

**DARWIN CITY COUNCIL**  
**SPECIAL COUNCIL MEETING**  
**TUESDAY, 4 MAY 2010**

**MEMBERS:** The Right Worshipful, Lord Mayor, Mr G R Sawyer (Chairman); Member J D Bailey; Member R T Dee; Member R K Elix; Member H I Galton; Member R Knox; Member G A Lambert; Member R Lesley; Member F P Marrone; Member A R Mitchell; Member K M Moir; Member J L Sangster; Member H D Sjoberg.

**OFFICERS:** Chief Executive Officer, Mr B Dowd; General Manager Corporate Services, Mr F Crawley; General Manager Community & Cultural Services, Mr J Banks; General Manager Infrastructure, Mr L Cercarelli; Committee Administrator, Ms L Elmer.

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## **1 MEETING DECLARED OPEN**

## **2 APOLOGIES AND LEAVE OF ABSENCE**

### **2.1 Apologies**

### **2.2 Leave of Absence Granted**

- A. THAT it be noted that Member R Lesley is an apology due to a Leave of Absence being previously granted on 13 April 2010 for the period 2 - 7 May 2010.
- B. THAT it be noted that Member H D Sjoberg is an apology due to a Leave of Absence being previously granted on 13 April 2010 for the period 3 - 4 May 2010.

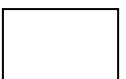
DECISION NO.20\() (04/05/10)

### **2.3 Leave of Absence Requested**

## **3 DECLARATION OF INTEREST OF MEMBERS AND STAFF**

## **4 CONFIDENTIAL ITEMS**

Nil

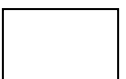


## 5 MISCELLANEOUS ITEMS

### 5.1 **Overview of Concepts and Issues Regarding the Prospect of the Northern Territory's Transition to Statehood**

Report No.10TC0028 BD:af (29/04/10) Common No. 1763246

*Report Number 10TC0028 BD:af attached*



ENCL: NO

## DARWIN CITY COUNCIL

DATE: 29 April 2010

### REPORT

TO: SPECIAL COUNCIL/OPEN

APPROVED: BD

FROM: CHIEF EXECUTIVE OFFICER

APPROVED: AF

REPORT NO: 10TC0028

COMMON NO: 1763246

SUBJECT: OVERVIEW OF CONCEPTS AND ISSUES REGARDING THE PROSPECT OF THE NORTHERN TERRITORY'S TRANSITION TO STATEHOOD.

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#### ITEM NO: 5.1

#### SYNOPSIS:

On 16 March 2010, Council resolved to hold Workshop on Statehood. (Decision No. 20\2552).

As background to the Workshop, this report provides an overview of the concepts and issues regarding the prospect of the transition to Statehood and includes the views of local government affiliates. Further, it identifies a number of relevant issues associated with Statehood to assist Council in formulating its position.

#### GENERAL:

#### Context - History and time-line

On 28 August 1985, Northern Territory Legislative Assembly established a bipartisan Parliamentary Committee on Constitutional Development to report and make recommendations on a Constitution for the new State and the principles upon which it should be drawn, the method to be adopted to have a draft new state Constitution approved by or on behalf of the people of the Northern Territory, and the issues, conditions and procedures pertinent to the entry of the Northern Territory into the Federation as a new State. That Committee tabled its final report including a draft constitution in the Legislative Assembly on 26 November 1996.

During the period 26 March to 9 April 1998 a Constitutional Convention (called the Statehood Convention) was convened and subsequently recommended the form of a 'Statehood Constitution' to the Legislative Assembly and urged Statehood for the Northern Territory 'as soon as possible'.

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On 3 October 1998, the Northern Territory community rejected Statehood in a Territory wide indicative referendum thus halting the Northern Territory's push in becoming Australia's Seventh State by 2001. In the wake of Referendum's 'No' vote, the Legislative Assembly, on 7 October 1998, resolved that the Standing Committee on Legal and Constitutional Affairs (the Standing Committee) conduct an inquiry into and report on reasons for the failure of the Northern Territory Referendum and to ascertain support for the Northern Territory gaining Statehood by 2001. The Committee was also required to recommend to the Assembly appropriate means whereby community support for Statehood could be achieved.

On 30 April 1999, The Standing Committee tabled its *Report into Appropriate Measures to Facilitate Statehood* in the Legislative Assembly recommending, among other things:

*That there be a public education program to inform Territorians about what Statehood means and about the process of constitutional development, presented in a dispassionate, balanced and informative manner. It is essential that the education program not be presented in a 'political propaganda' manner and it should be validated by independent sources. It is recommended that the Standing Committee on Legal and Constitutional Affairs be directly involved in the broad development of the education program and the engagement of an independent consultant to devise and implement the program. Specific strategies should be developed for effective consultations and education in Aboriginal communities. This should commence as soon as possible to take advantage of the enhanced awareness of the issue, which currently exists in the community (Recommendation 3).*

On 25 October 2001, the Legislative Assembly resolved to enhance the Standing Committee's primary terms of reference to inquire into and report on such constitutional and legal matters that are referred to it by the Legislative Assembly or the Attorney General by providing additional terms of reference to the Committee the power upon its own motion to address matters concerning:

- (i) Legal or constitutional issues, including law reform, parliamentary reform, administrative law, legislative review and inter-governmental relations.
- (ii) The Northern Territory's ongoing constitutional development that may also be tied to a future grant of Statehood.
- (iii) Other specific inter-governmental relationships that the Attorney-General may wish the Committee to address or investigate.

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On 18 June 2003, the Chief Minister of the Northern Territory referred to the Northern Territory Government's recommitment to the achievement of Statehood and that the Standing Committee in its deliberations would take into account and be guided by the following:

- (a) *The process would be community based, not imposed upon the community.*
- (b) *The Standing Committee would facilitate and provide resources to this community based process.*
- (c) *The Government's aim to achieve Statehood by 1 July 2008, which would include:
 
  - (i) *the drafting of a new constitution*
  - (ii) *the holding of an elected Constitutional Convention*
  - (iii) *the holding of a referendum**
- (d) *A central principle for the Northern Territory to achieve Statehood is the respect for and proper recognition of the Indigenous people of the Territory and that the Indigenous people are to be involved in all stages of the process.*

On 13 February 2004 the Standing Committee resolved, pursuant to its additional terms of reference of 25 October 2001 to address matters concerning the Northern Territory's ongoing constitutional development that may also be tied to a future grant of Statehood, that terms of reference be prepared relating to the establishment of an advisory committee to the Standing Committee on Northern Territory Statehood and constitutional development, with a membership comprising the Standing Committee and representatives from major stakeholders and others within the Northern Territory, to advise and assist the Standing Committee in its deliberations in respect of this matter.

On 17 August 2004, the Legislative Assembly –

- (a) endorsed following the Terms of Reference of the Northern Territory Statehood Steering Committee (SSC), tabled on 25 June 2004;
- (b) authorised the Standing Committee on Legal and Constitutional Affairs to appoint the membership of the SSC in accordance with the terms of reference tabled on that day.<sup>1</sup>

## **Issues**

In order to simplify the complex array of legal, constitutional, political and interest-group issues attendant to the matter of Statehood, the following matters for consideration are designed to provide an accessible method to engage in what is of significant importance to Council's decision-making process. Whilst this section of the report does not account for the full range of Statehood issues, a more complete account of them can be found at the SSC website at <http://www.statehood.nt.gov.au/>

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<sup>1</sup> <http://www.statehood.nt.gov.au/documents.DPAnnexWeb.pdf> viewed on April 24 2010

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which, importantly, cites sources not necessarily aligned to the SSC's provision of information.

## **Territory and State – what's the difference?**

There are three main differences between a State and a Territory which makes Territorians less than equal to the people of the States.

### **Difference One – National Representation for Territorians**

Territorians do not have constitutional rights to representation in the Commonwealth (Australian) Parliament. The Northern Territory currently has 4 representatives in the Commonwealth Parliament : 2 Members in the House of Representatives and 2 Senators in the Senate. These positions have been created by Commonwealth laws which could be changed by the Commonwealth Parliament at any time. States have guaranteed representation in the Commonwealth Parliament under the Australian Constitution. Each State has a minimum of 5 members in the House of Representatives and 12 Senators in the Senate. By becoming a State, Territorians will have a guarantee of representation at the national level of government.

### **Difference Two – Territorians' Say in National Referendums**

Territorians must vote in national referendums but our votes do not count equally in the final assessment of any change. Only States' votes are counted in the final determination of a majority support for change. By becoming a State, Territorians have a guarantee that their vote will fully count in national referendums and therefore give Territorians a stronger say on national affairs.

### **Difference Three – Control of Territory Parliament and Territory laws**

The Commonwealth (Australian) Parliament has more legal control over a Territory than a State. The States have final authority over their legal areas of responsibility. This means that a law made by a State government can only be changed by a State government. The Territory does not have the same control over the laws it makes. Even with Self-Government which created the Northern Territory Parliament in 1978, the Territory Parliament and people are under the final control of the Commonwealth Parliament.

- Because of this control, the Commonwealth can cancel a law made by the Northern Territory Parliament without asking Territorians.
- Because of this control, the Commonwealth can also change the powers the Northern Territory Parliament has been given without asking Territorians.
- Because of this control, the Commonwealth can dissolve the Northern Territory Parliament without asking Territorians.<sup>2</sup>

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<sup>2</sup> <http://www.statehood.nt.gov.au/wp-content/uploads/2009/07/what-is-statehood-brochure-final-june-09.pdf> viewed on April 24 2010

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## Constitution

The issue of a NT constitution is perhaps the most complex of the key aspects regarding a transition to Statehood. The following provides an overview of some options by which to consider the most optimal constitution model –

### Introduction

The Northern Territory does not have a Constitution. In the Northern Territory we follow the rules of the *Northern Territory Self-Government Act 1978*, a law made by the Commonwealth Parliament which may be changed at any time by the Members of that Parliament sitting in Canberra. The basic function of a Constitution in Australia is to set out the rules to make a parliament and the law run smoothly in a democratic society. Foundations and Principles are what we call the basic starting point for our own Constitution. These Foundations and Principles may include:

- Legislative Power - The new State parliament should have the power to make laws just like the already existing State parliaments.
- The Executive should be made up of the Head of State (or representative) and key ministers who are also members of Parliament.
- The independence of the judiciary (our judges and magistrates) is sometimes thought to be a key principle. Should this be part of the rules in a new State Constitution?
- A future Constitution should make sure the Northern Territory is a representative democracy.

Possible options to consider for a new Constitution are -

### Option 1

Using the *Northern Territory Self Government Act* as the basis for a Constitution.

The *Self Government Act* may be a good model for the new Constitution.

Original States like New South Wales and Queensland have Constitutions they were given by the English rulers in the 1800s. Maybe we should take the *Self Government Act* given to us and change it just a little to make our new Constitution.

### Option 2

The 1996 Final Draft Constitution as the Model Constitution.

This option considers the document called *Final Draft Constitution for the Northern Territory* which was published in December 1996. The document was developed after a lot of research and talking with people around the Northern Territory in the 1980s and 1990s. This draft Constitution includes recognising Aboriginal customary law and maybe changing our representation system in the parliament.



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This draft Constitution also includes the *Aboriginal Land Rights (Northern Territory) Act 1976* being protected from change so it is a special law of high authority in the new State.

### Option 3

The 1998 Statehood Convention Constitution.

A *New State Constitution for the Northern Territory* is the name of a draft Constitution published after the 1998 Statehood Convention.

The four objectives in it were:

- Equality before the law
- Maintenance of the 'Westminster system' (our system of parliament and government).
- Confirmation of the principle of separation of powers (Courts cannot be controlled by the government or the parliament)
- Continuation of the familiar where there is no good reason to change - this draft did not seek to protect the *Aboriginal Land Rights Act*, but did recognise customary law in a limited manner.

### Option 4

A new Constitution Drafted by a Constitutional Convention.

There may well be a need to hold a new Constitutional Convention - a Constitutional Convention is a meeting of people representing all parts of the Territory coming together to talk about what the basic rules of our democratic system of government should be. The previous Northern Territory convention began with a draft Constitution put together by the NT Government. Many people were not happy the Government did this ignoring one that was put together by a Committee talking to lots of people over a long period of time. When Alaska (in the United States of America) were planning on becoming a State they did not have a model, they used books and papers and experts to talk about how to make a Constitution, but it took a long time. It might be more expensive and time consuming for a Constitutional Convention to consider drafting from the very beginning. However, some Territorians may argue that it would be a proper democratic process.

### Option 5

A new Draft Constitution developed by the Statehood Steering Committee.

Should the Committee write up another new Constitution to send out for consideration by all Territorians? (see Option 1 of the Discussion Paper) by the Statehood Steering Committee taking an existing law and adapting it for discussion purposes.

### Option 6

A New Constitution incorporating some or all of the Elements of the Indigenous Constitutional Strategy Document.

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A meeting at Batchelor in November and December 1998 involving the Northern Territory's Land Councils resulted in publication of the *Indigenous Constitutional Strategy- Northern Territory*. The *Indigenous Constitutional Strategy* document is reproduced in the Discussion Paper. The *Indigenous Strategy* document outlines a number of safeguards designed to benefit all Territorians including Aboriginal people.

The Document starts out as follows –

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

The Statehood Steering Committee is asking people how the objectives in the *Indigenous Constitutional Strategy* might be achieved and if these things are what most people want. Many of the ideas are not just for the benefit of Aboriginal people - some Territorians believe they might benefit everyone. The *Indigenous Constitutional Strategy* document also looks at human rights for everyone and political participation of Aboriginal peoples as well as land rights issues.

#### Option 7

As Suggested, the Statehood Steering Committee's Community Discussion Paper already provides six options for discussion. Any interested Territorian who would like to suggest an option not already in the Discussion Paper is welcome to make a submission to the Statehood Steering Committee.

The Australian Constitutional Experience.

Each State in the Australian Federation has its own Constitution. Section 106 of the *Australian Constitution* states:

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

This means they all had a Constitution ready to go before they became a State. For example, when Victoria was a British colony the parliament had put together its Constitution from a law made in England. The Statehood Steering Committee wants this same protection for any new State Constitution in the Northern Territory.

Recent Experiences in Constitutional Development.

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The 1998 Statehood Convention was criticised and many people were disappointed in the way the delegates were appointed. A 1999 *Report into Appropriate Measures to Facilitate Statehood* found most people surveyed who voted *No* at the 1998 referendum were not opposed to Statehood but had concerns about the process and felt they had to vote *No*. Reasons included a lack of information and understanding as well as concern about the Statehood Convention process.

#### ? The Role of a Constitutional Convention.

Following from the brief discussion in Option Four above, this section of the Discussion Paper looks further at the role of a Constitutional Convention.

It is up to the Convention to decide what Constitution will go to the people to either accept or reject. The Statehood Steering Committee Community Discussion Paper invites interested Territorians to comment on developing the process for representation in a Territory Constitutional Convention and how a future Constitutional Convention should be formed.

#### The Role of a Preamble in a State Constitution.

A preamble is a common device in Constitutions throughout the world, and performs a useful purpose in a Constitution. A preamble does not give legal rights and it does not change the meaning of the constitutional rules. The preamble to the Constitution of the Republic of South Africa recognises the *injustice of the past* and states the adoption of the Constitution has the purpose of *healing the divisions of the past and establishing a society based on democratic values, social justice and fundamental human rights*. The preambles in the 1996 *Final Draft Constitution* and in the Convention's 1998 *New State Constitution* both acknowledge and recognise Aboriginal peoples of the Northern Territory.

#### Options for a Head of State.

The role and function of a Head of State must be considered. Do we want to adopt a system of Government where the Crown (Queen) is at the peak represented in the Northern Territory by a Governor? Or do we wish to provide for the selection of a State Governor in a different way? Territorians must consider whether it is still appropriate for the Queen to appoint the Governor or, whether the appointment of a Head of State should belong to the Northern Territory people or maybe even the Commonwealth. The Statehood Steering Committee is interested in debate and discussion on the role, function and selection of a future State Governor or other officer.

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### Constitutional Interpretation.

The 1996 *Final Draft Constitution* provided instructions to help the courts interpret the Constitution. This allowed for any relevant paper, report or other document to be considered. Whether we wish to limit future courts about how they consider a new Constitution will be a matter for Territorians to decide.

### Entrenchment of a Constitution or parts of a Constitution.

Entrenchment means a Constitution is difficult to change by a simple vote in the parliament. It means the people have to decide to make the change by voting. In 1987 the Select Committee on Constitutional Development published Information Paper No 2 called: *Entrenchment of a New State Constitution*. That Committee thought that some degree of entrenchment of the whole of the new State Constitution was desirable. The Committee also decided that whatever the method chosen for amending the new State Constitution the method itself should be entrenched. The Central Land Council has told the Statehood Steering Committee it wants to protect the *Aboriginal Land Rights Act* if we become a State. Would entrenchment achieve this? The Community Discussion Paper looks at this issue in more detail.

### Aboriginal Customary Law.

The Community Discussion Paper gives consideration to the issue of Aboriginal customary law and whether Aboriginal customary laws should be recognised in the Northern Territory legal system by a Constitution. Recently in Western Australia, the Law Reform Commission of Western Australia published a Final Report on Aboriginal Customary Laws which may be of assistance to us in the Northern Territory when considering these issues.

### A Bill of Rights?

Australia does not have a Bill of Rights in the Australian Constitution. It is sometimes said Australia does not need a Bill of Rights because the parliaments and the courts provide protection for individuals rights. Some people disagree. The Discussion Paper looks at this issue of constitutional development. Some of the models in our paper consider issues with regard to named rights. A Northern Territory Bill of Rights was considered by the Sessional Committee on Constitutional Development in Discussion Paper Number 8 published in March 1995. Since the publication of that paper, two Australian jurisdictions have introduced a charter of rights. The ACT has had theirs since mid 2004 and Victoria has the *Charter of Human Rights and Responsibilities Act 2006* which came into force in January 2007. In the United States, their Bill of Rights is the first 10 amendments to the United States Constitution. It has been around since December 1791.

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Bicameralism.

Do we need an Upper House? In November 2005, the Premier of South Australia the Hon Mike Rann said he wants to abolish the South Australian Upper House. In 1922 the Queensland Legislative Council was abolished. But in March 2006 discussion commenced about getting it back.

One of the arguments for a 'bicameral system' relates to the number of seats a government can win with single member electorates by winning less than 50% of the primary votes. This was not the case at the 2005 Northern Territory election, where the Government achieved 51.9% of the primary vote. However the Territory Opposition won 35.7% of the primary vote but holds just four seats (16%) out of the 25 seat Legislative Assembly. Should we consider representation and reform of the voting system in a Constitution? Bicameralism is one way of establishing checks and balances, but is it the best way?<sup>3</sup>

### Terms and Conditions

Section 121 of the Commonwealth Constitution sets out the following –

*The Parliament may admit to the Commonwealth or establish new States and may upon such admission or establishment make or impose such terms and conditions including the representation in either House of the Parliament as it thinks fits.*<sup>4</sup>

It is the interpretation and application of these terms and agreements which is crucial to the progression of Statehood for the NT and which, to date, the Commonwealth has not indicated. The central issue is whether the NT emerges from the transition as absolutely equal to other states or whether there is an endeavour by the Commonwealth to impose terms and conditions which render the NT to be unequal to its state counterparts.

In its submission to the Standing Committee on Legal and Constitutional Affairs, the SSC "acknowledges an immediate adoption of absolute equality by the Commonwealth is unlikely" but "contends that eventual equality of the NT as a new state with existing states (except insofar as the Commonwealth Constitution confers certain rights on original states only) should be the focus of any process toward statehood for the NT.

As the SSC views the matter, there is a clear difference between the processes for negotiating and implementing the terms and conditions of the proposed grant of statehood on the one hand and for preparing adopting and implementing the new state constitution on the other hand.

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<sup>3</sup> <http://www.statehood.nt.gov.au/documents/KeyIssuesSummaryJuly07.pdf> viewed on April 25 2010

<sup>4</sup> The Australian Constitution (Annotated), p.119

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(Furthermore), the SSC believes it is unlikely the Commonwealth Government will leave the determination of the issues to the Commonwealth Parliament (and the releasing of a Memorandum of Agreement between the Commonwealth and the NT government appears to be the more appropriate process in the initial stages. Once such a Memorandum is entered into, and Territorians are able to exercise their votes on the proposed grant of statehood with knowledge of that Memorandum then the grant can be advanced by the Commonwealth by drafting a Bill incorporating those agreed terms and conditions.”<sup>5</sup>

### Indigenous issues

The following points outline the recent history of Indigenous engagement with the issue of NT statehood, according to the SSC:

During August 1998 the Central Land Council organised a conference at Kalkaringi in anticipation of the October 1998 Northern Territory referendum on Statehood.

- From that convention, a document known as the *Kalkaringi Statement* was published.
- Following that convention another was held at Batchelor; this time the other Land Councils participated.
- The result was the production of a combined document called the Indigenous Constitutional Strategy.
- The document states *The Aboriginal Nations of the Northern Territory are governed by our own constitutions (being our systems of Aboriginal law and Aboriginal structures of law and governance, which have been in place since time immemorial). Our constitutions must be recognised on a basis of equality, co-existence and mutual respect with any constitution of the Northern Territory.*
- The Strategy also notes the Aboriginal peoples represented will: *Withhold our consent (to Statehood) until there are good faith negotiations between the Northern Territory Government and the freely chosen representatives of the Aboriginal peoples of the Northern Territory leading to a Constitution based upon equality, co-existence and mutual respect.*
- The Strategy outlines a range of issues that Aboriginal people considered vitally important in the context of Statehood in 1998.
- Many Aboriginal people see Statehood as an opportunity to realise some long held goals in terms of recognition of traditional laws and culture.<sup>6</sup>

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<sup>5</sup> <http://www.aph.gov.au/house/committee/laca/ntstatehood/subs/sub001.pdf> viewed on April 24 2010

<sup>6</sup> <http://www.statehood.nt.gov.au/wp-content/uploads/2020/01/2010-final-fact-sheet-16-on-letterhead.pdf> viewed on April 25 2010

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Other perspectives emerging from Aboriginal organisations and academic perspectives assert that it is not until the NT government and non-Aboriginal communities acknowledge and embrace aspects of the history, culture of, and contemporary challenges faced by, Aboriginal people in the NT that any transition to statehood could be viewed favourably by Aboriginal residents of the NT.

For example, in 2006 the Central Australian Aboriginal Congress, in its submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs, the Northern Territory Standing Committee on Legal and Constitutional Affairs and the Northern Territory Statehood Steering Committee, asserted that:

*The Territory population is generally thought of as about 30 per cent Aboriginal. This is so much greater than the states (all with less than 4 per cent Aboriginal) that it alone warrants a different model of political representation. But the gap is even larger. This is because Aboriginal citizens are permanent residents of the Northern Territory, and the non-Aboriginal population is relatively transient – and vastly more so than elsewhere in Australia.*

*Short-term residents are likely to have quite different interests in the Territory and its future than those who are permanent. Aboriginal people make up the majority of the Territory's long-term citizens and stakeholders. They are born here, and they do not leave on retirement. However, non Aboriginal people have disproportionate political sway. Amongst policy makers, themselves often transient, they rule.*

*If Aboriginal people are to gain a degree of political influence that matches their numbers and continuing stake in the NT, two types of benefit are possible. The first benefit would follow from their increased capacity to direct public resources in directions that ensure improvement in Aboriginal health and wellbeing. This would be through better health, education and welfare services, employment opportunities, and other measures directed at reducing exclusion and institutional racism.*

*The second, and obviously related, type of benefit concerns social status. With a more appropriate and inclusive political system, the status of Aboriginal people is likely to increase – along with their sense of control over their futures. There is now a great deal of evidence to show that social status and peoples' experienced capacity to shape their own lives has a critical effect on health and wellbeing.*

*Congress wants to see new governmental arrangements directed at ensuring the inclusion of Aboriginal people in the Northern Territory. A new constitution should guarantee equitable services and enshrine the rights and responsibilities of all citizens to fully participate in the social, political and economic life of the country.*

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*The constitution should target the elimination of status differences along racial lines. Public agencies should be required to exercise all possible measures, including appropriately enforced laws, to reduce inequalities between Aboriginal and non-Aboriginal people.<sup>7</sup>*

The University of Queensland's Australian Centre for Peace and Conflict Studies, in its 2006 submission to the Standing Committee on Legal and Constitutional Affairs, advises caution in relation to the NT's transition to statehood in terms of the requirement to consider "first people's" issues.

*On one side of the NT constitutional divide are many non-Indigenous people who see the constitutional future as a simple application of their own majority vote to establish a new state essentially the same as that model from the 1890's enshrined in the Federation of 1901.*

*On the other side are the Indigenous community who seek recognition and respect for its ethno-cultural regions, character, history, culture and aspirations in NT political and administrative arrangements including guarantees for land and other rights in federal and or NT constitutional documents. (Significantly), the Indigenous population of the NT is estimated to be half of the total longer-term population.*

*It is not necessary to achieve equality of socio-economic outcomes or other such markers before accepting that sufficient consensus, reconciliation or mutual acceptance has been reached politically before statehood to proceed. Rather the threshold needed is a sufficient commitment and process in place to ensure to Aboriginal (people) that the new NT entity can be their genuine political home and has a politico-legal framework which guarantees them sufficient autonomy and decision-making power and structures.<sup>8</sup>*

The matter of the Aboriginal Land Rights Act is also of central importance to the issue of statehood. The SSC outlines the following facts to consider this matter:

- The *Aboriginal Land Rights (Northern Territory) Act* is a law of the Commonwealth Parliament. The Northern Territory Parliament cannot change the *Land Rights Act*.
- Whenever changes are proposed like those in October 2005 where the Commonwealth proposed changes to the *Act* to provide for a Northern Territory based Authority to approve long term leases of land for the purposes of developing commercial and residential interests in towns and creating new towns on Aboriginal land with the permission of traditional owners it is relevant to us.

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<sup>7</sup> <http://www.statehood.nt.gov.au/documents/CongressSubmissionStatehood2.pdf> viewed on April 18 2010

<sup>8</sup> <http://www.aph.gov.au/house/committee/laca/ntstatehood/subs/sub009.pdf> viewed on April 15 2010



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- The changes are relevant to Territory power and Statehood because a change to the way land in the Northern Territory is administered under this *Act* is the responsibility of the Commonwealth.
- Legislation is debated and passed by a parliament with just two representatives from the Territory in each house, two out of 150 in the House of Representatives and two of 76 in the Senate.
- Administration of the *Land Rights Act* by Canberra has previously been supported by many traditional owners. With changes in the political landscape is this still the case?

The following information provides some background to the *Act*.

- The *Act* came about as a response to a Commission of Inquiry by Justice Woodward completed in 1974 to examine appropriate ways to recognise Aboriginal land rights in the Northern Territory.
- In his report Justice Woodward found that land was an essential part of peoples' economic wealth and their identity.
- As a result, the *Land Rights Act* says that decisions about mining and other development on Aboriginal land must be made by the traditional Aboriginal owners.
- The *Land Rights Act* also establishes the land councils in the Northern Territory and provides for the management of Aboriginal land.
- The functions of a Land Council are:
  1. To find out and express the wishes and the opinions of Aboriginals living in their area about the management of Aboriginal land
  2. To protect the interests of traditional Aboriginal owners, and other Aboriginal people interested in Aboriginal land in the area and to assist in the protection of sacred sites on land (whether or not Aboriginal land) in the area.
- The *Act* also outlines a process for land claims and provides for the Aboriginal Benefits Account which funds the four Northern Territory Land Councils for operations and to support Aboriginals in areas affected by mining.
- The Future of the *Land Rights Act* as either a Commonwealth or a Northern Territory Act is an important Statehood issue.<sup>9</sup>

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<sup>9</sup> <http://www.statehood.nt.gov.au/wp-content/uploads/2020/01/2010-final-fact-sheet-13-on-letterhead/.pdf> viewed on April 24 2010

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## Nuclear Waste

- The Northern Territory has a law called the Nuclear Waste Transport, Storage and *Disposal Prohibition Act 2004*. This law prohibits a nuclear or radioactive waste facility in the Northern Territory.
- South Australia and Western Australia have similar laws.
- The Territory law cannot prevent the Commonwealth deciding to place a radioactive waste facility in the Northern Territory because Australian law overrides Territory law and in the case of some radioactive waste laws the Commonwealth will prevail.
- What if we were a State? The relevant Commonwealth law is the *Australian Nuclear Science and Technology Organisation (ANSTO) Act 1987* which says certain State and Territory laws do not apply to ANSTO activities.
- The ANSTO Act deals only with the activities of ANSTO. ANSTO activities include the nuclear reactor at Lucas Heights in New South Wales. Waste from ANSTO may be stored in any State or Territory
- However, valid State laws could still prohibit radioactive waste storage facilities that are not from ANSTO.
- This is where Statehood is relevant. States will have an advantage if they want to prohibit other sources of radioactive waste (not generated by ANSTO), because they can enact valid laws to prevent that waste being stored in their State. Remember Commonwealth laws will always prevail over Territory laws but only *sometimes* over State laws.
- Some people have said that South Australia being a State prevented the placement of a radioactive waste facility at Woomera. This is not correct.
- In the South Australia case, the Federal Court ruled there was 'no urgent necessity for the acquisition' of the privately owned land under the *Land Acquisition Act 1989* and rejected the Federal Government's argument that it would have been contrary to public interest for the purchase to be delayed.<sup>10</sup>

## Industrial Relations

- The *Northern Territory (Self Government) Act 1978* provides that Commonwealth law applies to industrial disputes in the Northern Territory.
- The Legislative Assembly of the Northern Territory has no ability to change either the *Self Government Act* or the *Fair Work Act 2009*. The *Self Government Act* does not allow the Northern Territory to have its own Industrial Relations System.
- The Commonwealth uses the authority of the *Corporations Power* in the *Australian Constitution* (S.51(xx)) to make laws that apply to the vast majority of Australian workers and limit the industrial relations law making power of the States.

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<sup>10</sup> <http://www.statehood.nt.gov.au/wp-content/uploads/2020/01/2010-final-fact-sheet-22-on-letterhead/.pdf> viewed on April 25 2010

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- The *Workplace Relations Act* and the *Self Government Act* were amended in 2005 to implement a system called Work Choices (*Workplace Relations Amendment (Work Choices) Act 2005*).
- This has been changed by the passage of the *Fair Work Act* which came into effect on July 1 2009.
- A new Commonwealth body called Fair Work Australia sets the minimum and the award wages for the Northern Territory.
- The Statehood Steering Committee has no view on either the *Workchoices* or the *Fair Work* laws.
- If the Northern Territory were to become a State what would the situation be?
- The recent history of Commonwealth law-making on Industrial Relations suggests that it is unlikely to agree to the Northern Territory establishing its own Industrial Relations system when it becomes a State. The Commonwealth can do this under its power to decide the terms and conditions for admission to Statehood (S.121).
- If that is the case, Statehood may not make any difference to the industrial relations powers currently available to the Northern Territory.<sup>11</sup>

#### **Functions of the Statehood Steering Committee and comments on implications for local government and Darwin City Council.**

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

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

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<sup>11</sup> <http://www.statehood.nt.gov.au/wp-content/uploads/2020/01/2010-final-fact-sheet-30-on-letterhead/.pdf> viewed on April 25 2010

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The Committee aims to educate how our current system of government works and how the Northern Territory is a body politic established by and subservient to the Commonwealth, whereas a State in our federal system has its own constitutional rights and guarantees.<sup>12</sup>

The Executive Officer (EO) of the SSC describes the opportunities for recognition of local government in a transition to Statehood as a "blank canvas" insofar as it could act in a leadership role in terms of how local government could be recognised constitutionally and how partnerships with a prospective State government could be effectively formulated.

The EO referred to the concepts recently promoted by Councillor John Rawnsley of Alice Springs Town Council who considers the concept of the constitutional recognition of regions, and the attendant protection of the interests of those regions, to be one possible and important consideration in relation to the role of local government in the transition to statehood.<sup>13</sup>

### **Australian Local Government of Australia (ALGA)**

ALGA provided Council with the following response in terms of its commentary regarding a transition to statehood -

*The consensus view is that ALGA can not get involved in individual state or territory issues. State associations may be the best source of advice on the implications of the NT becoming a state, and state/Commonwealth governance issues.*

*In terms of constitutional reform, the technical implication is that currently the Northern Territory and the ACT are not counted for the purposes of a majority of the states of Australia (ie. 4 out of the 6 states need to vote yes in a referendum). ALGA would support the ability of Northern Territory citizens being able to vote on an equal basis to the other states of Australia, particularly in relation to a referendum on constitutional reform.*

*The view of Kerry Corke and Associates in a document prepared for the National General Assembly in 2004 The Constitutional Recognition of Local Government in Australia, is that the use of the word "Entity" rather than "State" in their proposal "recognises the practical fact the Northern Territory operates for all intents and purposes as a State," but that under the Northern Territory (Self-Government) Act 1978 and pursuant to the exercise of section 122 of the Constitution, is not a State.*

*"However, the Northern territory is treated for all political and practical purposes in the 21<sup>st</sup> century as a State of the Commonwealth".*

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<sup>12</sup> <http://www.statehood.nt.gov.au/documents/DPWeb/pdf> viewed on April 17 2010

<sup>13</sup> Discussions with Michael Tatham, Executive Officer, Statehood Steering Committee on April 28 2010

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*"It is intended to extend the requirement proposed to be imposed by the section [a draft section proposed by Corke and Associates in 2004] to the Northern Territory and other similar bodies politic."*<sup>14</sup>

### **Capital City Council of Lord Mayors (CCCLM)**

In accordance with its purview, CCCLM is unable to comment on issues relating to individual state or territory jurisdictions.<sup>15</sup>

### **Implications for Darwin City Council and the Local Government Association of the Northern Territory (LGANT)**

In discussions with the CEO of LGANT, Council was referred to the following correspondence comprising the 2007 submission to the SSC's Constitutional Paths to Statehood discussion paper –

*In this submission the Local Government Association of the Northern Territory ('the Association') confines its comments to:*

- *Part Two - Models for Consideration*
- *references to local government in a future constitution*

*The Association is of the view that much work has already been done on the question of Statehood for the Northern Territory. It concludes that the Committee should adopt the approach suggested in Option 5, A Constitution developed by the Statehood Committee as the most favourable future course of action for it to pursue. It makes this suggestion on the basis of cost and, given many of the other models have already been tried, it does not see it being effective to repeat them. Furthermore, the Committee outlines in the introduction to the paper the pathways it sees as necessary to finalise a Constitution and they point more towards Option 5 than any other model.*

*Regarding references to local government in the Constitution the Association does not consider that the comment 'local government gains recognition under Part Nine of the Draft Constitution' (Option 2 – 1996 Final Draft Constitution p.16) is true at all. Indeed the words that follow, the Association argues, do not amount to recognition but are merely symbolic. They probably do no more than acknowledge local government exists. The Association considers that far more substantive matters must be incorporated into the Constitution for 'true recognition' to be given any credence.*

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<sup>14</sup> Per Monica Telesny, AGGA Policy Officer on April 16 2010

<sup>15</sup> Per Deborah Wilkinson, Business Manager, CCCLM on April 16 2010

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*Substantive recognition comes about when there is some protection for local government over the scope of its powers. It is provisions such as these that the Association will be seeking to have included in any new Territory Constitution once a model for advancing the matter has been chosen.*

LGANT's policies on constitutional recognition are:

#### 1.2 Recognition

- (a) LGANT supports the recognition of Local Government in the Constitution Act of the Commonwealth of Australia.
- (b) LGANT supports the recognition of Local Government in the proposed Constitution Act of the Northern Territory.<sup>16</sup>

### Next Steps

The SSC will continue to conduct public forums until November 2010 at which time approximately 45 will have been conducted across the NT.

In September 2011 or thereabouts a Constitutional Convention will (probably) be convened and attended by delegates from across the NT to progress the development of a constitution. The method of identifying delegates has not yet been fully determined.

A draft constitution will then be tabled to the NT Legislative Assembly for the consideration of the NT Government.

It is considered crucial that the Federal government commences substantive engagement with the NT in relation to its view regarding a transition to statehood.<sup>17</sup>

### Summary

Notwithstanding debates regarding the terms and conditions for the transition to Statehood and pathways to achieve constitutional change as well as the concerns held by Indigenous people in relation to a raft of very significant issues, Statehood is a contemporary and potentially advantageous legislative and constitutional mechanism for the proper recognition of both the Northern Territory and the role of local government.

It is recommended, therefore, that Council broadly support the notion of Statehood for the Northern Territory at least until such time as the constitutional pathway and terms and conditions of its granting or establishing are known.

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<sup>16</sup> Sourced from Tony Tapsell, LGANT CEO, on April 15 2010

<sup>17</sup> Discussions with Michael Tatham, Executive Officer, Statehood Steering Committee on April 28 2010

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Further consideration of the following issues would be appropriate:

- the details of the terms and conditions of the transition to Statehood
- the pathways to constitutional change
- the status of the recognition of local government within the Commonwealth constitution.

### **FINANCIAL IMPLICATIONS:**

Nil at this stage.

### **STRATEGIC PLAN IMPLICATIONS:**

The issues addressed in this Report are in accordance with the following Goals/Strategies of the Darwin City Council 2008 – 2012 as outlined in the 'Evolving Darwin Strategic Directions: Towards 2020 and Beyond':-

#### **Goal**

- 1 Achieve Effective Partnerships and Engage in Collaborative Relationships

#### **Outcome**

- 1.1 Improve relations with all levels of Government

#### **Key Strategies**

- 1.1.4 Play a strategic role in the planning and developmental processes that impact Darwin

#### **Goal**

- 7 Demonstrate Effective, Open and Responsible Governance

#### **Outcome**

- 7.1 Effective governance

#### **Key Strategies**

- 7.1.5 Be active in the review and development of relevant legislation

#### **Goal**

- 7 Demonstrate Effective, Open and Responsible Governance

#### **Outcome**

- 7.2 Display strong and effective leadership, within Council and across Government

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### **Key Strategies**

7.2.2 Display Council's leadership across all levels of Government

#### **Goal**

7 Demonstrate Effective, Open and Responsible Governance

#### **Outcome**

7.2 Display strong and effective leadership, within Council and across Government

### **Key Strategies**

7.2.4 Keep abreast of Australian and world trends to ensure Darwin is prepared and can make informed decisions

### **LEGAL IMPLICATIONS:**

Nil at this stage

### **ENVIRONMENTAL IMPLICATIONS:**

Nil

### **PUBLIC RELATIONS IMPLICATIONS:**

Potentially positive insofar as Council may be perceived as engaging in the issue of Statehood via robust consideration.

### **COMMUNITY SAFETY IMPLICATIONS:**

Nil

### **DELEGATION:**

Nil

### **CONSULTATION:**

LGANT  
 ALGA  
 CCCLM  
 Statehood Steering Committee Executive Officer



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**PROPOSED PUBLIC CONSULTATION PROCESS:**

Nil

**APPROPRIATE SIGNAGE**

Nil

**RECOMMENDATIONS:**

- A. THAT Report Number 10TC0028 entitled Overview Of Concepts And Issues Regarding The Prospect Of The Northern Territory's Transition To Statehood, be received and noted.
- B. THAT Council broadly supports the notion of Statehood for the Northern Territory at least until such time as the constitutional pathway and terms and conditions of its granting or establishing are known.

**ANNIE FARRELL**  
**PRINCIPAL POLICY OFFICER**

**BRENDAN DOWD**  
**CHIEF EXECUTIVE OFFICER**

Any queries on this report may be directed to Annie Farrell on 5404 or [a.farrell@darwin.nt.gov.au](mailto:a.farrell@darwin.nt.gov.au)

**6 CLOSURE OF MEETING TO THE PUBLIC**

THAT pursuant to Section 65 (2) of the Local Government Act and Regulation 8 of the Local Government (Administration) Regulations the meeting be closed to the public to consider the Confidential Items of the Agenda.

DECISION NO.20\() (04/05/10)

