TEN YEARS OF SELF-GOVERNMENT:
A CONSTITUTIONAL PERSPECTIVE
By Graham Nicholson
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INTRODUCTION

This talk was delivered by Graham Nicholson on 29 June 1988 at the State Reference Library in Darwin, as one of the Library's series of 'lunchtime entertainments'.

It was no coincidence that this talk was given almost exactly ten years after the grant of self-government to the Territory. This was the State Reference Library's contribution to the anniversary celebrations, and who better to speak on the subject than Graham Nicholson, the Constitutional Adviser to the Territory Government, and a lawyer with a very long-standing interest in the Territory's constitutional development.
As you all know, 1 July this year commemorates ten years of self-government in the Northern Territory. It is an opportune time to look back at what has been achieved, and to look forward as to the prospects for the future. I would like to do this from a constitutional perspective. It is not my intention to talk about the politics of self-government.

Looking back, one thing that strikes me about the Territory's history is the dramatic changes that have occurred within a relatively short period of time.

The Territory was the late starter in the Australian constitutional stakes. At a time when most of the Australian colonies already had self-government, the Territory existed on paper only as part of the colony of New South Wales. It missed the convict era by a 'short nose' when in 1846 it was set up on paper as a separate colony to receive emancipists. They never arrived. That colony was abolished shortly thereafter and the Territory reverted to New South Wales.

The Territory was physically separated from New South Wales proper after the creation of South Australia and Queensland, although constitutionally still part of it. It was subsequently dumped on South Australia in 1863 by a handful of words contained in Letters Patent despatched from London.

The Territory never lived up to the early expectations of Adelaide. It was a largely forgotten backwater with a minute non-Aboriginal population until the gold rush of the late nineteenth century.

The Territory was, however, represented in the South Australian Parliament, and, in fact, I understand that the Northern Territory member acted as Premier of South Australia for a few days.

The coming of federation in 1901 saw the Territory fully integrated into the Australian federal system as part of the State of South Australia. Territorians (other than Aborigines) had a vote both in the State Parliament and in the new Federal Parliament. They had all the constitutional rights of other Australians.

Unfortunately for them, South Australia could not offload the Territory fast enough. The gold rush had fizzled, leaving the Territory with a legacy of economic somnolence, a half-finished railway, and a small but significant number of residents of Chinese origin.

A deal was struck, and the Commonwealth took over the Territory from South Australia in 1911 with an undertaking to build a north-south railway. Unfortunately a time limit was omitted for the performance of this undertaking, and the High Court has since said that it is not legally enforceable.

Constitutionally it was back to square one - the Territory reverted to being a dependency. It was ruled from Canberra with Territorians
being deprived of the constitutional rights afforded to their fellow Australians in the States.

Dissatisfaction soon developed with this state of affairs. The Darwin rebellion occurred, an Administrator was evicted, and eventually the Territory was given a non-voting member in the House of Representatives.

Various ideas for the Territory were mooted, such as disposing of it to an Anglo-German company, but most came to nothing. One idea that was tried, but which failed, was to split the Territory into two administrations and to set up a Commission to plan the northern half. They were even going to have the northern capital at Newcastle Waters. The scheme was eventually revoked, and the Territory was put back together again.

More inquiries were held, but all were lost as World War II touched northern shores. The Territory was placed under military rule for the duration.

Post-war, there was a ground swell for change. The Minister for the Interior in Canberra, Mr HV Johnson, wanted some local participation in Territory government. Mr Chifley as Prime Minister and Treasurer supported only a limited form of involvement not extending to powers of law making. He made a press statement supporting a system similar to that in Papua-New Guinea. When it was pointed out that this included legislative powers, Cabinet backpedaled. The Territory as a result received a grant of local law-making powers through a new Legislative Council. To begin with the Council only had a minority of elected members, but later changes created a majority of elected members.

Local government, which began in the previous century but which had lapsed, was also resurrected, beginning with Darwin. Town management boards were introduced in other centres.

Voting rights were granted to the Territory member in the House of Representatives, followed by the grant of two Territory Senate places. This representation survived two High Court challenges.

In 1974, the fully elected Legislative Assembly replaced the Legislative Council. The Joint Commonwealth Parliamentary Committee reported in the same year that a substantial grant of self-governing powers should be made to the Assembly. This was confirmed in a supplementary report after Cyclone Tracy.

By this time the pressure for constitutional development was developing rapidly. The new 'class of 1974' in the Legislative Assembly kept up the pressure and eventually the Commonwealth capitulated. Self-government was effected on 1 July 1978 by the Northern Territory (Self-Government) Act 1978.

I have said elsewhere that the 1978 grant constituted an extensive and comprehensive, but not complete, form of self-government. However it is clear that the grant does not amount to Statehood within the Australian federal system. The Territory remains a territory of the
Commonwealth, a view confirmed by a number of High Court comments. As such, it remains subject to the plenary powers of the Commonwealth under section 122 of the Commonwealth Constitution, unrestricted by most of the other provisions of that Constitution applicable to the States. In theory at least, the Commonwealth could even retract the grant of self-government, although the Attorney-General's Department, in a submission to the Joint Parliamentary Committee in 1974, stated that this would be unthinkable except in the event of some major crisis.

It must be remembered that government is a dynamic thing, changing as it responds to contemporary developments. It is not possible to regard self-government as some form of static constitutional state. Many influences are brought to bear that result in change from time to time, legal, economic, political, social, etc.

If you look at the past ten years of self-government it is possible in very broad terms to identify certain changes that have taken place. In the initial stage following 1 July 1978, the grant of executive powers to the Territory was fairly wide, and there was a flurry of activity to exercise those powers. The grant was in fact wider than originally proposed by the Joint Parliamentary Committee. This was combined with a generous financial deal under the Memorandum of Understanding with the Commonwealth.

This grant of executive powers was further extended in the first few years after 1 July 1978 by amendments to the Northern Territory (Self-Government) Regulations to include health, education, Supreme Court and certain other matters.

Combined with this, it gradually became accepted practice by the Commonwealth to treat the Northern Territory in much the same way as the States. Some restraint was exercised in the use of the Commonwealth's plenary legislative powers over the Territory.

Certain items of pre-self-government Commonwealth legislation having special application to the Territory were amended to bring them into line with the States, although several other major items of legislation applying to the Territory remained. The main examples of the latter are the National Parks & Wildlife Conservation Act 1975, under which Uluru and Kakadu National Parks are established, the Atomic Energy Act, under which Ranger operates, and the Aboriginal Land Rights (Northern Territory) Act 1976.

It was, I suppose, inevitable that this initial 'honeymoon' period would pass. We are all well aware in general terms of the public debate over inroads made into the Memorandum of Understanding and the changes that have been introduced in Commonwealth-Territory financial relations. The result is that the Territory is losing its favoured financial treatment. Constitutionally, the Territory remains exposed in this regard, more so than the States.

In addition, arguments over whether further powers should be transferred to the self-governing Territory seem now to be making little progress. Perhaps this is because most of the less contentious
matters appropriate for transfer have already been transferred. The difficult areas remain.

The Commonwealth has also on several occasions demonstrated its willingness to use its plenary legislative powers to impose its will on the Territory. For example, its ban on mining in Kakadu National Park and the extension of that Park into Gimbat and Goodparla. Also the grant of Uluru as Aboriginal land notwithstanding the earlier finding of the Aboriginal Land Commissioner that it was not available for claim. Another example was the combination of Christmas and Cocos (Keeling) Islands with the Northern Territory for federal electoral purposes, and notwithstanding an earlier report suggesting combination with the ACT.

To be fair to the Commonwealth, these examples have been more the exception than the rule. In fact, the Commonwealth does not generally intrude on transferred Territory matters. There have been suggestions on several occasions that the Commonwealth might use its powers to disallow Territory legislation with which it did not agree, such as the new Criminal Code, but these suggestions have not yet resulted in disallowance action. The strength of this convention may well be tested in forthcoming litigation concerning the Energy Resource Consumption Levy Act.

There has also been some difficulty in precisely determining whose advice should be sought and acted upon when the Governor-General appoints the Administrator, although when pressured by the Territory and its politicians, the Commonwealth has been fairly responsive to Territory demands. Certainly the Administrator now acts in a similar way to State Governors in all transferred matters, such that it can be said that there is a developing convention that he acts on the advice of his Territory Ministers. Responsible Cabinet government on the lines of the contemporary Australian model is now firmly entrenched in the Northern Territory.

The position of the Northern Territory as a separate body politic under the Crown also now seems to be established before the courts. I referred to this matter in an article I wrote appearing in the December 1985 issue of the Australian Law Journal. More recently, the full Federal Court in the Burgundy Royale litigation has recognised that the Crown in the right of the Northern Territory is distinct from the Crown in the right of the Commonwealth. As such, the Territory cannot be regarded as some form of Commonwealth statutory authority. It is an independent government in its own right, with the rights, privileges and immunities that attach to such bodies.

Let me at this point briefly mention Aboriginal land rights. This has tended to become a fairly contentious issue, leading to sharp divisions of opinion. Interestingly, the period in which an awareness has developed among Aboriginal Territorians of land rights and self-management issues has largely coincided with the period of the self-government exercise. These two developments, running in parallel, because of their very nature were bound to lead to some conflict and difficulties. The degree to which the Territory has been able to continue as a reasonably cohesive entity despite this is perhaps surprising. If it ultimately leads to increased recognition by
Territorians of both Aboriginal and non-Aboriginal descent, of the important contribution which they both can and do make to the total society, it will be a worthwhile result. Certainly a measure of tolerance and goodwill remains on both sides and should be encouraged.

Looking forward to the future, the most logical course for further constitutional development is in the direction of Statehood. Views will differ on whether the Territory should be a State or not. Such views tend to ignore the fact that the Territory can already be described as a 'defacto State'. It already has most of the powers of a State, it has the functioning administrative apparatus of a State and is largely treated as a State by other Australian governments in so far as this is constitutionally possible. Perhaps the debate would be more productive if it concentrated on the terms and conditions on which the grant of Statehood should be made, rather than on the more arid issue of whether it should be a State or not.

Action is of course already underway in anticipation of Statehood. You may be aware that a bipartisan Select Committee of the Legislative Assembly on the Constitutional Development of the Northern Territory has been established and is now active. That Committee has recently released a series of 'green' papers to the public. The main issue dealt with by that Committee relates to the constitution of the proposed new State, and public comment is presently invited. Copies of the papers are available now from the Legislative Assembly free of charge.

The basic steps for achieving Statehood as earlier proposed by the Chief Minister and as now set out in Part C of Information Paper No.1 of the Select Committee, may be briefly summarised as follows:

The Select Committee will conduct public hearings and prepare a report to the Legislative Assembly with a draft constitution. That draft will be debated and will in turn be referred to a Territory constitutional convention to be set up by Territory law. The constitution as ratified by that convention will then be submitted for approval by a referendum of Territory voters.

Concurrently with these developments, negotiations will proceed between the Commonwealth and the Territory Governments with a view to entering into a memorandum of agreement for the admission of the new State under section 121 of the Constitution and fixing the terms and conditions of that admission. Discussions will also take place with the States.

Subject to satisfactory completion of these two processes, the Commonwealth Parliament will be asked to enact the necessary legislation to grant Statehood. It is not essential to have a national referendum to admit the new State under section 121, although a national referendum remains as an alternative method of doing so.

Many issues remain to be resolved in the course of seeking Statehood. Among the more obvious are the question of new State representation in the Commonwealth Parliament, the question of what is to happen to Aboriginal land rights, national parks and uranium, the
financial terms and conditions of Statehood and the question of the relationship between the Queen and the new State.

It is not possible to enter into a satisfactory discussion of these issues in this talk, but I commend to your attention the recent publication *Australia's Seventh State*, which deals with many of the issues.

Much work remains to be done before Statehood can become a reality. It is certainly not going to happen overnight, and hopefully it will only happen after full consultation with the Territory community. It provides a good opportunity for Territorians to adopt a system of governing themselves which is both fair and appropriate to the special needs arising out of their unique situation. It is also to be hoped that it will contribute to the creation of a just and harmonious community of people of diverse origins, a community comparatively free of prejudice and discrimination and the tensions that now grip so many other parts of the world. If it is to do this, it is important that a wide cross-section of the community become involved in the processes leading up to Statehood.

There will remain those critics of a centralist disposition who will be opposed to this development. They will no doubt point to the deficiencies of federal systems to justify their position. Certainly there are many contemporary issues that can only be adequately dealt with at a national or international level. But there also remain many other issues that can much more appropriately be dealt with at a much lower level, closer to the community. In my respectful view, centralism becomes a real danger if it seeks to intrude too far into these other issues. It can lead to excessive bureaucratisation, lack of sensitivity to special needs, rigidity, arrogance and ultimately tyranny. The beauty of a federal national structure is that it provides a means of accommodating both national and regional needs in a constitutional framework, such that both unity and diversity can co-exist. The Territory as a State would certainly add an element of diversity to the Australian federal system.

That is not to say that I am advocating a grant of Statehood for the Territory. This is ultimately a political matter, to be determined in the light of prevailing circumstances. My role is one of a constitutional adviser only.

I remain convinced of the importance of the Territory, and Darwin in particular, not only to Australia but in the region generally. It is the 'bridge' between the largely European south and the massively populated Asian north. It forms the southern wing of the fastest growing economic region in the world - the western Pacific basin.

We enjoy the bounty of having a multicultural society which basically functions in harmony and within the framework of a reasonably democratic system based on the rule of law. These are valuable assets.

If self-government has contributed to this position, and on balance I think it probably has, it has for that reason alone been a success.

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1 Loveday P and McNab P (Eds). 1988 *Australia's Seventh State* Law Society of the NT and North Australia Research Unit, Darwin.