknowledge the importance of Aboriginal languages recognising that they are an integral part of Aboriginal culture.

2. When consulting with Aboriginal communities the Committee should follow its practice in 1989 and engage interpreters and translators to enable Aboriginal people to better understand the Committee's proposals and to enable them to speak to the Committee in their own language.

3. Recognise that the significant diversity of Aboriginal groups or 'nations' within the Territory is such that it is impractical to seek a common Aboriginal position on some issues.

4. In gathering evidence the Committee should recognise Aboriginal language as a significant fact in the regional differences among Aboriginal people in the Territory.

Peter J Carroll 24 July 1995
## MAJOR ABORIGINAL LANGUAGES \(^{28}\) IN THE NORTHERN TERRITORY

<table>
<thead>
<tr>
<th>LANGUAGE NAME</th>
<th>No. of Speakers (est)(^{29})</th>
<th>Main Communities where Spoken (^{30})</th>
<th>Bilingual Education Program</th>
<th>Other Education Programs</th>
<th>Languages Fortnight Batchelor</th>
</tr>
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<tbody>
<tr>
<td>Alyawarra(a)</td>
<td>500</td>
<td>Ammaroo, Tennant Creek</td>
<td></td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>Anindilyakwa</td>
<td>1000</td>
<td>Groote Eylandt</td>
<td></td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>Anmatyerr(e)</td>
<td>800</td>
<td>Nh of Alice Springs</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Arrernte - Central</td>
<td>500(^{?)}</td>
<td>Alice Springs &amp; to the north</td>
<td></td>
<td>x</td>
<td></td>
</tr>
<tr>
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<td>1000</td>
<td>Santa Teresa</td>
<td>x</td>
<td></td>
<td></td>
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<tr>
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<td>Hermannsburg</td>
<td>x</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Burarra</td>
<td>600</td>
<td>Maningrida</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Dharlwangu</td>
<td>200</td>
<td>Yirrkala, Gapuwiyak</td>
<td>x</td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>Djambarrpuyngu</td>
<td>450</td>
<td>Galiwinku</td>
<td>x</td>
<td>x</td>
<td></td>
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<tr>
<td>Djapu</td>
<td>200</td>
<td>Yirrkala</td>
<td>x</td>
<td>x</td>
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<td>Ramingining</td>
<td></td>
<td></td>
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<td>Gaalpu</td>
<td>200</td>
<td>Galiwinku, Yirrkala, Milingimbi</td>
<td>x</td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>Garawa</td>
<td>300</td>
<td>Borroloola</td>
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<tr>
<td>Gumatj/Dhuwaya</td>
<td>300</td>
<td>Yirrkala</td>
<td></td>
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<td>Gupapuyngu</td>
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<td>Milingimbi, Gapuwiyak</td>
<td>x</td>
<td>x</td>
<td>x</td>
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<td>Gurindji</td>
<td>400</td>
<td>Daguragu, Kalkaringi</td>
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<td>Iwaidja</td>
<td>180</td>
<td>Minjilang</td>
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<td>Barunga</td>
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<td>Neutral Junction</td>
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<td>900</td>
<td>Oenpelli</td>
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<td></td>
<td></td>
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<tr>
<td>Liyagalawumirr</td>
<td>160</td>
<td>Galiwinku</td>
<td></td>
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<tr>
<td>Luritja</td>
<td>300</td>
<td>Alice Springs &amp; south</td>
<td>x</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maung</td>
<td>200</td>
<td>Warruwi</td>
<td>x</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Murrinh-Patha</td>
<td>1000</td>
<td>Wadeye</td>
<td>x</td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>Ndjebbana (Kunibidji)</td>
<td>100</td>
<td>Maningrida</td>
<td>x</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ngaliwuru</td>
<td>100</td>
<td>Victoria River</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nalkbun</td>
<td>200</td>
<td>Barunga</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ngankikurungkurr</td>
<td>100</td>
<td>Daly River</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ngarinman</td>
<td>170</td>
<td>Victoria River</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nunggubuyu</td>
<td>400</td>
<td>Numbulwar</td>
<td>x</td>
<td>x</td>
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\(^{28}\) Language details adapted from Table 2, p7 in “Aboriginal Languages of the Northern Territory” by Paul Black, Published by Darwin Community College, 1983. Languages included are those with more than 100 speakers as stated in the Table. There are many other languages spoken in the Territory. Information concerning Education and Batchelor College Programs is for 1994.

\(^{29}\) Estimated numbers in 1983 compiled by Paul Black. The numbers of speakers for most languages will have increased. For some languages the number includes first and second language speakers.

\(^{30}\) In most cases the languages will be also spoken in smaller communities in the region surrounding the nominated centre.
### MAJOR ABORIGINAL LANGUAGES IN THE NORTHERN TERRITORY

<table>
<thead>
<tr>
<th>LANGUAGE NAME</th>
<th>No. of Speakers (est)</th>
<th>Main Communities where Spoken</th>
<th>Bilingual Education Program</th>
<th>Other Education Programs</th>
<th>Languages Fortnight Batchelor</th>
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<tr>
<td>Pitjantjatjara</td>
<td>600</td>
<td>Areyonga, Docker River</td>
<td>x</td>
<td>x</td>
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<tr>
<td>Pintupi</td>
<td>800</td>
<td>Haasts Bluff, Papunya</td>
<td>x</td>
<td>x</td>
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<tr>
<td>Rembarrnga</td>
<td>150</td>
<td>Barunga, Bulman</td>
<td></td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>Ritharrngu</td>
<td>300</td>
<td>Ngukurr area</td>
<td></td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>Tiwi</td>
<td>1500</td>
<td>Tiwi Islands</td>
<td>x</td>
<td>x x</td>
<td></td>
</tr>
<tr>
<td>Wangurri</td>
<td>150</td>
<td>Galiwinku, Yirrkala, Milingimbi</td>
<td>x</td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>Warlpiri</td>
<td>2800</td>
<td>Yuendumu, Willowra, Lajamanu</td>
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<td>Warramirri</td>
<td>175</td>
<td>Galiwinku, Yirrkala, Milingimbi</td>
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<td>x</td>
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<td>Warumungu</td>
<td>200</td>
<td>Tennant Creek</td>
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<tr>
<td>Yanyuwa</td>
<td>150</td>
<td>Borroloola</td>
<td></td>
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</tbody>
</table>
The Executive Officer  
Sessional Committee on Constitutional Development,  
Department of the Legislative Assembly  
GPO Box 3721  
Darwin, N.T. 0801  

Dear Sir/Madam  

Hello,  

Thankyou for sending me the "Public Hearing" notice re the Constitution, the meeting for which was held in Alice Springs early this month.  

I consider the work that has been done in the past, and which continues to be done, to be an important expression of a truly working democracy.  

In the past I have done my best to keep up to date with the discussions and developments, but unfortunately was not able to be present at the recent meeting. However, I wish the Sessional Committee well in its deliberations, and look forward to the further developments of the proposed Constitution.  

My further view is that, must as many people perceive Statehood as desirable for the Northern Territory within the next 10 years, and much as many of the powers of Statehood we presently exercised here, the Northern Territory should remain a Territory for the foreseeable future.  

Best Wishes to all involved in the future development of the constitution.  

Yours sincerely  

R G (DICK) KIMBER  

P.S. No answer needed or expected.
With Compliments,

Summary of an Address by K.T. Borrow to the Royal Commonwealth Society (Adelaide Branch), on 30 March, 1995, on Aboriginal Land Trusts in the Northern Territory of Australia.

1. The validity of the Trusts depends on the validity of the "take-over" of the Northern Territory of Australia by the Commonwealth of Australia in 1911.

2. The "take-over" cannot be reconciled with the Royal Letters Patent of 1863.

3. Two groups of anti-British land-hungry colonists, one in South Australia, the other in Queensland, took possession of, first the Northern Territory, the second of what may be called the three degree strip, to the west of Queensland.

4. The Colonial Office in 1884 refused to confirm the title to the Northern Territory. When the Chinese population was greater far than the White, the South Australians thought of handing it to an Australian Federation. John Langdon Parsons proved that this was illegal. C.C. Kingston, a South Australian politician, interested in the matter dismissed his Parliamentary Draftsman, with no reason given. This was Dr. Smith, from Natal, a prolific writer on legal subjects.

5. Alfred Deakin a Victorian Federationist, concoted spurious arguments to pretend that the Northern Territory was part of South Australia, which it was not.

6. The result of all this is that an Australian Republic would have to buy this fifth of Australia from the Queen. Perhaps a capital levy could be made to find the money.

7. Capt. H.V. Barclay who wrote an article on the title to North Australia was appointed explorer for the Commonwealth of Australia at a high salary before he could write his second announced article.

8. The historians will have to recount that the Australian Federation began its career in a near treasonable manner.
The Honourable
The Chief Minister
Northern Territory
PO Box 3146
DARWIN NT 0801

Dear Chief Minister

The RSL has noted your call for submissions on 'A New Northern Territory Constitution' in recent newspaper advertisements. We are pleased to offer comment.

In line with our National Standing Policy, we would expect that any new constitution would include recognition of the Crown as Head of State including its primacy of place in oaths and allegiances and the conduct of government and civic business. Our policy also totally supports retention of our Australian Flag and we would expect your new constitution would not demur from recognition of the national Flag and its place in national and community activities.

We would be pleased to discuss the matter further with you should you so wish.

Yours sincerely

W B 'DIGGER' JAMES
NATIONAL PRESIDENT
SUBMISSION NO. 129
MALCOLM H. BRANDON

20/8 Beetaloo Street
Hawker ACT 2614.

4 August 1995

The Executive Officer
Sessional Committee on Constitutional Development
Department of the Legislative Assembly
GPO Box 3721
DARWIN NT 0801.

Dear Sir

I write in response to a recent newspaper advertisement in which you called for submissions as to whether the Northern Territory should have a Bill of Rights.

I believe that there should be no such Bill. Please find enclosed some comments on this subject.

Yours faithfully
Malcolm H. Brandon

[Some enclosures to this Submission have not been included in this Volume.]
1. There is no need for a Bill of Rights

In my opinion, a Bill of Rights could only be justified if Australia had a long record of brutal, corrupt and authoritarian government. We don't have such governments in Australia, and we haven't had them since the convict days. The state of liberty in Australia is excellent, and is one of the finest in the world.

Charles Humana, in his book "The World Human Rights Guide" (1) (some extracts from which are attached), examined the records of a large number of the world's countries in regard to how far they complied with the most widely used yardstick of human rights, the International Covenant on Civil and Political Rights. He gave these countries a percentage rating (if accurate information was available) or ratings of "fair", "poor" or "bad" where accurate information wasn't available.

According to Humana, Australia's record of compliance with the Covenant was 92% - far above the world average of 64%, and one of the top ten in the world. No country's record exceeded 96%. It would therefore be extremely hard for any other country to point an accusing finger at Australia in this respect.

There is a good test to work out whether we need a Bill of Rights - what does the man in the street think? Is there any evidence that he sees any need for such legislation? It's evident that he doesn't. If there was any real feeling among the population that their liberties were in danger, then we could expect to see calls for a Bill of Rights expressed in spontaneous meetings, or letters to the editors of newspapers - but there haven't been. In fact, the present push for a Bill of Rights is coming from what appears to be a tiny minority of left-wingers who seem to have their own ideological barrow to push.

2. A Bill of Rights would create confusion

A Bill of Rights is necessarily written in vague, general terms, and thus creates endless confusion about what its words and phrases are supposed to mean. For instance, there is an article in the Belgian Constitution which states:

"Education is free, and any attempt to interfere with this freedom is punishable by law".

The question obviously arises: what does "free" mean? Does it mean "free of charge"? - is it illegal for educational institutions to charge tuition fees? Are the instructors supposed to work without pay? Is it illegal for governments to levy taxation for the purpose of providing education? Or does the provision mean "free of control"? Is it illegal for an educational institution to impose any discipline on its pupils, on the ground that this interferes with their freedom? Or is it illegal for an educational institution to impose any discipline on its teaching staff, so as to control what they teach or how they teach it? Or again, does "free" mean that anyone who feels like it can attend any course they choose, regardless of whether they are qualified to undertake it and regardless of whether the educational institution has the facilities to teach people efficiently? Or does "free" mean that educational facilities must be available to anybody at any time, regardless of the costs involved - for instance, is it an interference with anybody's educational freedom if the public library is only open on certain days and at certain times?
The above lists just some of the confusions which arise when you attempt to sum up complex social realities in simple terms.

A further area of confusion arises when saying that people have a "right" to this or that. Does this mean merely that there is to be no law forbidding people to do something, or does it mean that the government (or somebody else) has an obligation to provide facilities to enable people to enjoy a right? For instance, if the law says that you have a right to practise your religion, does this mean merely that there is to be no law that says you can't, or does it mean that the government is obliged to build and furnish a church where you can worship, and train a minister to conduct the services? The answer (at least from a commonsense point of view) is no. But supposing the law says that we have a right to vote in elections: does this mean merely that it isn't illegal to vote, or does it mean that the government is obliged to provide polling booths and ballot papers to enable us to express our opinion of the candidates? The answer (again from a commonsense point of view) is yes. So we have opposite ideas of what a right is, depending on the context.

Having a Bill of Rights, then, is a recipe for endless confusion as to what our rights and obligations are.

3. The danger of words and phrases being taken out of context

Sometimes the wording of a Bill of Rights may be clear to those who wrote it, but be misunderstood (whether by accident or design) by later generations. For instance, the Founding Fathers of the United States included in their Bill of Rights the following provision:

"Congress shall make no law respecting an establishment of religion, or for prohibiting the free exercise thereof".

To the Founding Fathers, the phrase "establishment of religion" meant government control over, and official preference to, a particular Christian denomination. The grand example which they had before them was the Church of England, which in those days was the established religion of England in many ways. For instance, the monarch was required, as part of the Coronation oath, to "uphold the Protestant religion as by law established". The State controlled the appointment of the senior clergy (the archbishops and bishops), who in turn controlled the appointment of the parish clergy. The State controlled what doctrines the Church could teach, and the form of its services of worship. You had to be a member of the Church of England in order to be a public servant, or to graduate from a university. It was provisions like these that the Founding Fathers were concerned to prevent.

However, they drew a distinction between that and State support for Christianity in general terms. Thus, the same Congress which passed the Bill of Rights also passed a law to provide Government subsidies for Catholic missionaries who were setting out to convert the Red Indians to Christianity. It was provided that the sessions of the Congress and the Supreme Court were to be opened with prayer. Moreover, when public education was introduced in the nineteenth century, general Christian principles were regarded as an integral part of the curriculum. For many years, American schools used a reader written by the Rev. William McGuffey which contained exhortations to Christian morality. The school day was opened with prayer, and school children frequently had the Bible read to them.
Over the last generation, however, American atheists have waged an aggressive campaign to use the force of the law to expel religion from schools. They have persuaded the Supreme Court to interpret the above mentioned prohibition on an establishment of religion to mean that there is to be "an iron wall of separation between church and state" - quite contrary to the intentions of the Founding Fathers and to the traditional understanding of the phrase. Some of the results of this twisted interpretation have been:

- children have been prevented from sitting together in their lunch hour to read their Bibles;
- school prayers have been declared illegal;
- a handicapped girl was told that she could not use her rosary on a school bus;
- high school students have been told that they can't write essays on the Resurrection of Christ, although they are allowed to write essays on demon possession and suicide notes;
- the mere display of the Ten Commandments on the walls of a classroom has been declared illegal;
- a girl was suspended from her high school for giving out Christmas cards with a religious theme;
- a group of teachers who met before school to pray for wisdom for the day were told to stop or be fired. (2)

These, then, are some of the ways in which a phrase has been twisted to mean something radically different from what the authors had intended.

4. A Bill of Rights would threaten democracy

As explained above, a Bill of Rights is necessarily written in vague, general terms. The question arises: Who decides what these terms mean in practice? Is it the people? Is it the legislative assembly elected by the people? Not at all: it is the judges - a small coterie not elected by the people, in no way accountable to the people, and who, once in office, are extremely difficult to remove. What a Bill of Rights does, in effect, is to remove vast areas of public policy from the hands of the people, or their democratically elected representatives, and put them in the hands of an elite elected by nobody and accountable to nobody. The courts, in effect, become competing legislatures, and not only competing legislatures but superior ones, since under a Bill of Rights they can declare any law invalid, no matter how large a majority that law might have passed the legislative assembly and no matter how firmly the majority of the people may support that law. Thus, the basic premise of a democracy - that it is the voters (acting either directly through a referendum or at one remove through their elected (and removable) representatives in the legislative assembly) who should be the supreme authority - is turned into a mockery.

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5. A Bill of Rights is no guarantee of our liberties

There are, and have been, many examples of despotic governments which have ratified human rights agreements but which, in practice, have denied their people many of the liberties which we take for granted in Australia. (For some practical illustrations, see the enclosed extracts from Mr. Humana's book regarding Iraq, Romania, Zaire and Chile). The governments of the former Eastern Bloc countries, for instance, offered their people all sorts of high-sounding guarantees of rights; but in practice, these guarantees were worthless. These countries were one-party states where people lived in fear of the midnight knock on the door and the secret police, and where criticism of the government was prohibited.

The lesson is clear: if human rights legislation didn't protect these countries from tyranny, it won't protect us. No Bill of Rights will stop a government destroying our liberties if it is determined to do so. If a government wants to establish a despotism, it will find an excuse to do so, Bill of Rights or no Bill of Rights.

6. A Bill of Rights would clutter up our legal system

There are currently long delays in our courts, with many cases taking years to resolve. For instance, the State Aid case dragged on for eight years before the High Court finally resolved it. Likewise, the Introvigne case (involving a schoolboy who sued his teachers for negligence) kept the courts occupied for ten years. If this is the sort of delay we get without a Bill of Rights, imagine how much worse matters would be if we did have one, with its infinite possibilities for legal action. And what about the amount of money expended in legal aid if a Bill of Rights is introduced? The present expenditure of public money on legal aid is colossal. A decade ago, the then Federal Attorney-General (Mr. Bowen) stated that the cost of legal aid was reaching critical proportions, with the Federal Government having to fund the system to the tune of $1.4 million a week (3). Can we really afford further expenditure in this area? It may be a bonanza for the legal profession, but I don't think it is in the interest of the general community.

7. A Bill of Rights would jeopardise the fight against crime

Time and again, Bills of Rights have been turned to the advantage of criminals and to the disadvantage of peaceable and decent citizens.

A current example is Papua New Guinea. When it became independent some years ago, it included in its Constitution the right to freedom of movement. The practical result of this has been that large numbers of young people have left rural areas and drifted to the towns, where they can't find jobs or decent accommodation. In their frustration they turn to crime - to such an extent that rape, robbery and burglary are rife. In urban areas many homes are guarded by barbed wire and bright lighting, and patrolled by armed guards - such is the fear of the "rascal gangs". Obviously, one of the things which need to be done is for the government to have authority to prevent excessive numbers of youths flooding into urban areas. However, this cannot be done at present because of the abovementioned guarantee of freedom of movement. In consequence, the lives of ordinary citizens have been turned into a nightmare of fear and terror.
The United States, too, has suffered grievously from the perversion of its Bill of Rights to favour the crooks. One of the Bill's articles states: "A well-regulated militia being essential to the security of a free people, the right of the people to keep and bear arms shall not be infringed". The reason for this clause was that Americans at that time distrusted a standing army, which they saw as a threat to their liberties. They thought that if war came, an army could easily be mustered on the basis of civilians who did military training in their spare time. However, the practical result of this clause has been that it has been easy for crooks, the mentally unstable and the untrained to get hold of firearms, resulting in a huge number of murders, robberies and injuries.

Macklin Fleming, a retired justice of the Supreme Court of California, quotes other examples where the high ideals of those who drafted the American Bill of Rights have been perverted to favour the criminals (4). One case concerns the Sixth Amendment, which entitles an accused person to the assistance of counsel for his defence. Initially, assistance of counsel was interpreted to mean the assistance of an attorney licensed to practise law and in good professional standing within the jurisdiction in which the accusation was pending. But the ideal of perfect justice envisages counsel in each case who function at maximum effectiveness. Under this conception, California has adopted the view that an accused person is entitled to the assistance of not just any counsel, but competent and diligent counsel, whose absence from a particular trial reduces it to a farce and compels reversal of a guilty verdict. With the full flowering of this doctrine, incompetency of counsel has come to embrace any arguable deficiency in strategy or tactics in the conduct of a case that might have had some effect on its outcome. In California, incompetency of counsel has become a routine ground for appeal, and the guilt or innocence of the defendant has become largely immaterial. In fact, it suits a criminal to get a bad counsel rather than a good one. A convicted criminal, if he can get a new trial on these grounds, stands a good chance that by the time a new trial is brought on, key witnesses will have died, or be untraceable, or be unwilling to testify again, or the courts will have reinterpreted the law in his favour. Fleming goes on to say that remarkably enough, he knows of no case where supposedly "incompetent" counsel have been required to defend their right to continue practising law, or have been prevented from imposing their alleged incompetence on other clients.

In the foregoing, I have tried to show that a Bill of Rights would do no good and a great deal of harm. Of course, I'm not claiming that the existing laws and systems are perfect. There are isolated cases of unjust and oppressive laws, such as anti-discrimination laws; but they shouldn't blind us to the fact that the current system serves us well on the whole. The way to deal with faults in the system is specific legislation to deal with particular problems, not vague legislation which would create the sort of problems listed above.

References

August 11, 1995

To Members and Staff,
Sessional Committee on Constitutional Development,
Legislative Assembly of the Northern Territory, Darwin.

A NEW NORTHERN TERRITORY CONSTITUTION

[This is a response to your published call for papers by August 11, which response I am foxing to you today.]

The work of the Committee under its various names over many years, and the commitment of its long-time Chairman, cannot be in any doubt. Considering the low level of interest in most sections of the NT community, the determination of this few is remarkable and praiseworthy. As a practitioner myself of territories' constitutional development and of territorial-federal relations all my adult life, I speak as one who is deeply interested in and sympathetic to your work.

My comments and conclusions below may be seen by some as criticism of the Committee's work. They are not. Rather, it is a commentary based on bitter experience of these matters elsewhere. For instance, when a dedicated bunch of us created the Northwest Territories (NWT) government in Northern Canada in 1966/67, I really believed we represented self-determination for the one-third of Canada which is the NWT. How soon that illusion evaporated. We had simply assumed that the indigenous Dene (Athabascan Indian), Inuit, and Metis people would benefit from and would adjust their ways to this system. The system was, like the proposals of the NT today, a distillation of Canadian conventions and a search for equality with existing Provinces — the latter an implicit goal. It soon became clear that the new system did not suit or satisfy the indigenous peoples. The eruption of indigenous ethno politics, and the steady hand of the federal government in ensuring that indigenous peoples were not marginalised or outcast as had been the experience in the
Provinces in earlier times, slowly led to a quite different outcome. I have summarised the experience of Canada's three Northern territories — Yukon, NWT, and now Nunavut which is being created from the East and North of the NWT — in a presentation to a conference organised by your Committee, a conference of whose organising group I was a member:


Those three Canadian territories illustrate some of the possibilities. The Yukon retains a conventional political system but with a claims settlement securing certain rights, including wide powers in respect of the whole territory's land and resource development, to the indigenous peoples. Nunavut is an overwhelmingly Inuit-peopled region whose public institutions will reflect Inuit culture and needs. The residual NWT is now embarked on a remarkable effort chaired by a former Canadian Prime Minister to develop a new constitution which meets the needs and aspirations of different regions and of whites, the half-dozen Dene peoples, the Western Inuit (Inuvialuit), and Metis (Indian-descended mixed blood people). The early draft constitution for the residual NWT may be the most interesting and innovative such approach yet seriously proposed in any 'first world' country:


The Nunavut movement, which more or less set the political agenda for the NWT for the past 20 years, was not merely a case of Inuit dissidence. Indigenous peoples and the various regions of the NWT were unhappy. I have excerpted some of the findings of a badly mis-named Unity committee set up by the NWT Legislative Assembly in 1979-80 on pages 11-13 of my booklet on the background and events of the NWT/Nunavut split:


In Canada the attempt by Territorial whites to proceed quickly to Provincehood, often no more than a secret code for their ambition to take control of lands and resources, mobilised the indigenous peoples. A clear-headed federal government refused to hand over lands and resources to the Territories until indigenous claims settlements were reached, this as part of a larger strategy to ensure white indigenous reconciliation (although Canadians more often choose accommodation as the word for the process Australians call reconciliation). Canada and its major national political parties — Conservative, Liberals, and 'labor' (the 'NDP' or New Democratic party) — wished to avoid the racial separation and indigenous marginalisation which had been part of the country's earlier 'frontier' and settlement experience.

Australians have many advantages today which Canadians lacked in the late 1960s when these issues arose there. The indigenous peoples in Australia are now moving consensually towards constitutional reform. The three reports on indigenous social justice published in March and April
1995 by the Council for Aboriginal Reconciliation, by ATSIC, and by the Aboriginal and Torres Strait Islander Social Justice Commissioner all deal with constitutional reform. Indeed, the third of these reports in its entirety, a sort of virtual reality introducing this new constitutional world in which indigenous people, no less than post-1788 immigrants, have a confident and just place in Australian society. The reports are:


In addition to nation-wide approaches, those reports also provide an entry point to micro-constitutional reform — notably funding reform for communities and regional agreements, the purpose of both of which approaches, either separately or in combination, includes indigenous self-government. The North Australia Research Unit in Darwin has many items on the former subject. The seven key studies and publications to date on regional agreements are:


The emergence of indigenous community and regional government within or outside the NT constitution, e.g., secured by separate federal legislation or a federally-enacted and federally-guaranteed NT constitution, is one of the most important possible subjects for the future of the NT. It is my understanding that NT indigenous communities are not yet in a position to define and negotiate the fine details of such outcomes. It would be wrong at this stage to pre-judge their views, or to dismiss concepts of, e.g., a Central Australian territory, or many other measures which might be proposed once more full discussion has taken place within the Aboriginal community.

It is my strong view, based on my experience and studies around the world over 35 years, that the criterion for new NT constitutional arrangements must be a double majority: the formal consent of NT indigenous peoples and of the NT as a whole. No other condition will bring social peace or anything like a unified territory.

However, at the special conference in October 1992 held by the NT Legislative Assembly to obtain and exchange ideas, the key NT ministers not only ostentatiously absented themselves from the session on indigenous issues. Soon after, the closing minister abused the ideas and goodwill of those very people who had been invited to express their ideas. If this is the level of NT political maturity and constitutional development, one must say that the proponents of reform are not yet ready for more control over their indigenous fellow-citizens. It must be remembered that the divided society in the NT, often publicly bemoaned by NT Ministers, is not a result of indigenous politics but of white attitudes and white official neglect of indigenous socio-economic and cultural needs which gave rise to those politics. The horse has bolted, however, and social programs will not remedy the consciousness which has been aroused.

**CONCLUSIONS AND RECOMMENDATIONS**

1. The work, intentions, persistence, and professionalism of the Committee's members and staff over many years have been admirable, for which it is to be congratulated.

2. The political and constitutional assumptions underlying the Committee's work are founded in long-standing Australian traditions in relation to which they appear progressive and refreshing. Nonetheless, a major ocean swell of political and culture is rising in relation to which those assumptions will very likely and soon appear to be archaic, partial, or unnecessarily limiting forces which were not evident or even existing when the Committee began work.
3. These major new forces include
   — a national debate at both elite and grass roots levels concerning Australian identity, politics, values, and future, including an evolving constitutional review component, the republican movement, etc;
   — a national debate and inter-related processes on identifying and recognising the place rights, and powers of Aboriginal and Torres Strait Islander peoples and communities in the national Constitution and in lesser constitutional arrangements which knit together, reflect, and re-form Australia as a national political community; and
   — a national commitment to the reconciliation, including political and constitutional measures, of indigenous peoples and other Australians.

4. Those several processes all promise major political and legal outcomes bearing on the future of all NT residents.

5. Any moves by the NT to pre-empt or prejudge those processes would be unwise and would, inevitably, appear to be a constitutional smash-and-grab launched by sectional interests against the new political values of Australian society and of the indigenous community. Defences of such moves by resort to the listing of conventional constitutional manners such as holding hearings in indigenous communities, etc. are irrelevant. It is important that the NT constitutional movers and shakers not delude themselves by any false innocence in these matters.

6. Any move by governments in Darwin and Canberra to transfer legislation governing Aboriginal lands from the federal government to an NT government and governing system mistrusted by many or most Aborigines in the Northern Territory without the formal consent of the Aborigines to be so affected, e.g., by means of a referendum, would violate norms and standards of international practice which Australia would condemn in other countries. The measure for behaviour by predominantly European populations in these matters is very stern, the more so when the country in question is an affluent liberal democracy with and informed public. To push Canberra into risking very damaging national and international political debate in this matter would be irresponsible, and ultimately damaging to NT politico constitutional and other aspirations.

7. Section 121 of the Australian Constitution clearly states that "The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make impose such terms and conditions including the extent of representation in either House of the Parliament, as it thinks fit." This Clause, and common sense, and the fact that the NT is seeking its political destiny not in the 1890s like the existing States but in the 1990s, render the argument for equality with existing States spurious.

8. The other Outback hinterland regions in "first world" countries — Lapland (Norway, Sweden, Finland); Faroe Islands: Shetland; Greenland; Northern Canada; Alaska; not to mention Torres Strait; Norfolk Island; Cocos-Keeling; and Christmas — all remind us that the search for unique political and constitutional accommodations of small indigenous populations in large or remote areas is normal in the late 20th century. In some cases a unified 'home rule' constitution has proven the answer (e.g., Greenland, Faroes, Norfolk); in others a dual system in which indigenous political settlements (e.g., Canada and Alaska
native claims) and creation or continuation of a general regional government forms the regional constitution.

9. In short, an NT push for Statehood at this time and under the conditions proposed by the Committee, while defensible in 19th century terms, is inadequate in terms of the standards of the turn of the millennium — and may even appear mischievous to those whose political support is ultimately required.

10. Whether or not the existing boundaries and public administration of the NT are found to be meaningful, relevant, or acceptable to the indigenous majority of the long-term NT population — as they were found not be in Canada's Northwest territories, leading to the redrawing of boundaries and re-constituting of governments and constitutions in that region — and what new approaches will emerge from the national and NT indigenous peoples' constitutional discussions, must be the fundamental building blocks for new political and constitutional arrangements in the Northern Territory.

11. It is not in the national interest, and not in the interest of NT residents, whether of European, Asian, or Aboriginal descent, to pre-empt the findings of the national and NT processes outlined in points No. 3 and 10 above. To do so would leave the NT open to justifiable charges of special pleading and political manipulation.

12. The good news is that the more ethnically inclusive approaches adopted in other 'first world' hinterland regions, including Australia, have brought more social unity and inter-ethnic harmony than ethnically skewed approaches like that implied in the Committee's work.

I hope this material is useful in your deliberations

Peter S Jull

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The author was policy and constitutional adviser on indigenous peoples and Northern territories in the office of Canadian prime ministers Clark (Conservative) and Trudeau (Liberal), 1968-76 and 1977-80. In 1976-77 he worked with British Columbia and in the BC group working with the other Canadian provinces on indigenous and hinterland policies. In 1966-68 he was assistant to successive heads of government of Canada's Northwest Territories during creation of that government and setting up of its administration in a new capital. From 1982 till 1987 he was founding head, constitutional development coordinator, and political strategist of the staff of the federally and territorially funded Forum which publicly and democratically developed the constitution for the new Northern territory in Canada, Nunavut. Since 1970 he has conducted case studies for governments and government-created bodies. Canada, and since 1990, in Australia, on hinterland indigenous policy and governance in 'first world' countries, and has many publications in Australia, North America, and Europe on these subjects. He lived in the NT from January 1990 to February 1993 working there on political and constitutional development in territorial, national, and international context.
Abbreviations example
HOS Head of State President, Prime Minister, Chairman of Central Committee
HR House of Representatives Senate, Congress, Parliament
MHR Member of the HR Senator, Member of Parliament
CIR Citizen Initiated Referendum/Referenda
BOR Bill of Rights

Context

I favour simple democracy

- a single HR with no lower levels of representation
- a single HOS appointed and dismissed by majority vote of the HR
- the HOS as formal head of both the Civil and Military Services
- the HOS with an absolute veto on legislation but not referenda
- restraint of government exercised by direct intervention by citizens empowered by provisions of the Constitution
  - MHRs dismissible by petition of 50% of their electorate
  - referenda and veto of legislation compelled by petition of 5% of all electors

My reasoning is as follows

- The federal government uses state governments to relieve itself of responsibility.

  The federal government defines and takes most of the revenue base. The manner of collection is almost as important as manner of disbursement. Although the federal government does allocates funds back to the states, states cannot introduce individual incentives.

  There are financial advantages to dispensing with state government.

  - a single police and judicial system
  - fewer politicians
I apply similar reasoning to state government vs local governments.

- If the HOS is appointed by the HR, the HOS has no mandate to operate contrary to the legislature.

- As the senior public servant, the HOS becomes the final arbiter for fund allocation and responsibility within parts of the public service.

- Since the HOS has to implement legislation, veto gives the chance to reject conflicting legislation, but not to change the charter under which he/she operates.

- The first flaw in restraint of government by separation of the Judicial, Executive and Legislative arms is that the Legislative arm selects and pays the other two. The second flaw is that each arm can pass responsibility to the other. CIR work well elsewhere.

Good government comes from simple structure and clear delineation of responsibility. If this structure could be adopted and works for the Territory, it has a better chance of adoption at the Federal level.

Re Discussion Paper No 7. Australian Republic - Implications for the NT

(i) Is there a requirement for the NT to adopt a republican mode of government should Australia become a Republic?

- Emphatically yes. I prefer Australia to be a republic, but I would have Australia remain monarchic rather than induce such a division of loyalties.

(ii) Should Australia become a Republic is there a requirement for a new NT constitution to be consistent with other States constitutions?

- No.

(iii) Is there a requirement under a NT constitution to have a head of state...

- because Australia formally becomes a republic? No, not strictly speaking. A defacto HOS will evolve anyway, be it the Speaker, Head of the prevailing party, Senior representative, etc. (Note that I am only addressing Australian Republic considerations - I want a HOS.)

and if so...

should that HOS be above party political issues

- No. A government appointed HOS will be a neutral or an advocate anyway. A HOS appointed by separate election could counter an unresponsive government, but will generally create more heat than light.
should that HOS be appointed or removed

- by majority vote of the HR, I hope. Otherwise, by disqualification or recall. It depends on the duties, powers and process of selection.

how long should the term of office be

- If appointed by majority of HR, no term is necessary. Otherwise, 4 years is ample.

what should be the qualifications of office

- no qualifications necessary. The appointee will reflect the appointers, regardless. MHRs should be required to resign their seats if selected.

what powers should the head of state have

- If not already a MHR, at least some veto on legislation. I despise empty ceremony, and a HOS without real power is anathema. Ideally, absolute veto and sole hire and fire authority of the top rung of the Public Service.

(iii) What are the other consequential implications for the NT in the event Australia becomes a Republic

- I don't foresee any..

Re Discussion Paper No 8. A NT Bill of Rights

Preamble

A right is conferred by agreement between parties, and is meaningless without that agreement and those parties.

A right defines classes of activity that are permitted or prohibited.

Rights cannot overlap: one must take precedence and then the other is no longer a right.

Rights cannot provide a thing per se, only behaviour regarding that thing.

A right is a statement, implicit or explicit, of principle.

Responses

1 Terms of inclusion ('Yes' means I favour inclusion.)

(a) What are the merits etc?

A BOR defines our expectations of our representatives and ourselves.
A just society is possible without, but easier with.

(b) should there be a BOR at all?

The NT should have a BOR until such time as the Federal Constitution does

(c) Where should the Bill of Rights be set?

Entrenched in the constitution, with mechanisms for each right; ie not “Citizens shall have the right of assembly” but "No law shall prohibit assembly"

2 The right to life

No. Too many exceptions are needed to be workable, including
- favouring the rights of a foetus over those of its mother. (overlap)
- losing the right of lethal force in self-defence (principle)

3 Torture, cruel inhuman or degrading treatment or punishment

Torture, yes. There is no place in a peaceful society for it.
Mechanism: no physiological damage permitted, no punishment in secret.
As for the rest, I hold that there is a place for punishment as a part of the socialisation process. I would rather a thief was caned, humiliated and thus dissuaded rather than be kept at the public expense whether dissuaded or not.

4 Slavery.

Yes. Mechanism: right to bankruptcy, retention of voting rights.

5 Liberty and security of person. Yes. Mechanism: no arrest without
- informing arrestee of charge
- presentation to a magistrate within 7 days - trial within 6 months.

6 People detained

Yes. Mechanism:
- punishment (of people under sentence) limited to deprivation of liberty
- retention of voting rights while under sentence

7 Imprisonment for contractual default.
8 Freedom of movement

It sounds nice, but I don't have a mechanism..

Fair trial

Yes. Mechanism: open hearing, no retrospective law, right of appeal.

10 Retrospective law and penalties

Yes. Mechanism: prohibit retrospective law and penalties.

11 Right to privacy

It seems to me that privacy is what you have when all your other rights are observed.

12 Freedom of thought, conscience and religion

Thought: yes. Conscience: a sub-set of thought (the reason I prefer "freedom of belief"). Religion: don't know. Thuggee is a religion with ritual killing.

Mechanism: freedom of speech, liberty and assembly.

13 Freedom of expression

Yes. I favour an absolute freedom of speech, including abolitions of

- the law of slander
- restrictions in the interest of national security
- restrictions in the interest of public morals

14 Freedom of assembly

Yes. I favour an absolute freedom of assembly, whether peaceful or not, criminal or not. Mechanism: no law to forbid assembly.

15 Freedom of association

Yes. Mechanism: no law to prohibit association.

16 Right to participate in public affairs

Yes. Mechanism: no diminution of voting rights permitted.

17 Non discrimination and equal protection of the law.

The only guarantee of equality before the law is equal and unchangeable voting rights.
Other rights

(i) The right to own property and to fair compensation for the arbitrary deprivation of property.

Yes. I favour no arbitrary deprivation at all, however if arbitrary acquisition is permitted, the government should be required to submit the acquisition and compensation to judgement in court beforehand and the deprivee should have the right of appeal.

(ii) The right to freedom from arbitrary or unreasonable searches, entry and seizures.

Yes. Mechanism: the right to claim compensation for such treatment.

(iii) Equality of the sexes

The only guarantee of equality before the law is equal suffrage.

(iv) Rights of the child

No. A child by definition lacks capacity to enter into agreement. This is duty, not right.

incomplete

unable to finish and revise before 11-8-95 deadline.
The Executive Officer  
Sessional Committee on Constitutional Development  
Department of the Legislative Assembly  
Parliament House  
DARWIN NT 0800  

Dear Sir  

I enclose a submission to the Committee on Discussion Paper No. 9, "Constitutional Recognition of Local Government".

Yours sincerely  

Paul Watson  
Lecturer in Law
I write to make some observations on the role of the Commonwealth, including recent developments, concerning Aboriginal Councils and associations and to address some issues arising directly from the Discussion Paper.

(i) **The Aboriginal Councils and Associations Act 1976 (C'th)**

The history and intended operation of the Commonwealth *Aboriginal Councils and Associations Act* and the *Aboriginal Land Rights Act* 1976 (C'th) are intertwined. Hence the proposal to "patriate" the latter Act upon Northern Territory statehood should not stand alone. The Committee has previously noted that it would not be possible to exclude the operation of the *Aboriginal Councils and Associations Act*\(^{32}\), and in Discussion Paper no. 9 "presume[s]"\(^{33}\) that this Act will continue to operate. More liaison with the Commonwealth on the operation of the Act after Northern Territory statehood seems called for. As at 30 June 1994, there were 496 associations from the Northern Territory (out of a national total of 2076) registered under the Commonwealth Act\(^{34}\).

Highly relevant here is that ATSIC has recently commissioned a review of the *Aboriginal Councils and Associations Act*. The Consultancy Brief\(^ {35}\) for this Review notes that the yet-to-be-used provisions of the Act dealing with Councils, as Aboriginal local government bodies:

> w[ere] motivated mainly by the absence of local government structures in remote parts of Australia. In this regard, it will be noted that the Act predated self-government in the Northern Territory.

Even before 1978 incorporation under the Northern Territory *Local Government Ordinance*\(^ {36}\) was of course available to Aboriginal communities and groups. However, as the Committee noted in Discussion Paper no. 6, even to July 1993, no Aboriginal community had incorporated as a [conventional] local government municipality\(^ {37}\). The modified form of local government that was introduced in 1978, community government, has been more successfully utilised, as Appendix 4 to Discussion Paper no. 6 shows. It is likely that the pending review of the Commonwealth Act will

\(^{32}\) Discussion Paper no. 6, 36.

\(^{33}\) Page 6.


\(^{35}\) ATSIC File Ref: 95/2228

\(^{36}\) *Local Government Ordinance* (NT) 1954-59.

\(^{37}\) Page 26.
take into account these developments in the Northern Territory, in assessing the overall operation of that Act.

Of particular note is the growth of de facto local government bodies. Discussion Paper no. 9 notes that there are 30 incorporated associations, which although they are not local or community government bodies de jure, are treated as local government bodies for funding purposes\(^{38}\). The four (of the total 30) such associations which are established under Commonwealth law seem particularly anomalous, as the Commonwealth Act also expressly provides for local government Councils, as a separate type of body from incorporated associations (albeit these provisions have not to date been used, this fact being a key feature of the ATSIC Review, noted above). The inference can thus be drawn that the flexibility that comes with being an incorporated trading association is a useful, if not invaluable feature. (The 26 de facto local government bodies set up under Northern Territory legislation would seem to have been established under Part III of the Associations Incorporations Act, rather than as being ordinary non-profit incorporated associations). The future of these de facto local government bodies under Commonwealth legislation will depend on the outcome of the review of the Aboriginal Councils and Associations Act. The wider point can be made here that the consideration of the ongoing role of the Commonwealth Act should be an integral part of the comprehensive statehood "package" for the Northern Territory.

(ii) NT Statehood and Aboriginal Local Government

At the purely Territory level, the Committee needs to consider whether the flexibility that is a feature of the 26 de facto local government bodies under Northern Territory legislation should be contained in any new, or entrenched, form of Aboriginal local government which may arise from the progression to Northern Territory statehood. Connected with this, important issues concerning the content of community government are still unresolved from Discussion Paper no. 6, which perhaps makes the focus on the mechanics of entrenchment in Discussion Paper no. 9 premature. Two specific points requiring priority resolution are whether Aboriginal tradition should override other legal requirements\(^{39}\) and whether the boundaries of Aboriginal local government bodies should be able to co-exist within, or - presumably - across, the boundaries of other local government bodies\(^{40}\). Also requiting resolution is the broader issue - one which is the Committee has looked at elsewhere - of the interplay of Aboriginal self-determination and Northern Territory statehood, and whether this would involve some form of regional agreement. If a regional agreement is to be negotiated, I suggest that seeing the outcome as incorporating a traditional Anglo-Australian local government framework would be inappropriate or misguided. In other words, community government may not be able to necessarily remain recognisably in the image of its template, as a modified form of ordinary local government.

Paul J Watson
Faculty of Business
Northern Territory University

\(^{38}\) Discussion Paper no. 9, 9.

\(^{39}\) Discussion Paper no.6, 37. Also quoted in Appendix 2 of Discussion Paper No.9.

\(^{40}\) Discussion Paper no. 9, 5; compare Discussion Paper No.7, 27.
Mr R Gray  
Executive Officer  
Sessional Committee on Constitutional Development  
Legislative Assembly of the Northern Territory  
GPO Box 3721  
DARWIN 0801

Dear Mr Gray,

Thank you for forwarding documents relating to the development of your new constitution. Please find enclosed a submission relating to constitutional recognition for Local Government.

I have attempted to focus explicitly on matters relevant to constitutional recognition, and to avoid issues such as the range of responsibilities, or the nature of the enabling legislation. Should you want a broader ranging discussion, I would be pleased to provide this.

Nor have I referred directly to other authors or publications. Two documents which should be available to you are Advisory Council for Inter-government Relations, Report 8, *Implications of Constitutional Recognition for Australian Local Government*, Tasmanian Government Printer, Hobart, 1985, and ACIR, Discussion Paper 3, Constitutional Recognition for Local Government, ACIR, Hobart, 1981. I have deliberately not drawn from these in developing the accompanying submission. Should you not be able to locate these, I could make photo copies available if you wish.

Should you require clarification of any of the statements in the submission, I would be pleased to provide this.

Yours sincerely,

[Dr] Colin Balmer
Constitutional Recognition

of

Local Government

Submission
to the Legislative Assembly of the Northern Territory
Sessional Committee on Constitutional Development
from
Dr Colin Balmer

Introductory overview and summary

This Submission will argue that recognition of Local Government should occur in the Constitution of the Northern Territory, both now and when the Territory achieves statehood. It will further argue that recognition should be of a substantive nature, rather than a minimalist gesture and that the provision should be entrenched. It will also argue that while the form of Local Government that is provided for different groups within the jurisdiction of the Northern Territory may vary to suit circumstances, the terms of constitutional recognition should embrace all forms since recognition should be given to the principle, or concept, of Local Government, not to the manner in which this is given expression.

Definitions

For convenience, and in view of the intended objectives of the Sessional Committee, the term "State" will be used throughout to refer to the jurisdiction currently known as the Northern Territory.

For similar convenience, the term "Local Government" will be reserved for use when referring to the system or state-wide collection or network of local governing bodies. The term "municipality" or "municipal area" will be used for a single local governing unit within this system, regardless of whether it might otherwise be known as a city, shire, or council. "Council" will be used to refer to the elected representatives of a municipality.

The term "Local Government" refers to a system of governance whereby adult property owners, residents and occupiers of residential and commercial property are able to elect in a freely democratic manner representatives empowered

(a) to undertake a range of "responsibilities" within the municipal area,

(b) to make by-laws or similar measures in respect of those responsibilities;

(c) to raise revenues by taxes, fees and charges for the purpose of funding wholly or partly these responsibilities; and
(d) subject to the laws of the Territory/State, to do all things relevant and necessary to enable it to undertake the activities for which Local Government has been given responsibility.

"Responsibilities" is here used to embrace the complete range of functions and services which may from time to time be designated by the State as being within the power of Local Government, whether as mandatory powers or permissive ones.

**Vision of Local Government**

Local Government is the only sphere of government able simultaneously to reflect the wishes of local communities, articulate a vision for their future and possessing the capability to transform those visions into actuality. In providing governance, the elected members of Local Government have a responsibility not merely to respond to issues but to offer proactive leadership for the betterment of society.

The State Government, for its part, has the responsibility of recognising that its role is primarily to focus on matters of state-wide significance and in consequence to encourage Local Government to operate in a spirit of partnership in the governance of local areas.

Parliaments and councils are properly seen as partners whose roles are complementary in providing governance for the territorial area of the state and its communities.

**Major roles of Local Government**

Local Government is suited to the role of carrying out those responsibilities which require sensitivity to the wants and needs of the communities within the municipal area and, in particular, those responsibilities:

· which lead to the development of the information base necessary for facilitating, coordinating and regulating in an economical and effective manner activities within the municipality and surrounding local region;

· which are provided at a property, whether of a physical nature or as "personal" services for the householders and occupiers of the property;

· which establish necessary contextual frameworks and infrastructure (whether in the form of networks or at particular locations) for the municipality or the local region;

· which ensure protection of the environment generally, and land care, coast care, and stream catchment in particular, in an ecologically sustainable manner; and

· which are in the form of personal and community services where these do not need to be integrated into state-wide networks and do not require levels of expertise beyond the resources of this sphere of government.

In conjunction with undertaking such responsibilities and to further their objectives, it can be expected that Local Government collectively, and councils individually, will promote, represent and lobby on behalf of the local area and the communities, economic and cultural activities within it.
Essential nature of Local Government

It will be seen that the definition offered above embraces the key features of Local Government, which distinguish it from other voluntary organisations. It is a multifunctional, responsible and electorally accountable institution:

- possessing the power to make [by-] laws binding on all people within the territorial jurisdiction of the municipality, regardless of whether these are "permanent" residents or visitors (as for example laws relating to littering and causing a public nuisance);
- possessing the power to levy taxes and impose fines which can be enforced at law (as for example the payment of rates on properties and parking fines);
- possessing the power compulsorily to require people to undertake specific actions (as for example to remove material likely to create a fire hazard or to comply with public health notices);
- possessing the power to carry out works and undertakings which may in turn require people to undertake complementary action (such as the installation by the municipality of infrastructure for the removal of drainage and sewage, and require property owners to connect to this system); and
- possessing the power to employ staff and to empower them in appropriate ways to undertake their duties (as when health surveyors are empowered to enter properties and conduct tests and collect samples in the interests of the public health of the wider community).

While not included within the definition, another feature of Local Government in some jurisdictions is the power to require those who are enfranchised to vote at elections for the municipal council. The definition relies on voluntary voting by those who are enfranchised, although it is my personal belief that while the Commonwealth and all State and Territory parliaments are elected by compulsory voting, voting for Local Government elections should also be compulsory. However this is not a necessary feature of a Local Government system.

Similarly, the definition does not refer to the term of office of councils, or to whether all council elections should occur on a set day. It is my view that:

- the term of office should be similar to that for the State parliament,
- all councillors should subject to election simultaneously, and
- there are advantages if all council elections within the state are held on the same day.

These attributes are desirable, rather than necessary.

It will be realised that Local Government is a distinctive institution within our democratic system.
Local Government powers to be binding

It will be noticed that people or organisations are not able to opt out of or avoid the Local Government powers that apply to it. They may certainly relocate to another site, whether within the state or elsewhere, but if that site is within a municipal area, they will become liable to comply with all relevant laws and other requirements of that council. Persons and organisations can resign from voluntary organisations and so escape their requirements.

Local Government powers should also bind the Crown. There are two aspects to this. The statement should apply without question to all public authorities and business trading enterprises owned by the State. In the past it has been much debated whether such entities do in fact enjoy the shield of the Crown. Given that they provide commercial type services and functions, it is my view that they should not. The much discussed Competition Principles also support this view.

It is much more debatable whether the shield of the Crown should apply to the activities of general governance. Where the actions are at the core of governance, rather than ancillary to that core, it is agreed that the shield should apply and be reciprocal. That is, Local Government under similar circumstances should also enjoy that right, just as there is reciprocity between the Commonwealth and the States. In regard to ancillary activities, each sphere should be subject to the powers and regulations of the other. Perhaps the two most pervasive instances are in relation to planning and to environmental standards. State buildings should be subject to council planning provisions, just as council waste disposal areas are subject to State environment protection provisions. The size, scale, parking requirements of a government building should not differ from those applied to a similar building being erected for ownership by the private sector. As is well recognised, buildings are bought and sold, and in this process move from public to private ownership and back again.

Electoral responsibility of Local Government

Local Government differs from a regionalised administration system, as might be introduced by a state government, in that the local administrators of a regionalised system are not responsible to locally elected representatives. Instead they are responsible ultimately to the parliament which was elected to provide state-wide representation, only a small minority of whom will represent this local area.

At all times governments seek to be representative of wider interests and to be both effective and economical in their activities. There is a fundamental opposition between the broader state-wide "big picture" perspective which the State parliamentarians are required to take, and the attention to detail and "fine tuning" that is required for the cost-effective provision of services at the local level. State and Local Government complement each other. Both are required, especially in a country as large as Australia, with state jurisdictions as large as they are. It is appropriate that such a fundamental requirement is recognised within the document that defines and depicts the roles of the principal institutions that provide governance and justice.
The need for certainty

Effective and efficient governance relies on a degree of certainty. In part this is ensured by the customary practice, followed in all but extenuating circumstances, of laws not being retrospective in their application. However, this need for certainty is relevant for the institutions of society as well as the laws of a jurisdiction.

Given the lengthy history of Local Government in the countries from which Australia has drawn its institutional framework - England, Wales, Scotland and Ireland - as well as those European countries from which so many of our non-English speaking residents have come, any attempt by a State government to abolish the system of Local Government which has evolved within its jurisdiction would almost certainly create public unrest. This would disrupt the quest for certainty and stability which is a feature of the modern commercial and industrial system. Recognition of the Local Government system in the constitution would remove any likelihood (however unlikely) of that system being disrupted for arbitrary reasons. Constitutions can be changed, but usually only when there is widespread acceptance that something is fundamentally wrong with the present provisions, and widespread discussion has occurred about the provisions that should replace those considered to be no longer appropriate.

The need for flexibility

The focus in this discussion is on the basic features of the Local Government system. All societies change, and it can be expected that an area as relatively unpopulated and whose degree of economic development has yet to reach its potential, as is the Northern Territory at present, will undergo significant change during the next half century. This change will affect the areas presently settled by "western" interests, such as Darwin and Alice Springs, it will affect the areas with only sparse "European" occupation such as the pastoral areas, and it will affect the areas that are predominantly occupied by Aboriginal communities, who themselves will change in ways that cannot be predicted. A centrally located government whose primary interest must be on the state-wide scene, cannot be expected to attend to the fine detail required to handle these diverse circumstances in a manner designed to ensure the most effective governance possible at the local level, and to ensure justice for all at that level. Hence, as well as a system of Local Government being necessary, that system must enable, in fact encourage, diversity of form and task. Only in this way will local people be able to devise and establish the institutions needed for their circumstances and conditions.

The role of constitutions, and the nature of constitutional recognition

One might derive from this the notion that a constitutional recognition clause should simply say that "there shall be a system of elected Local Government". It is submitted that, on the contrary, the very extent of the diversity to be catered for, and the extent of the changes that can be anticipated (even if not predefined) imply the need for some guidelines to give a lead to those who in future years will develop their Local Government institutions. One has only to think of the uncertainty and inefficiency that has resulted from the vagueness of some clauses of the Australian constitution.

While constitutional clauses should be broad statements of general principle, and be capable of reinterpretation to suit emergent conditions as these evolve, they should not be so open and loose as to provide no guidance for the future.
Consequently, I would suggest that the constitutional clause which is drafted to give recognition to a system of Local Government should mention all of the essential attributes of a Local Government system:

- that it be elected
- that it be empowered to undertake responsibilities as defined in [separate legislation]
- that it have power to make [by-]laws
- that it have power to raise revenue
- that it have such powers as are necessary to meet the objectives set for it by the parliament and
- that individual municipalities and councillors be protected from arbitrary dismissal.

While providing that these provisions must be met, the clause would not say on which franchise the council should be elected, or which powers should be exercised, or what the revenue base should be. The provision relating to dismissal should be couched in terms that are comparable to those relating to dismissal of the State Government and which would be included in the constitution. That is, the language should be of a similar degree of detail, although the processes might differ.

Further, such a clause would permit the legislature to develop the Local Government system as a set of sub-systems, such as exists at present given the differences between municipalities of the "traditional" style, such as Darwin and Palmerston on the one hand, the community councils on the other, and possibly "special" towns as a third sub-set. Each sub-system could meet those requirements in different ways.

**Dismissal of councils and councillors**

It is apparent that from time to time all parliaments/councils attract individuals who abuse their powers and responsibilities. It is also apparent that occasionally the government as a whole or the council as a whole exceeds its powers. Accordingly, there must be some means of addressing such excesses in a lawful manner. While each of the three Australian spheres of government has a different status and constitutional basis, each does provide some means of calling the government/council to account.

In the case of Local Government, when a council as a whole is alleged to have acted illegally, there should be a three step process by which the allegations are examined. First, the relevant Minister should call for a routine review by a regularly constituted body, such as the Auditor General or Solicitor General. Where this finds prima facie grounds for a more thorough, and more searching investigation, the Minister should then suspend the council while an enquiry is conducted by independent suitably qualified practitioners. These latter will be chosen to reflect the nature of the allegations and should report as expeditiously as possible. During the enquiry, the role normally taken by the council should be carried on by a commission. The council should be dismissed.
only if the independent review finds the allegations are substantiated AND if these findings are supported by an appropriate review. This latter review might be by parliament itself, it might be by the Governor in Council, it might be by some similar means which is congruent with the processes of the Northern Territory. It should not be a mere “rubber stamp” of the cabinet of the time.

When dismissal occurs, a new council should be elected at a special election for the remainder of the term until the next Local Government election would normally be held.

It is regularly noted that governments seek to apply different standards to councils than they apply to themselves. The suggested process seeks to suggest a predictable and non-partisan approach which would reserve the ultimate penalty only to well substantiated situations. It is a rare event for a parliament to be dismissed - only the Lang Government of New South Wales in the 1930s and the Whitlam Government of the Commonwealth in 1975 come to mind. Despite widespread allegations, and subsequent convictions of individual parliamentarians following due process, the Bjelke Petersen Government of Queensland was not dismissed: its successor of the same Party lost office at an election. The same principles should apply to Local Government.

In the case of individual councillors, a similar institutionalised procedure should be followed. Allegations should be subject to routine enquiry, establishment of a prima facie case should lead to suspension during an appropriately constituted independent enquiry during which the suspended councillor would retain all rights as a citizen. Only if the allegations are found to be substantiated, should dismissal as a councillor occur.

Whether dismissal of a council or expulsion of a councillor should be matters for parliament to decide are probably matters that can only be determined in the context of the complete text of the constitution, for the document must be a coherent and consistent whole. Similarly, while clauses relating to Local Government should be entrenched, and therefore require something more than the simple majority for their amendment, constitutions differ in the way in which entrenchment is achieved. In both instances - dismissal and amendment to the recognition clause - the objective is to ensure that these occur only after due consideration has occurred, and in a manner that reflects a widely held consensus.

It should not be possible for a government with a bare majority and a grievance over one or two issues against a particular council, or the Local Government system collectively, to dismiss the council or abolish the system. Just as it is not unusual for the Australian States to have major differences of view with the Commonwealth, so it is not unusual for a state-wide system of Local Government to have a major difference of opinion with its State Government. Such grievances do not, and should not of themselves, lead to the abolition of one or the other spheres of government.

**Municipal boundaries**

There is probably no more vexed question associated with Local Government than seeking agreement on the criteria to be used and the procedures to be followed when attempting to identify the boundaries of individual municipal areas. The topic has not infrequently given rise to complete books, to say nothing of pronounced inter-government friction. To keep the coverage here within
the limits of a reasonably short submission, only key factors will be mentioned. [Additional material could be provided if required.]

The principal criteria which should always be heeded are:

- community of interest among residents
- geographical features which serve to unite or separate localities
- ease and regularity of communication within the area, from the perspective of both residents and elected councillors seeking to represent the area
- the efficiencies of scale associated with the core functional responsibilities of municipalities

**Community of interest**: A sense of community based on territorial considerations is more common, and more important, in rural areas than urban ones. In the latter the plethora of interests, the wide range of opportunities and the ease of travel result in people having dispersed social contacts, which extend across a wide geographical area. Criteria other than community of interest become more important when considering municipal boundaries in such circumstances. In rural areas, however, close-knit communities continue to be quite common. Where this is the case, they should not be divided between two or three municipalities.

**Geographical considerations**: Geographical features usually provide a very suitable basis for municipal boundaries. In saying this, it must be recognised that, like all general principles, there will always be exceptions. Geographical features embrace natural features such as rivers and ridges and such man-made ones as railway lines, highways, and property boundaries. Broad estuaries sever communities and can serve as municipal boundaries. Smaller streams, however, often create communities as families living on both sides of the stream share the resources of the valley, which was often the simplest route for the first track, now principal road, for the valley. Small streams, therefore, do not make good municipal boundaries for this would divide a community. In these instances, the ridge serving as the catchment divide makes a more suitable municipal boundary. Railways, and to a degree major highways, are divisive, for crossings tend to be some distance apart. However, it should be noted that highways are periodically redesigned and realigned. When this occurs, they may sever properties, resulting in the one property being in two municipal areas. Clearly, major features which are permanent and visible, such as estuaries, escarpments, catchment divides and some classes of property boundary have much to commend them as municipal boundaries for the divisions they create between communities mean that fusion of local interests is less likely than if other features are chosen for the municipal boundary.

**Ease of communication and representation**: This criterion is linked to the already discussed concept of community of interest, but raises other issues. Mail and telephone are readily available to most families and so enable all residents to contact easily with each other and to elected councillors. They underpin the sense of unity and identity which is present in all cohesive municipal areas. Areas that share this should be included within the one municipality unless there are other overriding considerations. However, representativeness requires more than ease of communication. It implies that the representative has both a factual knowledge of the area and a "feel" for the way in which its residents think and perceive issues. Consequently, municipal areas should be such that, given the
available and affordable means of travel and communication, it is practicable for representatives to
gain familiarity with, and be known to all sections of the municipal area.

**Economies of scale:** Economies of scale tend to dominate discussions of boundary determination.
In this context, it is appropriate to quote from a Discussion Paper commissioned by the Joint
Officers Group of the Local Government Ministers' Conference and released during February,
1991:

*It is often assumed that amalgamations would improve the efficiency of Local
Government by achieving economies of scale. ....

However, there is little real evidence available to suggest that inefficiency exists in
Local Government to any extent and, if it does exist, that it bears any relationship to
whether the unit of Local Government is fiscally strong or weak. While the theory of
economy of scale would suggest that larger units of Local Government would provide
opportunities to reduce the unit cost of services, the diversity of Local Government
situations is such that amalgamations may not result in opportunities to obtain scale
economies. There are also views that suggest there are diseconomies of scale with
larger bureaucracies

The reality is that efficient and effective Local Government is, in general terms,
related more to electoral, administrative and management processes than to
structural conditions.

*(Morton Consulting Services: Issues Review: Local Government (Financial
Assistance) Act, 1986, p. 11

As this statement suggests, there is often difficulty in measuring this concept. Suffice to say here that

(a) the measures used to determine economies of scale must be appropriate and be used in such
a way that genuine comparisons are undertaken, not ones that are superficially similar;

(b) the costs used must be specifically defined for this purpose, not ones abstracted from
administrative records compiled for other purposes; and

(c) each function has its own scale of operation, and in a multi-functional operation such as
general state government or Local Government, the territorial area which will enable efficient
operation for one function will almost certainly be a less than optimal area for another.

There has to be "give and take" on this issue.

It is common knowledge that accounts are kept in different ways and that the costs of
"administration" are not comparable from one municipality to another.

Neither efficiency nor effectiveness of municipal operation is the sole preserve of "large" councils,
regardless of how "large" is measured. Nor, by the same token, is a modest degree of efficiency or
effectiveness found only in small councils.
In other words, to base the territorial structure of Local Government on arguments related to economic aspects of community of interest is likely to focus on the "symptoms" of good or poor administration, rather than their causes. Opportunities for co-operation between municipal areas will still be needed; and legislative reform of the planning system will be more likely to provide incentives for such cooperation than boundary definition.

**Economic viability:** In the late 1980s, when the Victorian Cain Government was contemplating the restructuring of the Victorian Local Government system, it suggested that, among other things, the sizes of restructured municipalities should reflect criteria related to minimum resident population and minimum levels of self-raised revenue, to ensure that each municipality would be able to provide appropriate levels of service and employ professionally trained staff. The Tasmanian Local Government Advisory Board adopted a similar approach in its review of the territorial areas of Tasmanian Local Government in the early 1990s. While not opposing this approach, it must be noted that such criteria tend to be chosen arbitrarily and to not reflect adequately the total circumstances of each option that is under consideration. Furthermore, there will be occasions when an area should be constituted as a municipality in the light of other criteria, such as geographical cohesion and community of interest, but where economic viability is an impossibility. In such circumstances, it is my view that the municipality should be established and other arrangements put in place to ensure that it provides an appropriate quality of service, and has relevant professional support. One method of achieving this would be for the State to establish a pool of funds, similar to the Commonwealth Financial Assistance Grants, but limited in its distribution to those municipal areas which cannot be efficiently merged with any other municipality, and for the funds to be tied to ensuring the receiving council uses them to obtain professional expertise. [In southern Australia, my thoughts are that each municipality would be eligible to receive a maximum of $0.5 million, to be spent on two or three professional areas, such as engineering, environment, and financial management. The idea I have in mind is modelled on the per capita minimum grant under the FAGs system, except that it would be applied to instances where it is not feasible to merge the municipality into some larger unit Examples might be because it is an island, or because it is an isolated settlement (such as a mining township). The concept may provide a model that could be adapted to the circumstances of the Northern Territory.]

**Boundary determination process:** Given the complexities of this issue, boundary determination should be the subject of an impartial enquiry with an opportunity for all interested parties to make a significant contribution to the discussion. It is submitted that in at least some of the Australian states, Boards of Enquiry (by whatever formal title) established in partnership between the State Government and the state-wide Local Government Association, have successfully arranged restructuring of Local Government territorial areas in recent years. Such a model is worth adopting in all jurisdictions, for the need for territorial change seems likely to remain as a response that must be considered when reviewing the implications of other changes that are occurring.

**Conclusion**

Since the commencement of Local Government in Australia more than 150 years ago, its roles have remained fundamentally unchanged:

- to be an informed and responsible decision maker in the interests of developing the community and its resources;
· to be a responsive and effective provider and co-ordinator of public services at the local level;

· to be a catalyst for, and a resourceful initiator and co-ordinator of, local effort; and

· to represent the local community to other governments and the wider society.

An institution whose roles are so essentially at the heart of our democratic way of life and which complement necessarily the roles of central governments in the provision of essential infrastructure, the protection of the environment in an ecologically sustainable manner and the governance of society, warrants recognition within the constitutions of both the State and the Commonwealth.

The Northern Territory is urged to provide a meaningful statement of recognition to its system of Local Government in its constitution, and to entrench this statement in a suitable manner.
Central and Northern Land Councils

PO Box 3321 Alice Springs NT 0871
Telephone 089-51-6215 & Facsimile 089-53-4343

PO Box 42921 Casuarina NT 0811
Telephone 089-205100 & Facsimile 089-452633

25 August 1995

Hon Steve Hatton MLA,
Chairman,
Sessional Committee on Constitutional Development,
G.P.O. Box 3721,
DARWIN N.T. 0801

Dear Minister,

Please find enclosed the Response of the Central and Northern Land Councils to the Exposure Draft of a new Constitution for the Northern Territory which was prepared by the Sessional Committee on Constitutional Development.

Yours sincerely,

for L.B. TILMOUTH
DIRECTOR
CENTRAL LAND COUNCIL

DARRYL PEARCE
DIRECTOR
NORTHERN LAND COUNCIL
RESPONSE OF THE CENTRAL AND NORTHERN LAND COUNCILS
TO THE
SESSIONAL COMMITTEE ON CONSTITUTIONAL DEVELOPMENT
EXPOSURE DRAFT - PARTS 1 TO 7:
A NEW CONSTITUTION FOR THE NORTHERN TERRITORY.
AUGUST 1995

This paper does not attempt to address the detail of any of the specific provisions of the Exposure Draft of the proposed Northern Territory Constitution.- published by the Sessional Committee on Constitutional Development ("the Committee"). Such comment cannot be forthcoming until Aboriginal people are able to obtain expert advice and then disseminate that for discussion amongst all Aboriginal people in the Territory. The rights and entitlements that are to be included in the constitution and the range of related matters covered by Aboriginal self-determination and Aboriginal self-government have not yet been resolved. At a later stage, Aboriginal people will be able to negotiate with government about the framework and scope of the constitutional development process and also the provisions that might be contained in any Northern Territory constitution.

1. A Modern Australian Constitution:

The development of a constitution for the Northern Territory (whether or not accompanied by the grant of statehood) is a unique opportunity for the passage of a modern Australian constitution. As Professor Cheryl Saunders said:

"You in the Northern Territory are in a unique position to draft a modern constitution to meet modern needs..." 41

Such a modern constitution must recognise the special rights and entitlements of Aboriginal people and facilitate Aboriginal self-determination. These rights must be enforceable. It is not sufficient to merely acknowledge the historical reality of prior occupation by Aboriginal people.

In tabling this Exposure Draft of the Northern Territory Constitution, the Chairman of the Sessional Committee on Constitutional Development, the Hon Steve Hatton MLA said

"[T]he Committee recognises that there will be no major constitutional development in the Northern Territory without the support and recognition of the basic rights of Aboriginal people".42

It is apparent from the series of Discussion Papers and Reports published by the Committee that work has been done and some progress has been made in some areas over the ten years of its operation. However the Committee gives insufficient attention to the fundamental importance of the

41 Professor Cheryl Saunders, The Contents of Constitutions paper delivered to the Constitutional Change in the 1990s Conference in Darwin in October 1992, p. 7.

42 Hon Steve Hatton, Chairman Sessional Committee for Constitutional Development, Tabling Statement delivered on the N.T. Legislative Assembly on 22 June 1995.
recognition of Aboriginal people's native title rights and fails to recognise the impact this has had on the Committee's work. Many of the issues relevant to the rights of Australia's indigenous people that must be addressed in a constitution for the Northern Territory are similar to those already being discussed and researched in the Federal arena as Australia approaches the centenary of Federation. Considerable work has been carried out by a range of bodies including the Constitutional Centennial Foundation Inc.\textsuperscript{43}, and by ATSIC, the Council for Aboriginal Reconciliation and Aboriginal & Torres Strait Islander Social Justice Commissioner and the Northern Land Council in their submissions to the Federal government on the Native Title Social Justice Package\textsuperscript{44}. We will not repeat the work carried out by those organisations here but refer the Committee to this work and comment that it is very disappointing that the Committee has either ignored this work or rejected it for reasons that are not given in any of its published Discussion Papers or Reports.

2. The Scope of Issues Raised in the Development of a N.T. Constitution:

In his paper on Constitutional Reform nationally, Peter Jull identified three main practical meanings of constitutional reform, the latter two of which are relevant here (the first was amendment of the national Constitution):

"2. change in the general structures of Australian political life (the summit of which structures is the national (Constitution itself) and re-organisation of responsibilities and relations among governments whether by Constitutional amendment, other laws, or other politico-administrative arrangements; and

3. the creation of local 'constitutions' providing for the powers and procedures whereby indigenous communities or groups of communities manage their own affairs to a greater or lesser degree".\textsuperscript{45}

If the Committee is to try to properly address the rights and needs of Aboriginal people in developing this constitution, then it must look much further than what rights and entitlements are to be explicitly contained within the constitution. The entrenchment of those rights is important but it must be accompanied by a genuine desire to listen to what Aboriginal people want and to be flexible and creative in trying to meet those needs in a range of ways. As Jull went on to say ....

\textsuperscript{43} See the speeches and papers from the June 1993 conference \textit{The Position of Indigenous People in National Constitutions} published by the Council for Aboriginal Reconciliation and the Constitutional Centenary Foundation Inc. AGPS; see also Frank Brennan's paper \textit{Securing a Bountiful Place for Aborigines and Torres Strait Islanders in a Modern, Free and Tolerant Australia} published by the Constitutional Centenary Foundation Inc. 1994.


"... unless constitutional changes are the ones which Aborigines and Islanders want, and unless changes actually transfer powers and rights - and the means to use them - to indigenous peoples, reform will mean little." 46

Some of the other major issues to be considered in developing a constitution for the Northern Territory might be:

- recognition and entrenchment of forms of Aboriginal self-government;
- recognition and entrenchment of Aboriginal customary law including recognition of the Aboriginal justice system;
- a Bill of Rights containing not only universal human rights, but also special indigenous people's rights, both collective and individual;
- a guarantee of the preservation and protection of Aboriginal cultural heritage;
- permanent protection of rights embodied in existing Commonwealth legislation which is beneficial to Aboriginal people, such as the Aboriginal Land Rights (Northern Territory) Act 1976;
- review of financial arrangements for Aboriginal communities to provide real autonomy in decision-making;
- the need for any N.T. constitution to be adopted by a double majority: a majority of Aboriginal people and a majority of all Territorians;
- the mechanism for amending the proposed N.T. constitution.

3. Aboriginal Need to Develop a Comprehensive Constitutional Approach:

Indigenous people in Australia, and elsewhere, are seeking constitutional reform "to guarantee the survival of their culture, society, livelihoods, and territory against alien majorities who are encroaching on them" 47.

Governments have considerable resources to enable politicians and public servants to visit other countries and study comparative situations. Aboriginal people are significantly disadvantaged by lack of access to information and advice from other indigenous peoples who are facing similar problems and also from other experts. Aboriginal people need the opportunity to understand the many different options that have been considered and used in other countries as we try to develop a uniquely Australian solution to current problems with the Federal Constitution as well as the in the development of a Northern Territory constitution. Without this access to information Aboriginal people are unable to participate effectively in the important debate about these issues. While some work has been done over a period of years the pace of progress is dependent on the level of resources available within Aboriginal organisations.

46 ibid.
47 ibid.
4. Processes for Consultations with Aboriginal people:

The processes used to develop a constitution for the Northern Territory are probably as important as any document which results. The processes must be agreed to by Aboriginal people at the outset and they must feel confident and empowered by them. The process will take considerable time and commitment and will not be resolved by a single event like a Constitutional Convention.

"It is important to realise that in constitutional work, process is as important as product. Thai is, the legitimacy of the process by which change is agreed or negotiated is essential to its results being accepted by both sides. This is particularly true if the settlement of historical grievances is a principal factor. Indeed, the whole exercise will seem unjust or will become a new grievance in itself if the process is not seen to be fair by the weaker side".48

The visits by the Committee to towns and remote communities in the Territory are not at all adequate as consultations. Large scale meetings with some members of a community conducted in English, which is not the first language of most Aboriginal people, and which are likely to be found to be intimidating to discuss very complex issues of government with which most people would have no familiarity at all is not real consultation. The Committee must identify through consultations with Aboriginal people a culturally appropriate consultation process for these issues.

Moreover, Aboriginal people are unable to participate in any consultation process until they are provided with the resources necessary to investigate various ways in which the interests of Australia's indigenous people may be given constitutional recognition. This process was begun through the Northern Territory Aboriginal Constitutional Convention: Today We talk About tomorrow held in Tennant Creek in August 1993. However this convention was only part of the process.

Aboriginal people also need to have sufficient resources to carry out their own culturally appropriate consultations and community education in towns and remote communities. This would enable all Aboriginal people in the Territory to explore the options which may provide them with their rightful recognition in a modern constitution. They could then make informed decisions about what they want.

"Next we must have mechanisms to transmit our views to government and non-indigenous Australia. Such mechanisms must retain the integrity of our voices and at the same time be able to advocate our interests in terms which can be understood and accommodated by government and non-Indigenous organisations, agencies and individuals. It is the perpetual experience of Indigenous peoples that we speak and the

words which are then printed as ours bear little resemblance to what we have said and rarely retain their integrity". 49

Finally Aboriginal people must be given ample opportunity to negotiate with government over the constitutional recognition of their special rights and entitlements and in addressing the other issues which may be raised (such as those set out above).

To date the consultations with Aboriginal people have been inadequate. Without the precondition of extensive and appropriate consultations there will be no basis for meaningful negotiations. The process will have no legitimacy and will fail unless this happens.

Mr. Rick Gray,
Executive Officer,
Sessional Committee on Constitutional Development,
Department of the Legislative Assembly,
G.P.O. Box 3721,
Darwin, N.T. 0801.

Dear Sir.

Please find enclosed my thoughts in respect of the relevant sections of the proposed Northern Territory Constitution.

I would be pleased to be able to appear before a Committee meeting at some time to answer any questions members may have or to explain in greater detail the thoughts behind my proposals.

Yours faithfully

G.E. Casey
Section 3.6(4) &(5)

Alternative 1 - Single Member Electorates, This position gives the greatest stability to the structure of the Government as the will of the people can be clearly demonstrated. A multi member system could see a member from the Government side and a member from the opposition side elected as happens in the case of the N.T. Federal Senate seats. The nett effect in a N.T. Government would be to neutralise the representation of that electorate.

Section 3.11

Alternative 1 - No Fixed Term, Affords the Government and the Governor the maximum flexibility to as there can be elections called when and if they be needed. The maximum period of four years gives a stable time frame in which the Government can implement its policies. Should there be a crisis the Government, with the authorisation of the Governor, could go to the people for their endorsement or otherwise. The only drawback is probably in the timing of elections as this would be according to the Government's agenda, although theoretically this should serve to keep the opposition of the day on it's toes. A method of minimising the politicly motivated timing of elections (e.g. a Government calling an election part way through their term of office because they are "riding high" with the electorate) would be to require the Premier/Chief Minister to demonstrate just cause to the Governor and Executive Council for the calling of an early election.

Section 3.15

Additional sub-section (1) (e) The person has been convicted of contempt of court.

The purpose of this clause is that a person having been so convicted has demonstrated that they have no proper respect for the laws of the land or the institutions administering these laws. It therefore stands to reason that a person showing such disrespect cannot be guaranteed to uphold the principles and obligations of a member of Parliament. Sub-section (d) precludes a person convicted and sentenced to a term in excess of one year from nominating or holding office. Although contempt of court is regarded as a serious offence it seldom attracts a sentence of this period of time. This additional sub-section will ensure that candidates for election to Parliament will be of impeccable character.

Sub-Section 2 would appear to contradict Sub-section 1 (b) (i) and (ii)

Part 4 - THE EXECUTIVE

Additional Sub-section 4.1 (a) Reserve Powers

The Governor has the power and the right to dismiss, if he deems it necessary and appropriate, a politically appointed Public Servant, a Member of Parliament, a Minister or the Government provided it has been demonstrated that :-

(i) the Public Servant, Member of Parliament or Minister has been guilty of misleading Parliament or contributing to the misleading of Parliament
the Government has failed in the execution and maintenance of this Constitution and/or the laws of the Northern Territory.

The purpose of this suggested additional Sub-section is to provide accountability of politically appointed Public Servants, the Parliamentary Members and indeed the Government itself. This accountability provides a mechanism equivalent to the Council of 24 Barons referred to in the Magna Carta of 1215 which is the fundamental principle of the Westminster system of Government. As the N.T. is operating under a single House parliamentary system the Governor, together with the Executive Council, takes the role of the Upper House. Allowing for our small population this alternative is better and more economical to maintain.

4.2 (1) ............. who shall hold office for a term of four (4) years. The Governor shall be appointed by the Parliament who shall vote by way of secret ballot on nominations called for from the public and having the same qualifications as a member of Parliament and carried by a minimum 75% majority of the Members of the Parliament.

4.5 EXECUTIVE COUNCIL

(2) The Executive Council shall consist of the persons for the time being selected by the Governor and consisting of seven (7) members having the same eligibility as a Member of Parliament. The Governor may from time to time create additional temporary positions should the Executive Council deem this to be necessary. An Executive Council shall have a quorum of five (5). Members of the Executive Council shall be appointed for a term of Two (2) years with the option of nominating for further terms. Members of the Executive Council shall receive remuneration such as is provided for by or under an Act.

The purpose of this amendment to Sub-section 2 is to enable the Governor to receive advice from persons having expertise in various fields and are not politically or financially motivated.

The exclusion of people holding Ministerial office is designed to maximise the range of information available to the Governor and avoid the situation whereby he/she becomes a mere "rubber-stamp" for a political party, in power. A cynic could state that the role of the Governor as proposed is akin to the current Administrator, an expensive social officer.

5.3 WITHDRAWAL OF PUBLIC MONEYS

(1) ............. as authorised by an Act and such issue or expenditure shall be reported in the Auditor General's Annual Report.

(2) ............. provided by or under an Act and such investment shall be reported in the Auditor General's Annual Report.

The purpose of these additions is to ensure Government accountability.

7.1 PROTECTION OF ABORIGINAL LAND RIGHTS

(2) Alternative 2 with three-quarters of the vote should ensure maximum protection and avoid protests.
(4) Addition to this sub-section. The Aboriginal people coming before this Court or body shall be free to select their own representative and/or advisers and not bound to any statutory body representing or claiming to represent the Aboriginal people.

The purpose of this addition is to allow the various Aboriginal groups greater freedom of choice in their selection of representation. Under the present system small groups often disagree with the actions etc. of the Land Council but are powerless to have their individual views considered.

7.2 PROTECTION OF ABORIGINAL SACRED SITES.

Addition to 7.2 A clause which precludes the registration of new sacred sites because by the time this Constitution is adopted sufficient time will have elapsed to enable any genuine claims to have been lodged for registration.

7.3 (New Sub-Section)

   Aboriginal sites of archaeological importance shall be registered if discovered or disclosed by non-aboriginals as Heritage area not liable to claim as sacred sites. Such sites shall be afforded protection by relevant Acts.

The purpose of this additional Sub-section is to provide a mechanism whereby sites of significance the knowledge of which has been lost by the Aboriginal people but have been discovered by non-Aboriginals. Under present circumstances non-Aboriginals are reluctant to reveal the location of such sites because although they are obviously abandoned and forgotten, they will if revealed, become subject to a Land Claim or a Sacred Site claim.
SUBMISSION NO. 136
SUPREME COURT DARWIN

CHIEF JUSTICE'S CHAMBERS
SUPREME COURT
DARWIN

STRICTLY CONFIDENTIAL

20 September 1995

Mr Rick Gray
Secretary
Sessional Committee on Constitutional Development
Parliament House
DARWIN NT 0800

Dear Mr Gray

The Judges of the Supreme Court consider that it is appropriate that comment be made by them in respect of the Exposure Draft, Parts 1 to 7 of the new Constitution for the Northern Territory.

Our attention will be directed especially to Part 5 - The Judiciary, but the relationship between that Part and others also needs to be carefully considered.

The importance and complexity of the issues will necessarily require time for adequate consideration.

Please note the interests of the Court.

The manner and method of the proposed judicial comment has not yet been decided.

Yours sincerely

Chief Justice
18 March 1996

Mr G Nicholson  
Northern Territory Attorney-General's  
Department  
Counsel's Chambers  
GPO Box I 722  
DARWIN NT 0801

Dear Mr Nicholson

I consider your draft memo fairly represents our preliminary discussions regarding the draft Constitution.

I see this as being an ongoing task. Other issues may arise as the Judges have greater opportunity to focus on the matter. It would help our further consideration to have an indication of the Committee's response on the matters raised so far.

Yours sincerely

Chief Justice
7 March 1996

Our Ref:
Your Ref:

Chief Justice
Supreme Court
Mitchell Street
DARWIN NT 0800

Your Honour,

DRAFT NORTHERN TERRITORY CONSTITUTION - COMMENTS OF NORTHERN TERRITORY SUPREME COURT JUDGES

I enclose a first draft of a memo summarising the discussions we had on 6 March 1996, for your consideration and comments, as agreed.

I look forward to your reply.

Yours faithfully

GRAHAM NICHOLSON

Enc.
TO: Sessional Committee of the Legislative Assembly on Constitutional Development, Darwin.

FROM: GRAHAM NICHOLSON.

DATE: 7 March 1996

DRAFT NORTHERN TERRITORY CONSTITUTION — COMMENTS OF NORTHERN TERRITORY SUPREME COURT JUDGES

I was recently contacted by the Chief Justice of the Supreme Court of the Northern Territory, His Honour Justice B Martin, with a request that I meet with the Judges of the Supreme Court to informally discuss in broad terms the constitutional proposals of the Committee.

I attended that meeting on Wednesday, 6 March 1996 at 4.30 pm at the Supreme Court Building. Present was His Honour the Chief Justice and their Honours Justice Kearney, Justice Mildren and Justice Thomas. Justice Angel and the Master sent their apologies. Full sets of the Committee's tabled papers were presented to those at the meeting.

The Chief Justice stressed that any comments made at the meeting were confidential and did not represent the considered or final views of either their Honours collectively or individually. It was intended to be an informal discussion only with a view to assisting the Committee in the process of constitution-making.

It was agreed that I would prepare this summary of the meeting in draft and for it to be settled with the Chief Justice before its submission to the Committee for its consideration. This has been done.

The Meeting addressed its comments to the Committee's Exposure Draft Parts 1 to 7 of June 1995 and its Additional Provisions to the Exposure Draft of November 1995, as tabled in the Legislative Assembly. The comments are summarised as follows -

1. Clause 2.1(f) (Exposure Draft - Sources of Law)

It was queried why the term "the common law of the Northern Territory" was used (see also clause 2.1.1 in the two boxes, where the same term is used). It was felt that this should simply be a reference to "the common law".

2. Clause 2.1.1 (Exposure Draft - Recognition of Aboriginal customary law as a source of law)

Some concern was expressed about the intended operation and effect of this clause, including its implications for the workload of the Court, although no specific proposals for amendment were advocated.
3. Clause 6.1 (Exposure Draft - Judiciary)

It was questioned whether it was intended to create a new Supreme Court by the new Constitution to replace the existing one, or just to continue the existing Supreme Court. It was noted that the transitional provisions had not yet been drafted. A clear preference was expressed for the continuance of the existing Supreme Court and its Judges and officers, with a continuance of existing proceedings, etc.

4. Clause 6.1(3) (Exposure Draft)

It was felt that the jurisdiction of the Supreme Court should be expressed to include that under existing laws in force in the Northern Territory as at the commencement of the new Constitution.

It was also felt that, while the Supreme Court may not need exclusive jurisdiction as to matters arising under the new Constitution or involving its interpretation, there should be power to remove such a constitutional question from a lower court into the Supreme Court or for a lower court to refer it to the Supreme Court. Query, whether this need go in the Constitution or just in ordinary legislation.

5. Clause 6.1(4) (Exposure Draft)

It was pointed out that such an advisory jurisdiction was novel in Australia. Their Honours noted the other provisions in the draft Constitution providing for a reserve power in the new Governor in constitutional matters. If the advisory jurisdiction was to be retained, it was felt that there should be an express discretion in the Court to decline an invitation to exercise that jurisdiction. It was queried why standing need be accorded to the Speaker, the Executive Council and the Premier in addition to the Governor in instituting proceedings for an advisory opinion. It was suggested that this jurisdiction be limited to specific Parts of the new Constitution - for example, those Parts relating to the Legislature and the Executive, and not to provisions such as those relating to rights.

6. Clause 6.2 (Exposure Draft)

It was felt that the draft Constitution should provide for a minimum number of Supreme Court Judges (not being additional or acting Judges) - the number of 4 was suggested, being the absolute minimum number necessary to constitute a Court of Appeal. If the number of such Judges at any time fell below the minimum number, there should be an obligation on Government to make sufficient appointments as soon as practicable to make up the minimum number.

The drafting of clause 6.2(1) and (2) was queried as to the manner of consultation with the legal profession. It appeared that the Governor would be the person to undertake that consultation under the existing draft, whereas perhaps this was more appropriately a task for the Attorney-General.

7. Clause 6.2(3)(Exposure Draft)

There was some discussion as to whether this provided an adequate guarantee of the independence of Supreme Court Judges, but no specific suggestions were made.

8. Clause 6.2(4) (Exposure Draft)
It was felt that there should be provision for the appointment of a Judge who has reached 70 years of age or more, and who is fit and able to continue in office, as an acting Judge, for such term and otherwise on such terms and conditions as may be determined. At present, clause 6.2 does not provide for acting or additional Judges.

9. Clause 6.2(6)(Exposure Draft)

It was felt that the prohibition on reducing a Judge's remuneration or terms and conditions of appointment should be expressed to be without the consent of the Judge - that is, a Judge should be able to consent to such a reduction.

10. Clause 6.3 (Exposure Draft)

It was queried why the term "judicial authority" was used in this clause, in contradistinction to the term "judicial power" used in Clause 6.1 (1). The latter term was thought to be preferable.

Some concern was expressed as to the capacity of the new Parliament to create a tribunal or other body (not being a court) that could exercise judicial power. It was felt that the section should at least exclude such a body from imposing a sentence of imprisonment (including a suspended sentence) or otherwise from committing a person to prison (including for contempt). Their Honours noted, however, the power of the Legislative Assembly to impose a penalty of imprisonment in the Legislative Assembly (Powers and Privileges) Act of 1992, section 25, which would need to be considered in this context.

11. Clause 7.1(3) (Exposure Draft - Aboriginal Land Rights)

Concern was expressed as to the possibility of a Supreme Court Judge being expected to sit with non-judicial officers on the body to be established to determine whether there should be a disposal of, or other dealing in, Aboriginal land in fee simple. It was felt that the proposed function should be treated as a judicial function, not a political one. If this clause was to remain, membership should be limited to a Supreme Court Judge only, to be nominated by the Chief Justice.

It was also questioned whether the decision of the Supreme Court Judge in this matter should be subject to appeal in the normal way, bearing in mind, that the proposal was for a judicial determination, not a mere recommendation.

The drafting of these provisions was queried in so far as they refer to "an estate or interest in freehold". It was felt that the wording should follow that of the Aboriginal Land Rights (Northern Territory) Act 1976, that is, "an estate in fee simple".

12 Part 5 (Exposure Draft)

It was pointed out that there were two "Part 5's". The need was stressed for Parliamentary Counsel to settle the draft so as to ensure internal consistency.

These comments are submitted for the consideration of the Committee.

GRAHAM NICHOLSON
Mr Rick Gray  
Executive Officer  
Committee on Constitutional Development  
Legislative Assembly of the Northern Territory  
GPO Box 3721  
DARWIN NT 0801  

Dear Mr Gray,

PROPOSED WORDING OF THE CLAUSE OF THE NORTHERN TERRITORY CONSTITUTION TO RECOGNISE LOCAL GOVERNMENT

When I appeared before the Committee in Darwin on Wednesday 26 July, 1995 I indicated that the Local Government Association would consult with Councils and Associations in the Northern Territory on the proposed wording of the clause of the Constitution to recognise Local Government.

At the Annual Government Meeting of the Association at Yulara earlier this month, members agreed on the following wording and it is submitted for consideration of the Committee:-

RECOGNITION OF LOCAL GOVERNMENT

1. There shall continue to be a system of Local Government for the State under which democratically elected local government bodies are constituted with responsibility for the good order and good government of those parts of the State that are from time to time subject to that system of Local Government.

2. The manner in which local government bodies are constituted and the nature and extent of objectives, powers, functions, duties and responsibilities shall be determined by or under Acts of the Parliament from time to time in force.

3. In enacting legislation relating to Local Government the Parliament will provide for -

a) a general competence power for each local government body to act autonomously in response to their community’s needs.

b) a central core of powers and functions;
and

c) a sound and secure financial base including adequate taxing powers.

4. There shall be full consultation between the State and Local Government before any changes are made to objectives, powers, functions, duties, responsibilities, financial resources and boundaries of local government bodies.

5. A Local Government body cannot be dismissed without a public enquiry and subsequent motion of the State Parliament. A duly elected Local Government body must be reinstated as soon as practicable and, in any case, within 12 months of dismissal.

There has been full consultation with Local Government in developing the above proposed clause.

Please also advise the Committee that the Association supports the principle of double entrenchment for amending the new Constitution and will be seeking a Local Government appointment to the Constitutional Convention when it is established in the near future.

We welcome further discussion with the Committee on our proposed clause to recognise Local Government.

Yours sincerely,

JEFF HOARE
Executive Director
The Honourable Members,
Sessional Committee on Constitutional Development,
G.P.O. Box 3721
DARWIN N.T. 0801

Dear Honourable Members,

Thankyou for the work you have done, and no doubt continue to do, on the various matters to do with Constitutional Development. And thankyou, Mr R. Gray (Executive Officer), for so promptly sending me the "Exposure Draft - Parts 1 - 7" (sent 31-7-1995, your Ref. 18/6/1).

As a citizen of the Territory, I genuinely appreciate the contribution that you are making, but as previously indicated, whilst believing that Statehood will eventually be granted, I am yet to be convinced that the Territory is capable enough now or in the near future of the proposed time-table to be able to be considered for such a change by the Federal Government, other States, or indeed by the majority of the N.T. population.

This is not to disparage your fine work, which I have read with interest. A number of points come to mind.

1. On intermittent occasions since 1788 there have been proposals that various different States be created from the existing ones, at times with parts of or the whole of the N.T. being incorporated. Without being able to give the reference, I have seen this mentioned again in the discussions about a proposed Republic. I respectfully suggest that, if this potential has not yet been considered by the Sessional Committee, that it be given at least some thought — the Northern Territory, with Darwin as capital, could for instance have geographical additions from W.A., Qld., S.A. (though I doubt these States would concur). In any such consideration, it is obviously a possibility that the concept will be rejected. I do not make the point in support of this idea, so much as for discussion and debate.

2. Since I have so early touched on the proposal for a Republic, I congratulate you on Discussion Paper No. 7; I particularly appreciated p.10.

3. Congratulations on your concerns with regard to the "checks and balances", which I believe are exceedingly important whether we remain a Territory, or whether we develop into a State under our present system or as part of a republic.
4. I generally approve of Interim Report No. 1. Although it is not necessarily a major point, I approve of p.24(15) to do with "televising", but the reference leads to two thoughts. If "the Committee may authorise", equally it "may not authorise"; I would argue for the fullest support of "televising" — "under such rules as the Speaker considers appropriate", not so much to support the television stations so much as to support the rights of the population-at-large to witness elected Government, and Opposition, working — basically, democracy at work.

This leads me to a digression, however, which is doubtfully of relevance. I do not believe that televising of our judicial system at work is necessarily in the best interests of the legal system/justice, which rather contradicts my overall view that all facets of democracy ought to be as freely accessible as possible. I have come to this view after witnessing the Australian televised case but, more particularly, because of the O.J. Simpson trial in the U.S.A. I need not develop this any further.

5. Although I am aware of the Territory's unusual demographic structure, both geographically and in age-groups (and at times in some localities in ratios of the sexes), and presently accept the 20% tolerance level, I believe that this should be exercised on non-political-partisan lines at regular intervals - e.g. every 5 years. The lower this % is, obviously the better, although as with W.A., in the N.T. it is unlikely that there will be major changes for some considerable time. Since, I believe that it is a matter that requires regular review.

6. I endorse the numerous references to recognition of Aborigines, keeping in mind that, for Aborigines as for all citizens, "the national interest" prevails (as indicated in the "Land Rights Act"). This interest cannot be defined as it may well change over time — defence purposes, national pipeline grids for oil or water, etc. Clearly, too, if the N.T. becomes a State it can actively lobby for or against aspects of any such Acts, yet on that the "national interest" is involved, the Federal Government must have the over-riding power. (This is obviously my view; Aborigines and others may well disagree with the above, particularly those Aborigines who wish for maximum autonomy, or particularly those politicians who want States' rights to prevail).

7. I am concerned that the N.T. is presently, in my view, "over-represented", and therefore that excessive costs are involved — much as I also appreciate the problems of old demography and "the tyranny of distance". This leads me to wish to automatically reject the "Convention model" (Interim Report No. 1) (pp.27-28), even though I can appreciate its advantages. The costs would be prohibitive Australia-wide, in my view, and be effectively exaggerated in the N.T. in the foreseeable future.

8. Discussion Paper No. 9 seems to me to be eminently sensible, so I'll not comment on it at all.

9. Discussion Paper No. 8 is exceptionally important. I applaud the Sessional Committee for this fine paper — pp.28-29 in many ways are the significant starting point.

In any such Bill, the closer it is defined, the more likely there are to be tensions between the broad ideal and the detailed clauses. For instance, the present "Euthanasia Bill" might not be
permissible under a closely defined Bill of Rights; there is, in effect, recognised ...... in
p.35,6(e) that at least some people would object to; the rights of detainees who are
refugees/illegal immigrants may be exceedingly difficult to uphold and, given that Darwin
officials have to deal with these along with their Federal counterparts (e.g. Indonesian
fisherman trespassing as well as refugees), is very complex; and p.47(b) seems to me to
"cover" what could, for some people, be a contentious issue.

These are simply, "spin-off" thoughts, but I add two more in the assumption that some, if not
all, members are aware of the cases.

Would Mr .... of Alice Springs have had two complaints dealt with better under a Bill of
Rights?

What are the ramifications of the John Bill v. Harry Brandy case for any proposed N.T. Bill
of Rights? (I appreciate that this case was in the A.C.T., but it has Australia-wide
ramifications).

I do not expect any answer to these questions, yet they may be cases worth considering
because of their actual or potential ramifications in any proposed N.T. Bill of Rights.

The preceding few points are those which, for one reason or another, struck me as I studied
the Discussion Papers. (There were others, but I mulled them over to my own satisfaction).

Thank you again for all of the work you have done and are doing on behalf of the citizens of
the N.T., now and into the future.

Please note that I do not need, or expect, any particular responses to these few pages.
However, I hope that they may be of some interest to members.

Yours sincerely

R.G. (Dick) Kimber

P.S. (1) There may be particularly unusual circumstances, relating to such as what constitutes
"the national interest" and to any proposed N.T./State Constitution and Bill of Rights
because of the Defence forces build-up in the Top End, Coastal Surveillance, the J.D.S.R.F.
("Pine Gap") in Alice Springs, the other American base in Alice Springs, and the radar
project north of Alice Springs. All of these seem to me to set up tensions between Federal-
N.T./State rights and, indeed, in N.T./State — Federal — U.S.A. rights. These aspects
might well be deserving of very special consideration by the Select Committee, above-and-
beyond the excellent work already done.

(2) I believe there are very "grey areas" following on from the "Mabo" decision and the
Native Title/recompense decisions by the High Court and Federal Government. For
instance, with the greatest respect for Aboriginal rights, how the seas and the waterways
should be preserved seems to me to be a very grey area. I attempted to discover, for
instance, my rights with regard to travel in or along the major rivers and creeks of Central
Australia, which of course are normally dry, but was unable to receive any clear rulings at
all. The situation which has, on paper at least, prevailed along such as the Murray-Darling River systems, has apparently never been tested in the Centre. I have been told by legal people, for instance, that those pastoralists who either consistently, or from time to time, publicly state that trespass is not permitted on certain major Rivers (particularly waterholes), in fact could not successfully take people to court over such trespass.

Thankyou again.

Yours sincerely

R G Kimber.
Mr Rick Gray  
The Executive Officer  
Sessional Committee on Constitutional Development  
Department of the Legislative Assembly  
GPO Box 3721  
Darwin NT 0801  

Dear Mr Gray,  

Discussion Paper No. 8: A Northern Territory Bill of Rights?  
Interim Report No. 1: A Northern Territory Constitutional Convention  

Please find attached a submission in relation to the abovementioned Discussion Paper and Interim Report from Youth for Christ Northern Territory. I apologise for any inconvenience caused as a result of the lateness of it being provided to you.  

Yours sincerely,  

Brett Midena  
Secretary
Youth for Christ Northern Territory Incorporated

Submission to the Sessional Committee on Constitutional Development

on

Discussion Paper No. 8: A Northern Territory Bill of Rights?

and

Interim Report No.1: A Northern Territory Constitutional Convention

Introduction

Youth for Christ Northern Territory Inc. ("YFC") is a non-denominational Christian organisation the principal purpose of which is to see that every young person in the Northern Territory has the opportunity to be a follower of Jesus Christ and endeavours to achieve this goal by various means, such as conducting Adventure Plus programmes. And the particular goals of the Adventure Plus programmes are, for instance -

· to create a positive learning environment to engage young people in adventure activities that are challenging, exciting and achievable,

· to develop programmes using this adventure resource that will cause positive input to character traits such as confidence, self-esteem and team work, and

· to present the programmes from a foundation of genuine loving concern for the young people as individuals, with a message that will enable them to realise the tremendous value they have in the eyes of God.

At the present time, YFC employs one full-time member of staff.

Discussion Paper No. 8: A Northern Territory Bill of Rights?

The Board of YFC has not reached a view on whether the Northern Territory ought to have a Bill of Rights. However, if there is to be a Bill of Rights then it is submitted that the Bill should be drafted so as to take full account of the following matters.

In the discussion on Freedom of thought, conscience and religion it is noted that, at least for the purposes of construing Article 18 of the ICCPR, this freedom extends to the right to "manifest (one's) religion or belief, in worship, observance, practice and teaching". (See page 39 of the Discussion Paper.) Any Bill of Rights should expand and clarify this right to make it clear that it includes the liberty for people, both individually and corporately, to discriminate in relation to the employment of persons who are to be engaged in work reasonably associated with the worship, observance, practice or teaching of the religion or belief.

The right should extend to organisations in the operation of which certain religious belief and practice is fundamental and this right must, assuming it is bona fide exercised to reflect the principles of the relevant religion, prevail over any prohibition on discrimination, such as are briefly addressed at pages 44-45 of the Discussion Paper.
To require any organisation to which a certain religious belief and practice is genuinely fundamental, whether a church, school, mission or the like, to employ people who do not subscribe to the those beliefs and practices is to deny the organisation and its members of the right to freedom of religion. The fight to freedom of religion, genuinely exercised, must prevail over the fight to non-discrimination and this primacy should be clearly stated in any Bill of Rights.

If such a right is denied then it will simply not be possible for YFC to function effectively, or perhaps at all, with young people.

Some discussion on these issues was recently generated by a proposal of the Australian Democrats to amend Commonwealth anti-discrimination legislation to prohibit discrimination on grounds of sexuality and copy of various materials further analysing the issues are attached.

**Interim Report No.1: A Northern Territory Constitutional Convention**

With respect to any Constitutional Convention it is submitted that -

1. some of the representatives should, as the Committee suggests in Recommendation 4, be nominated, and

2. in addition to the groups nominated in Recommendation 4, the Religious Organisations in the Northern Territory must be included.

The latter appears to be a glaring omission.
Dear Madam,

I received an article the other day which in part reads as follows:

"A new Federal Bill to be introduced by the Australian Democratic Party prohibits discrimination on the grounds of sexuality and is said to urge that all exemptions for church schools be dropped so that homosexuals can have full access to all children, not just in public schools."

And again:

"It goes further. Children's rights are violated when parents, for reason of conscience and religion, seek to withdraw their children from such classes and therefore parents should be prospected for violation of human right."

And again:

"The NSW Law Reform Commission, Independent Teachers' Association, Anti-Discrimination Board and Federal Discrimination Commission are all working overtime to overturn exemptions enjoyed by church schools"

A paragraph written by Rev Dr K J Gardner, Clerk of Assembly of the Presbyterian Church Queensland:

"We believe there will be those who are law abiding citizens within the church who will refuse to obey legislation which refuses the right of the church to discriminate positively in the selection of those it employs, even to the extent of being gaoled."

There is more but that will suffice to pinpoint the Bill concerned.
Some years back I worked with a group of people in a counselling service. There were a number of gay people in the team with whom I worked. We had no problems working together. I have a friend who is gay, should he come to me for help, I assure you that he will be treated as I treat any other friend. He has the God-given right to choose his sexual preference. Having made the choice he has to accept the consequences of such a choice. I, too, have the same right. God has not made me judge of anyone but as a Christian He expects me to be obedient to the standard of sexual morality that He has set for His people.

The legislation envisaged above has nothing to do with free choice and child discrimination. Here we have a group of people who have made their choice, but who are not prepared to accept the consequences. As a result there has been a steady, consistent lobbying going on to make it all acceptable. In other words, force their way on to everyone else. What better way than to indoctrinate the kids.

Abraham Lincoln once said, "The philosophy of the classroom today is the philosophy of the government in the next generation". Here I believe is the hidden agenda of this legislation. Is this what the party is aiming for, a country controlled by gays? I once heard it said that the Australian Democratic party was there to keep the others honest.

Presenting such a Bill under anti-discrimination is not being honest. This Bill raises a number of issues which discriminate against basic fundamentals of our land:

1. Does the teaching, training and rearing of the child rest with the parent or the State?
2. Are we to be denied the right of free choice?
3. Are we to be denied freedom of religion? Choosing moral standards are basic to many faiths besides Christianity.
4. This legislation will either compromise or close religious schools thus denying the principle of free education. All will be subject to what is imposed on them from government bodies. Communism worked this way.
5. This Bill will lead to confrontation with many Christians and possibly others. A Christian is guided by the Bible. This gives specific standards to adhere to. The standards of the Bible and the standards that will be imposed on church schools will be incompatible if this Bill is passed. The net result will be that as Christians stand firm to their faith they will be prosecuted thus turning decent, law abiding citizens that society needs, into criminals. Is this what the Party wants?
6. How many times will the parent be prosecuted before he/she is deemed unworthy to care for the child? Is this the next step, declaring a child to be a ward of the State?

This may sound fanciful but remember those moving this legislation are already implying by their move that there are parents in the community who they do not believe to be capable of teaching their children a "suitable sexual morality".
If you read history you will find that real Christians are a pretty stubborn mob. When the apostle Peter and John were told to stop what they were doing by the church leaders of the day their response was "you yourselves judge what is right in God's sight - to obey you or to obey God". The Romans threw Christians to the lions but that did not change them.

Recently I read about a Chinese Christian who suffered imprisonment and torture for 20 years. This is what one of his guards said to him, "You Christians are contagious - like a bad disease, There's a smell on you and no matter where you go people know you're Christians. It's like a force, an influence and it's very contagious to others." Instead of breaking this man's spirit, others were converted.

Legislation may control the body but it does not necessarily control a person's mind.

In the final analysis this legislation is directed at the moral standard that God has set for people everywhere. If your Party wants to take on God so be it. He has never been a loser. I have always had a fair respect for the Democratic Party and could see the value of the Senate but if both are going to allow themselves to be manipulated by a minority group for their own ends, incurring the loss of basic rights and freedoms of other groups, that respect will no long be there and perhaps Mr Keating is right after all - the Senate is serving no good purpose. Let's get rid of it.

I find it hypocritical that people working on anti-discrimination bodies are deliberately working to bring in legislation that discriminates against family and freedom of religion. The real health of the nation does not lie in the strength of the economy but rather in its moral fibre. When I was a kid everyone knew the definition of the family. Today the experts can't agree.

Every builder knows that if shoddy material is used in a building more and more maintenance will be required as time goes on. The family unit is the building block of society. Break down its' moral structure and society and government will be faced with an ever increasing maintenance bill.

One of the basic issues in the Queensland election at this time is law and order. This legislation, if passed, will aggravate this issue Australia wide. Older people will tell you that over the last 30 years Australia has been on "skid row". Check the statistics and see.

Your Party, with the Senate Committee, seem determined to assist this deterioration of the nation's health.

There is only one signature to this letter but I assure you that there are many, many people both in and out of the churches with a similar view.

Yours faithfully,

Clem Gullick
A LETTER TO THE PM

It has come to the attention of the General Assembly of the Presbyterian Church of Queensland that there is a proposed Private Member's Bill to come to the Federal Parliament with a view to removing the exemptions granted to religious organisations (or churches).

The Presbyterian Church of Queensland requests that no amendments be made to Section 38 - Educational Institutions Established for Religious Purposes - of the Sex Discrimination Act of 1984, as the exemptions granted in the Act enable a church to consistently administer its own educational institutions in keeping with its doctrines and practices.

The Presbyterian Church of Queensland is gravely concerned that if the Church is unable to selectively employ persons who subscribe to the theological standards and ethical position of the church, the integrity of the church and its programs will be seriously undermined.

Even in a developing multi-cultural, pluralistic society it is essential to recognise that there are positions adopted by a range of groups. To force these groups to employ persons who do not hold to their beliefs is to discriminate against their integrity and the future existence of that group.

It would seem that we have reached a stage when there those in society who would seek to dismantle the integrity and the structure of the Christian church by forcing the church to employ persons who despise its position.

What would happen if the Aboriginal community were forced to employ those who believe that the Rainbow Serpent is a pagan idol?

What would happen if the homosexual community were forced to employ Fred Nile?

This church views the possibility of this change to the legislation as a direct attack on its viability. We believe there will be those who are law abiding citizens within the life of the church who will refuse to obey legislation which removes the right of the church to discriminate positively in the selection of those it employs, even to the extent of being gaoloed.

Very Rev Dr K. J. Gardner

Clerk of Assembly
Presbyterian Church of Queensland.
Briefly the Bill purports to give homosexuals the right of access to our Christian schools and religious institutions. The Democrats have issued a Working Paper entitled: 'Prohibiting discrimination on the grounds of sexuality.' Its main thrust is to invite the views of groups in the gay community concerning the Bill.

The 'preferred alternative' was to develop a piece of legislation which comprehensively, decisively and as effectively as possible, prohibits discrimination in all spheres of communal life. Same sex relationships being viewed similarly to heterosexual de-facto relationships is achievable.

Comments made by gay activist Rodney Croome at a Senate committee hearing, were as follows: 'I want access to all educational facilities.' Asked if he would exempt religious schools, he stated that he would not.

The Australian Education Union recently proposed that AIDS and sex education classes be compulsory in all schools from primary level. It goes further. Children's rights are violated when parents, for reasons of conscience or religion, seek to withdraw their children from such classes and therefore parents should be prosecuted for violation of human rights.

The NSW Law Reform commission, Independent Teachers Association, Anti-Discrimination Board and Federal Sex Discrimination Commission are all working overtime to overturn exemptions currently enjoyed by church schools.

Any intelligent political party in their right minds would surely not sanction such heinous legislation from the gay movement when its very seeds are formulated in the pit of Hell. Read Genesis chapters 18 - 19. See God's judgment poured out on such evil practices.

If such groups as there are interested in democracy, then let them practice their own beliefs and leave us Christians to do what we must do under the guiding hand of God. Would our Government dare to put this to a referendum before the people? I think not! The family unit is being destroyed. Our children's minds are suffering pollution of the worst kind and as our citizens for the next generation (if there is to be a next generation) we have the responsibility to protect them.

Destroy the family unit and we destroy the nation. Their quest for access to our learning centres can only have one object in view: to control what our children are being taught and so condition their minds to accept their lifestyle as the norm.

We, as Christians, have a direct mandate from Scripture to train and develop our children's lifestyle in order that they will grow to be Godly citizens. We have authority for what we do. I ask: where are they drawing their authority from?

Proverbs 29:2 says: 'When the righteous are in authority, the people rejoice; but when the wicked rule, the people mourn.' I am sure that the great majority of people in our society would reject outright the proposals being put forward by such groups.

I further ask: If they are to be granted access to our institutions, will we have the same rights to access their groups and meetings, and propagate the Gospel of Jesus Christ? History has proved that the wicked laws perpetrated upon subjects for political expediency have proved to be disastrous. Read Biblical history.
Horrendous problems are being experienced on our society today, socially, morally, spiritually and yes, even economically, because of the departure from Godly principles. William Penn once said: If we are not governed by God, then we will be ruled by tyrants. Abraham Lincoln said: 'The philosophy of the classroom is the philosophy of the government of the next generation.' George Washington said: 'True religion affords government its surest support. The future of our nation depends on the Christian training of our youth. It is impossible to govern without the Bible.'

Read Psalm 9:16 - 20, Psalms 1 and 2, 2nd Thessalonians 1: 6-9. May God awaken us, particularly Christians, to be alert to what is happening to us, Let your light shine before men. May we continue to be light and salt in this earth whilst we await our Lord's glorious and imminent return. The Bible says: 'The effectual and fervent prayers of a righteous man avail much.' May God in mercy call our nation to prayer and confession for sins of omission before it is forever too late.

Sydney S. Bell

Principal and Pastor
Avonsleigh (Vic) Christian School and Church.

Copy of an article taken from NEW LIFE Thursday 15th June 1995

Exemption Laws Under Threat

A new federal bill to be introduced by the Australian Democrats prohibits discrimination on the grounds of sexuality and is said to urge that all exemptions for church groups and religious schools be dropped so that homosexuals can have full access to all children, not just those in public schools.

In Victoria similar legislation is due to be decided on in Parliament soon but only two churches have entered the debate - the Uniting Church in favour and the Catholic Church against.

The Australian Democrats have issued a working paper entitled 'Prohibiting Discrimination on the Grounds of Sexuality: Issues Paper No 1.' The paper is 'designed to collect the views of individuals and groups in the gay community' concerning the proposed bill.

Concerning same sex couple relationships, the document says that 'Legal equality with heterosexual de facto relationships is in my view achievable.'

The selection on exemptions reads: 'Exempting controversial areas, e.g. employment as teachers in religious institutions, was generally rejected despite superficial attraction as a strategy to reduce the opposition to the bill. The crucial role of teachers in perpetuating (or removing) stereotypical prejudices was emphasised.'

Similar comments were made by Tasmanian gay activist Rodney Croome at a Senate Committee hearing last November, where he clearly stated he would not exempt churches and church schools.
In NSW anti-discrimination laws based on sexuality already exist. Religious exemptions are currently in place but the NSW Law Reform Commission, the NSW Independent Teachers' Association, the NSW Anti-Discrimination Board and the Federal Sex Discrimination Commissioner are all hard at work trying to overturn the exemptions currently enjoyed by Church Schools.

*Bill Muehlenberg,*  
*Australian Family Association, in 'Light'*
EXTRACT FROM ARTICLE IN "NEW LIFE" 20 JULY 1995

EXEMPTIONS - NOT WHAT THEY SEEM

"In June Senator Spindler wrote to say that he is now proposing to 'enable religious teaching institutions to obtain an exemption'

This does not mean what we would like it to mean:

I have since spoken to him and he stated: 'The exemptions will be for teaching personnel only in schools. 'There is still no certainty that exemptions will be given for churches or that pastors will be included as teaching personnel.

NO exemptions for counsellors, principals, office staff, gardeners, etc. He says he has had discussions with churches, but when questions further he has only spoken to the Quakers and the uniting Church.

Mr Spindler is feeling the heat so much that he made a statement in parliament about his intention to allow 'religious teaching exemptions.' (Writing letters does work!)

He finished his letter by saying: 'I trust this meets your concerns and look forward to your support for this important human rights bill'. Our response to that must be NO: We must oppose ALL aspects of this bill.

Exemptions are not good enough. Exemptions are not going to protect the millions of children who don't go to Christian schools. What about the rest of the community?

In "The Australian" 14.6.95 he states that 'this bill was in the great Christian tradition of tolerance and love.' Our response needs to be 'Yes' to the love but 'No' to tolerance because in this instance 'tolerance' means acceptance and if the church accepts homosexuality then we go against the very clear messages from the Bible that same sex relationships of a sexual nature are SIN.

As Christians we must be concerned about the moral decline of our society in general. We must continue writing to Senators Sid Spindler and Cheryl Kernot and other politicians, voicing our opposition to this entire bill.

"Salt Shakers", a ministry of Blackburn Baptist Church, is a Christian Ethics Action Group. We have recently issued a two page update on this issue obtainable by phoning (03) 9878 3521.

Peter Stokes
Salt Shakers,
Blackburn, Vic."
SUBMISSION NO. 140
SUPREME COURT, DARWIN

CHIEF JUSTICE’S CHAMBERS
SUPREME COURT
DARWIN

18 March 1996

Mr G Nicholson
Northern Territory Attorney-General’s Department
Counsel’s Chambers
GPO Box 1722
DARWIN NT 0801

Dear Mr Nicholson

I consider your draft memo fairly represents our preliminary discussions regarding the draft Constitution.

I see this as being an ongoing task. Other issues may arise as the Judges have a greater opportunity to focus on the matter. It would help our further consideration to have an indication of the Committee’s response on the matters raised so far.

Yours sincerely

Chief Justice.
7 March 1996

Chief Justice
Supreme Court
Mitchell Street
DARWIN NT 0800

Your Honour

DRAFT NORTHERN TERRITORY CONSTITUTION - COMMENTS OF NORTHERN TERRITORY SUPREME COURT JUDGES

I enclose a first draft of a memo summarising the discussions we had on 6 March 1996, for your consideration and comments, as agreed.

I look forward to your reply.

Yours faithfully

GRAHAM NICHOLSON.

Enc.
TO: Sessional Committee of the Legislative Assembly on Constitutional Development, Darwin

FROM: GRAHAM NICHOLSON

DATE: 7 March 1996

DRAFT NORTHERN TERRITORY CONSTITUTION - COMMENTS OF NORTHERN TERRITORY SUPREME COURT JUDGES

I was recently contacted by the Chief Justice of the Supreme Court of the Northern Territory, His Honour Justice B Martin, with a request that I meet with the Judges of the Supreme Court to informally discuss in broad terms the constitutional proposals of the Committee.

I attended that meeting on Wednesday, 6 March 1996 at 4.30 pm at the Supreme Court Building. Present was His Honour the Chief Justice and their Honours Justice Kearney, Justice Mildren and Justice Thomas. Justice Angel and the Master sent their apologies. Full sets of the Committee's tabled papers were presented to those at the meeting.

The Chief Justice stressed that any comments made at the meeting were confidential and did not represent the considered or final views of either their Honours collectively or individually. It was intended to be an informal discussion only with a view to assisting the Committee in the process of constitution-making.

It was agreed that I would prepare this summary of the meeting in draft and for it to be settled with the Chief Justice before its submission to the Committee for its consideration. This has been done.

The Meeting addressed its comments to the Committee's Exposure Draft Parts 1 to 7 of June 1995 and its Additional Provisions to the Exposure Draft of November 1995, as tabled in the Legislative Assembly. The comments are summarised as follows -

1. Clause 2.1 (f) (Exposure Draft - Sources of Law)

It was queried why the term "the common law of the Northern Territory" was used (see also clause 2.1.1 in the two boxes, where the same term is used). It was felt that this should simply be a reference to "the common law".

2. Clause 2.1.1 (Exposure Draft - Recognition of Aboriginal customary law as a source of law)

Some concern was expressed about the intended operation and effect of this clause, including its implications for the workload of the Court, although no specific proposals for amendment were advocated.

3. Clause 6.1 (Exposure Draft - Judiciary)

It was questioned whether it was intended to create a new Supreme Court by the new Constitution to replace the existing one, or just to continue the existing Supreme Court. It was noted that the
transitional provisions had not yet been drafted. A clear preference was expressed for the continuance of the existing Supreme Court and its Judges and officers, with a continuance of existing proceedings, etc.

Clause 6.1 (3) (Exposure Draft)

It was felt that the jurisdiction of the Supreme Court should be expressed to include that under existing laws in force in the Northern Territory as at the commencement of the new Constitution.

It was also felt that, while the Supreme Court may not need exclusive jurisdiction as to matters arising under the new Constitution or involving its interpretation, there should be power to remove such a constitutional question from a lower court into the Supreme Court or for a lower court to refer it to the Supreme Court. Query, whether this need go in the Constitution or just in ordinary legislation.

Clause 6.1 (4) (Exposure Draft)

It was pointed out that such an advisory jurisdiction was novel in Australia. Their Honours noted the other provisions in the draft Constitution providing for a reserve power in the new Governor in constitutional matters. If the advisory jurisdiction was to be retained, it was felt that there should be an express discretion in the Court to decline an invitation to exercise that jurisdiction. It was queried why standing need be accorded to the Speaker, the Executive Council and the Premier in addition to the Governor in instituting proceedings for an advisory opinion. It was suggested that this jurisdiction be limited to specific Parts of the new Constitution - for example, those Parts relating to the Legislature and the Executive, and not to provisions such as those relating to rights.

6. Clause 6.2 (Exposure Draft)

It was felt that the draft Constitution should provide for a minimum number of Supreme Court Judges (not being additional or acting Judges) - the number of 4 was suggested, being the absolute minimum number necessary to constitute a Court of Appeal. If the number of such Judges at any time fell below the minimum number, there should be an obligation on Government to make sufficient appointments as soon as practicable to make up the minimum number.

The drafting of clause 6.2(1) and (2) was queried as to the manner of consultation with the legal profession. It appeared that the Governor would be the person to undertake that consultation under the existing draft, whereas perhaps this was more appropriately a task for the Attorney-General.

7. Clause 6.2(3) (Exposure Draft)

There was some discussion as to whether this provided an adequate guarantee of the independence of Supreme Court Judges, but no specific suggestions were made.

8. Clause 6.2(4) (Exposure Draft)

It was felt that there should be provision for the appointment of a Judge who has reached 70 years of age or more, and who is fit and able to continue in office, as an acting Judge, for such term and
otherwise on such terms and conditions as may be determined. At present, clause 6.2 does not provide for acting or additional.

9. Clause 6.2(6) (Exposure Draft)

It was felt that the prohibition on reducing a Judge's remuneration or terms and conditions of appointment should be expressed to be without the consent of the Judge - that is, a Judge should be able to consent to such a reduction.

10. Clause 6.3 (Exposure Draft)

It was queried why the term "judicial authority" was used in this clause, in contradistinction to the term "judicial power" used in Clause 6.1 (1). The latter term was thought to be preferable.

Some concern was expressed as to the capacity of the new Parliament to create a tribunal or other body (not being a court) that could exercise judicial power. It was felt that the section should at least exclude such a body from imposing a sentence of imprisonment (including a suspended sentence) or otherwise from committing a person to prison (including for contempt). Their Honours noted, however, the power of the Legislative Assembly to impose a penalty of imprisonment in the Legislative Assembly (Powers and Privileges) Act of 1992, section 25, which would need to be considered in this context.

11. Clause 7.1 (3) (Exposure Draft - Aboriginal Land Rights)

Concern was expressed as to the possibility of a Supreme Court Judge being expected to sit with non-judicial officers on the body to be established to determine whether there should be a disposal of, or other dealing in, Aboriginal land in fee simple. It was felt that the proposed function should be treated as a judicial function, not a political one. If this clause was to remain, membership should be limited to a Supreme Court Judge only, to be nominated by the Chief Justice.

It was also questioned whether the decision of the Supreme Court Judge in this matter should be subject to appeal in the normal way, bearing in mind that the proposal was for a judicial determination, not a mere recommendation.

The drafting of these provisions was queried in so far as they refer to "an estate or interest in freehold". It was felt that the wording should follow that of the Aboriginal Land Rights (Northern Territory) Act 1976, that is, "an estate in fee simple".

12. Part 5 (Exposure Draft)

It was pointed out that there were two "Part 5's". The need was stressed for Parliamentary Counsel to settle the draft so as to ensure internal consistency.

These comments are submitted for the consideration of the Committee.

GRAHAM NICHOLSON
The Honourable Steve Hatton MLA
Chairman
Sessional Committee on Constitutional Development
Legislative Assembly
Darwin

Dear Steve

Aboriginal Language Policy

The Department of Lands Planning and Environment, with support from the Office of Aboriginal Development sponsored my attendance at the World Congress of Translators in Melbourne in February at which I presented a paper on Aboriginal languages and the need for interpreting. I have attached a copy of the summary report I have prepared on the Congress.

The information concerning South Africa on page 2 of the Report is of direct relevance to the Territory in our move to Statehood. The interim constitution embraces language as a fundamental right, "Every person shall have the right to use the language of his or her choice" (section 31). A copy of the paper given at the Congress by Dr Anne-Marie Beukes from the South African Department of Arts, Culture, Science and Technology is attached. I have also included details of the South African language policy and an extract from their Constitution.

Among the priorities to be achieved in our move to Statehood are:

- support from Aboriginal Territorians
- recognition by the rest of Australia that the Territory is treating its Aboriginal citizens with respect.

I am not suggesting that we should seek to replicate in the Territory what South Africa is doing in relation to indigenous languages. However a properly prepared and presented Territory policy on Aboriginal languages that acknowledges their existence and recognises their importance has the potential to contribute to both of these objectives.

With best wishes

Yours sincerely

Dr Peter J Carroll

[Some enclosures to this Submission have not been included in this Volume.]
THE XIVth WORLD CONGRESS OF TRANSLATORS
MELBOURNE - 12 TO 16 FEBRUARY 1996
SUMMARY REPORT

Background Information

The Congress is arranged every three years by the International Federation of Translators. This is the first occasion that the Congress has been held outside Europe, which was a significant achievement for Australia.

The Congress was attended by over 500 people from 42 countries. Four Territorians were among the Australian attendees: Dr Prith Chakravarti and Mr Michael Cooke from Batchelor College, Ms Aurora Quinn from the Office of Ethnic Affairs, and Dr Peter Carroll from the Department of Lands, Planning and Environment.

Papers Presented

While many of the papers were of a technical and linguistic nature, there were a number of papers with relevance to the situation in the Territory. These papers dealt with a range of issues:

- interpreting in a court
- community interpreting
- medical interpreting
- general interpreting and communicating issues.

The two most relevant and available papers from the workshops are:

- "Negotiating Meaning, Negotiating Reality, Aboriginal Language Interpreting in Court” by Michael Cooke - copy provided to the Office of Aboriginal Development (OAD) and to the Office of Courts Administration.
- "Community Translation, The Theory, The Practice, The Pain and the Rewards” by Patricia Burley-Lombardy of RMIT - Copy provided to OAD.

Other helpful papers will be available after the release of the second volume of the Proceedings at the end of April. Copies of relevant papers will be circulated to appropriate agencies.

The South African Example

At one of the Plenary Sessions of the Congress there was a presentation on the language situation in the Republic of South Africa. The Constitution of the Republic provides for the recognition of the principle of multilingualism.

The presentation by Dr Anne-Marie Beukes of the South African Department of Arts, Culture, Science and Technology outlined the new National Language Policy. The South African
Government has a clear policy of recognising the many different languages spoken in the country. There are two levels of language recognition:

- eleven officially recognised national languages: English, Afrikaans and nine African languages,
- acknowledgment that the many other languages spoken in the country warrant respect.

The Pan South African Language Board was established by legislation as an independent reference point on language issues in the Republic. The objective of the Pan South African Language Board Act 1995 is:

"to provide for the recognition, implementation and furtherance of multilingualism in the Republic of South Africa; and the development of previously marginalised languages"

Two of the Board's more important functions are:

- to be consulted and to make recommendations in relation to legislation and in relation to official policy and practice on matters of language use as set out in the Constitution.
- to promote respect for the development and use of the other languages (nonofficial) spoken in the Republic.

**STATEHOOD AND A TERRITORY LANGUAGE POLICY**

It is recognised that there are many differences between the Northern Territory and South Africa. It would not be appropriate for the Territory to seek to replicate some of the provisions of the South African constitution. However the importance given to African languages in South Africa provides an example that might be adapted to assist the Territory's move to Statehood. The constitutional principle that "the diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged." would have a different application in the Territory.

There are many Aboriginal languages spoken in the Northern Territory. A study published by the Australian Institute of Aboriginal and Torres Strait Islander Studies indicated that 12 of the 20 strong Aboriginal languages still spoken in Australia are spoken in the Northern Territory. Census figures indicate that 70% of Aborigines (approximately 30000) in the Territory speak a language other than English in their home. The existence of these languages is already recognised by the Department of Education in Bilingual Schools and in Aboriginal language classes in other schools.

A policy statement on the use and recognition of Aboriginal languages would be well received by the majority of Aborigines who still speak their own language and has the potential to encourage support of the move to Statehood. Such a statement would demonstrate that the Territory has the capacity to lead Australia in the study and use of Aboriginal languages.

Dr Peter J Carroll