

Northern Territory Statehood: The Lassetter's Reef of Constitutional Development?

Paper presented by Michael Tatham¹ to the Australasian Study of Parliament Group in Darwin October 2012

Background

Statehood for the Northern Territory may be akin to the fabled Lassetter's reef of gold, it just needs to be found and exploited...or it may not be there at all.

The Statehood story has many layers and offers rich pickings through character analysis, character assassination, strongly held beliefs, rampant ideology, intelligent and thoughtful policy development, populism, myths and misconceptions, jealousy and a range of other attributes but with few victories and many disappointments along the road travelled thus far.

This paper only explores some of the recent moves toward Statehood in the Northern Territory from the perspective of the writer who was working closely with the program. After setting the scene with a little background we start from the creation of the Statehood Steering Committee in 2005 through to the 2011 passage of enabling legislation to support the election of delegates² to a constitutional convention and the deferral of that election and convention process.

This paper also briefly argues that the Northern Territory is constitutionally weaker in 2012 than it was in 1978 and asks: *is it just too difficult to engage the public on constitutional reform? And what lessons are to be learnt from the 2005-2012 experience?*

Introduction

On 21 May 2003 then Chief Minister the Hon Clare Martin³ announced at the Charles Darwin University Symposia that there would be a renewed effort toward Statehood which would be community focused rather than government focused, thus learning from the 'mistakes' of the 1998 referendum process.

Although the Northern Territory is regarded as an intrinsic part of the nation, we still do not enjoy many of the political rights of other Australians. ... Today I announce my Government will work with the community on a new campaign to achieve Statehood, based on a Territory constitution we develop ourselves. This time we will get it right. We will do this with careful community consultation and community involvement from the start⁴.

These words echoed the comments documented in the 1999 report of the Standing Committee on Legal and Constitutional Affairs into the outcome of 1998 entitled *Appropriate Measures to Facilitate Statehood*.

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² The legislation was considered necessary to enable compulsory voting to elect delegates to a constitutional convention. If voting was not compulsory the legal advice was that legislation would not be required.

³ Shortly to publish a book about Chief Ministers which it is understood will also canvass the Territory's status as a non state in the Australian Federation.

⁴ Address to the Charles Darwin Symposia at Charles Darwin University.

In 1998, 51.3% of voting Territorians rejected the Statehood model put forward at a referendum⁵. The Standing Committee looked at the causes of this result and produced the *Appropriate Measures to Facilitate Statehood* report in April 1999 which recommended a fresh approach with greater community involvement.⁶

2005: The Statehood Committee is formed

During June 2004 the position of Executive Officer to the as yet unformed Statehood Steering Committee was advertised nationally. The position was filled by early 2005 with applicants being interviewed by a cross party panel which included the then Leader of the Opposition Terry Mills MLA (now the Chief Minister) and the then Chair of the Legal and Constitutional Affairs Committee Elliott McAdam MLA.

The position was originally proposed and advertised to be a role within the Department of the Chief Minister, however it was moved to the Department of the Legislative Assembly most likely in response to a debate in the Assembly where the then Member for MacDonnell (a central desert seat now called Namatjira) raised concerns as follows:

I do wish to place on the record my concern about the administrative arrangements that surround this particular officer. I would hope that, in the spirit of what we have learned, and in the spirit of what this committee is trying to achieve, that this Executive Officer Level 2 is an officer of the parliament - quite definitely something different to an officer of the government. The reason that I say that is that an officer of the parliament has, and is seen to have, insulation from the influence of government. If the officer is a government appointee, then there may be difficulties in relation to the ability for the ruling government of the day - be it either side of this Chamber –

to be able to clearly state that the whole thing is being done at arms length of government.

The process that surrounds the appointment of this officer is not yet clear. I hope that the CEO of parliament, the Clerk, and the CEO of the Chief Minister's Department get their heads together on this particular issue. I believe the best arrangement would be to make the funds available to the parliament directly, to be administered by the parliament on behalf of parliamentarians, for the appoint of this officer through the parliament, and that government steps back from the appointment of this officer completely - doing nothing more than providing money from government to the parliament to offset the cost of this officer⁷.

The Legislative Assembly formally established the Statehood Steering Committee on 17 August 2004.⁸

Once the Executive officer was engaged⁹, the next step by the Standing Committee on Legal and Constitutional Affairs was to seek expressions of interest from Territorians to become members of the Statehood Steering Committee.

⁵ On a number of occasions during the past seven years, notably at a briefing at Darwin City Council during 2010, the writer, as a presenter on the topic, has been challenged that this statement is incorrect because 'people voted against the then Chief Minister' (or stronger words to that effect). However the result was a 'no' to the questions asked and while context is important that was the outcome.

⁶ Available at the Committee Reports link on www.nt.gov.au/lant

⁷ Mr John Elferink MLA Parliamentary Record 26 June 2004 *Motion - Northern Territory Statehood Steering Committee - Adopt Terms of Reference - debate adjourned from 15 June 2004*

⁸ Terms of reference amended 24 March 2005, 30 November 2006 and most recently by a Motion of the Minister for Statehood Hon. Malarndirri McCarthy MLA on 12 February 2009.

⁹ The writer of this paper,

The Steering Committee's terms of reference required selection after an advertising campaign from a diverse range of peoples from a range of community groups and occupations.

Getting to Work

The Standing Committee received just short of 100 nominations for an unspecified number of positions on the Committee. The Standing Committee made an informal decision during this period not to appoint former politicians and some candidates were immediately excluded on those grounds.

The Statehood Steering Committee convened in April 2005 in Alice Springs with 14 selected community representatives as its foundation members (this would grow to 19 by the time the Committee was disbanded in 2010).

The choice of location was a deliberate attempt to demonstrate to those outside of the capital city that the process was not to be about Darwin and the area north of the so called Berrimah Line¹⁰. While this was the aim, arguably few noticed and it was a continuing challenge to engage central Australians on the matter of Statehood and remains so today¹¹.

The first meeting the Steering Committee confirmed community representative Mrs Sue Bradley¹² as the Committee Co-Chair. This was a unique arrangement where the Assembly Member who was Chair of the Standing Committee and also chair of the Statehood Steering Committee would step out of the limelight to allow the community co-chair to take on the role of being the committee spokesperson and to take the lead at meetings of the committee.

So began the Statehood Steering Committee's program of work which started off with public promotion through traditional institutions such as the annual show circuit and a range of early speaking engagements at schools and service clubs along with the creation of a website and publication of factual and informational materials. These publications can be seen through a link to some of the former Committee's content at www.ntstate7.com.au

House of Representatives Committee

While this activity was taking place within the Northern Territory, the House of Representatives Standing Committee on Legal and Constitutional Affairs was also engaged on the matter of Territory Statehood. On 9 May 2005 the then Attorney General, the Hon Philip Ruddock MP referred to the House of Representatives Committee the question of Northern Territory Statehood focusing on:

- Recent developments in the Northern Territory on the question of Statehood, including any proposals to advance statehood and
- Emerging issues which may have implications for federal arrangements.

The Representatives Committee at the time was chaired by the Hon Peter Slipper MP and one of its active members was the then Member for Solomon Mr David Tollner now the MLA

¹⁰ For the information of non Territory residents Berrimah is a location some 15km from the Darwin CBD said to mark the place where government interest in the rest of the Northern Territory ends because at one time it was the last set of traffic lights in the Northern Territory as you travelled south from Darwin.

¹¹ Lack of community interest was consistently cited during the life of the Committee and was the reason also given for the announcement of the deferral of the national referendum on recognition of Aboriginal people in the Australian Constitution when announced by Minister Jenny Macklin on 20 September 2012.

¹² Sue Bradley AM was succeeded by Fran Kilgariff AM during 2008

for the Territory electoral division of Fong Lim located in Darwin and as of 2012 the Northern Territory's new Minister for Health.

The Representatives Committee reported during May 2007 and the Government¹³ published their response which was received by the Committee on 23 October 2009.

During November 2006 some Statehood Steering Committee members appeared as witnesses before the Representatives Committee.

At the Representatives Committee Seminars held in Alice Springs and in Darwin, the Statehood Committee Co-Chair expressed a concern that had arisen during the first 18 months of the Statehood Steering Committee's operation – which was how to explain what Statehood would look like without an understanding of Commonwealth terms and conditions¹⁴.

The Statehood Steering Committee suggested that the Commonwealth could take a greater lead in assisting the resolution of the terms and conditions of a grant of statehood prior to bringing the matter back to the people at a future referendum.

I hope a clear message that the Commonwealth committee takes back is that the Territory must never again be asked to vote in that vacuum.¹⁵

The Territory Committee had become concerned after being given limited access to some of the 1998 correspondence between the Territory and Australian Governments (Chief Minister to Prime Minister) to discover that the Territory Chief Minister's calls for more certainty on these matters were not heeded ahead of the 1998 referendum.

It has become apparent that the Australian Government has no intention of publishing anything which details their views of the terms and conditions ahead of the Territory proving that it wants Statehood, notwithstanding the Territory is asked to do so not knowing what form of Statehood that might be.

The Representatives Committee's seminars took evidence from former Senator for the Northern Territory the late Bern Kilgariff and the Member for Lingiari Warren Snowdon MP who indicated that he had rarely been approached about the matter of Statehood in his years in parliament¹⁶ and that many Territory residents saw it as a second order issue.

2006 Community Engagement and Consultation

A lengthy discussion paper called *Constitutional Paths to Statehood* was launched by the Statehood Steering Committee during 2006 in conjunction with that year's Charles Darwin University Symposia the theme of which was whether the Northern Territory should have a bill of rights in the context of Statehood.

The Symposia attracted attention and a healthy level of participation based on the theme of a bill of rights, whereas the Discussion Paper, despite offering up various constitutional models which included and excluded 'rights' received fewer submissions than hoped for¹⁷.

¹³ The subsequent Labor Government

¹⁴ Terms and conditions as available to be imposed on a new state under s.121 of the Australian Constitution.

¹⁵ Co Chair Sue Bradley quoted in *Long Road to Statehood* report at page 12

¹⁶ Page 29

¹⁷ Only 22 formal submissions were received.

One participating academic expressed disappointment the paper itself had not argued for abolition of the states notwithstanding the remit of the Committee was to promote Statehood for the Territory not to argue for the abolition of existing states in the Federation.

During its first year the Statehood Committee determined seven reporting milestones:

1. Establishing the Statehood Steering Committee;
2. Community Education;
3. Community Consultation;
4. Public Meetings and Hearings;
5. Legal Requirements;
6. Constitutional Convention;
7. Referendum.

After more than five years of operation, the Standing Committee and Statehood Committee during 2010 came to an agreement that the Statehood Committee could and should complete the delivery of phases one to four, which focused on community engagement. However, phases five to seven, including the conduct of a constitutional convention and referendum, would be better delivered with the aid of a different form of advisory committee and more direct input from the Territory Government.

On the basis of this, the Legislative Assembly resolved to establish a Northern Territory Constitutional Convention Committee to take over from the Statehood Committee for the implementation of the final three phases identified for the Statehood Program¹⁸.

The process of community education and engagement had been a constant challenge as the Committee struggled with how to engage the public on what many saw, and continue to see, as an esoteric matter that has no immediate impact upon their everyday lives.

Public forums held in Darwin, Palmerston and Jabiru over November and December of the Committee's first year of operation (2005) attracted only small audiences. With the final push in 2010 and the holding of 50 public forums many hundreds of participants became engaged on the promise of a proposed constitutional convention in 2011. Given this was since deferred until 2012 and now deferred indefinitely, that momentum has arguably faded.

The 2010 sessions were carefully crafted in response to earlier experience where community representatives repeatedly told the Committee there was a need for repeated exposure and that so called 'fly in-fly out' visits are counterproductive. The 2010 program was designed specifically to address these concerns by using an advance team to arrive in a community some days ahead of the forums taking place, use of employed Aboriginal interpreters and providing follow up information where possible.

Details of the extent of the community outreach program are available in the Statehood Steering Committee's Final Report and Recommendations tabled in the Assembly during February 2011¹⁹.

Challenges along the way included the introduction of Northern Territory Local Government Reforms and the passage and implementation of the Australian Government's 'Emergency Response'²⁰

¹⁸ The membership of which was the member so the Standing Committee along with a number of community members and a constitutional specialist. See www.ntstate7.com.au

¹⁹ Available at www.nt.gov.au/lant

Communities were dealing with significant and pressing governance matters relating to the proposed abolition of their local councils and the introduction of the so called intervention and as a result, notional concepts such as Statehood became a very hard sell.

Government Relations

During 2006 the Territory Government announced the creation of a Minister for Statehood, however it was a ministerial portfolio with no agency support. There was and is no Department of Statehood or part of any existing Northern Territory Government Department to serve a Minister for Statehood's needs.

As a consequence of this lack of agency support to the Executive, the blurring of the lines between the Assembly and the Executive has been a challenge.

In order to ameliorate any risk of Assembly committee officers being perceived as servants of the Executive and the Minister, the Statehood Office developed a Committee approved protocol to allow for information to be sent to and received from the Minister and Shadow Minister for Statehood. A change to the Committee's Terms of Reference was made to recognise this process and agreed by the Legislative Assembly in the final sitting week of 2006.

During February 2007, in a show of bipartisan strength the then Statehood Minister and his counterpart Shadow Minister²¹, accompanied by the Committee's Executive Officer, visited Canberra and met with key representatives including the then Attorney General and then Minister for Territories as part of developing relations and ascertaining the Commonwealth's views on Statehood.

Then Attorney General, the Hon Philip Ruddock MP stated the Australian Government's position was that the Northern Territory must demonstrate a desire for Statehood before the Australian Government will engage on the terms and conditions of Statehood. This stance was reiterated by representatives of the successor Labor Government to the next Northern Territory Minister on visits during 2008 and 2009.

During the 2007 visit, Mr Ruddock made it clear that the Australian Government had no interest in revisiting the matter after the 1998 result. Australian Government officials appear to have briefed successive governments against taking any initiative with regard to Territory Statehood. During 2008 when the Territory Minister and Shadow Minister visited a number of Australian Government Ministers, the blank looks on the faces of Ministers and officials made this very apparent.

The reluctance of Australian Government officials is also evident from the lack of progress on the settlement of measures to facilitate agreement between the Territory and Australian Governments mentioned above.²²

Recent Australian Government activity in the Territory has also seen changes in relation to attitudes about so called self determination and the application of customary law.

²⁰ *Northern Territory National Emergency Response Act 2007* replaced by both the *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* and the *Stronger Futures in the Northern Territory Act 2012*

²¹ Minister Hon. Syd Stirling and Shadow Minister Mr Terry Mills.

²² Correspondence made available to the Statehood Steering Committee by the Department of the Chief Minister during 2005.

Matters which in the 1990s were routinely discussed in the same breath as constitutional development and Statehood have fallen out of favour.

Recognition of customary law has for many become equated with child sexual assault, whereas the 1998 Statehood Convention outcome adopted by the then Territory Government proposed recognising customary law 'as a source of law' within five years of Statehood in a developing constitution²³.

More recent consideration of customary law has become a lightning rod issue which is divisive and often misunderstood. It is perhaps unlikely the Australian or Territory legislatures would today entertain recognition of customary law as was considered in the 1990s.

Events of 2007

On 21 June 2007 then Prime Minister John Howard and Minister Mal Brough announced the Northern Territory Emergency Response, often referred to as *The Intervention*. On the evening news that day were images of a stern Prime Minister contrasted with images of the Territory Chief Minister waving the V8 Supercars into Darwin.

To say the Territory Government didn't see it coming is an understatement.

To reflect on the fact that within six months the Prime Minister and Minister Brough no longer held seats in the House of Representatives and the Chief Minister was on the backbench and retired in 2008 may be to read too much into this single day of events, but its significance in the Territory still resonates many years later.

As indicated above, these events also led to a lull in Steering Committee activity.

Setbacks in 2008 - 2009

In an attempt to re-focus after finding remote engagement difficult during this time the Committee launched a 'walking together' campaign with mixed results.

This more urban focused campaign involved community activities including market stalls and shopping centre visits and activities such as workshops with the planting of 'footsteps' to Statehood and the opportunity to sign a plastic two dimensional facsimile of a foot for an eventual display of all these feet to demonstrate support sometime in the future.

As time passed and the impact of the 2007 Australian Government measures became more apparent, both supported and criticised by various Aboriginal leaders, awareness was being raised in communities just by the fact the Australian Government has the capacity to intervene in the Northern Territory unlike in an existing Australian state.

Progress in 2010

As outlined briefly above, during 2010 Statehood Committee members and officers conducted 50 public forums. These were promoted under the banner *NT 2011 Towards Statehood Information Roadshow* reflecting the idea that 2011 was to be the year of the convention and the 2010 forums were the forerunner to get there²⁴.

²³ Statehood Convention Report Volume 1 1998 page 3

²⁴ See attachment No 1

The Roadshows lasted from February to November travelling the length and breadth of the Territory²⁵. An underlying advertising campaign was used to prompt people about the most commonly raised concerns over the years to come and have these addressed at the Forums.²⁶

After the Statehood Steering Committee was disbanded later that year, the plan agreed to by the Standing Committee was for 75 Territory residents to be elected as delegates (three from each of the existing NT electoral divisions) to attend a Constitutional Convention also attended by non-voting observers and advisors from experts in fields such as business and law.

The Statehood Committee's proposed timeframe was:

- November 2011 Constitutional Convention Commences in Darwin over ten days.
- January 2012 Constitutional Convention Reports with a written report released.
- February 2012 Release of Exposure Draft Constitution - Delegates would be asked to be active in their communities to discuss the Draft Constitution in anticipation of the Convention reconvening in Alice Springs in November 2012. Public Submissions would also be invited during the exposure period.
- [August 2012 NT Election]
- November 2012 - Convention reconvenes to consider the Exposure Draft Constitution and ratify a Final Draft - In Alice Springs over three to five days
- February 2013 Final Draft Constitution debated in the Legislative Assembly
- May 2013 Message sent to the Australian Parliament advising of this milestone advising that the Final Draft Constitution is agreed to and requesting action pursuant to s.121 of the Australian Constitution.
- Late 2013 – Territory Referendum on Statehood.

The above proposal was put to the Territory Government by the Standing Committee. However the time taken for consideration and agreement to fund the program meant a revised timetable was agreed to which saw the proposed Convention being held in April 2012 and the election of delegates being conducted at the same time as local government elections during March 2012.

Steaming Ahead in 2011

The public announcement of the Constitutional Convention was made at a media conference which took place on 17 June 2011 at Parliament House in Darwin. Media were advised the Convention would be made up of elected delegates and would convene for the first time during April 2012,

The conference announcing the program as well as the two proposed dates for the Constitutional Convention²⁷ was fronted by the members of the Constitutional Convention Committee, the Chief Minister and the Leader of the Opposition and was reported widely on television news that evening.

Activity in the Australian Parliament was also a focus for the Territory during 2011. In September 2010 Senator Bob Brown introduced a bill called the *Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the*

²⁵ From zero turning up at Jabiru (Forum No 31) to 62 at Elliott (Forum No 1)

²⁶ See attachments 2 & 3

²⁷ April 2012 and mid 2013 after consultation on the draft document coming out of the first convention.

Commonwealth) Bill 2010. The bill was amended in March 2011 to include the Northern Territory. The bill removed the power of the Australian Executive to disallow Territory laws, but of course retaining the ability under s.122 of the Australian Constitution for the Australian Parliament to overturn Territory law.

The bill was dispatched to the Senate Standing Committee on Legal and Constitutional Affairs and the members of the Northern Territory Assembly Standing Committee on Legal and Constitutional Affairs appeared as witnesses before the Committee as did the then Chief Minister Paul Henderson MLA and former Chief Minister Marshall Perron, both of whom supported the bill.

Professor George Williams AO submitted that, '*[a]s a matter of good governance, the Commonwealth should not remove power from a self-governing jurisdiction to make laws on a topic*'. Specifically, he argued: *Removing power is a blunt instrument that prevents the making of any laws, for good or ill, including those that are clearly in the best interests of the local community. It also sends a clear signal that the Commonwealth believes that the Territories are not up the task of enacting appropriate laws on the subject. This is at odds with the fact that the ACT and the Northern Territory both have a larger population, and a better functioning system of self government, than some of the colonies that became [states upon Federation in 1901].*²⁸

The Territory Committee appeared as a bi partisan bloc and provided compelling testimony as follows:

*Speaking with, and on behalf of, members of the NT Standing Committee on Legal and Constitutional Affairs at the first public hearing, Mrs Aagaard emphasised the maturity of the NT Legislative Assembly: The Northern Territory has demonstrated in its 11 assemblies and almost 34 years of self-government that it is a mature body politic in the Australian system of government with a healthy representative democracy working on behalf of the electors of the Northern Territory. Section 9 of the self government act provides that the Governor-General, on the advice of the Federal Executive Council, may disallow or recommend amendments to a law passed by the Legislative Assembly of the Northern Territory within six months after it is made. This power of the Commonwealth may be exercised by the federal executive in respect of any legislation passed by the Northern Territory Legislative Assembly, not just legislation relating to matters for which the Legislative Assembly is expressly precluded from making laws. The repeal of section 9 would not give the Northern Territory any greater legislative authority than it presently enjoys. It would, however remove the federal executive power to disallow valid laws passed by the Legislative Assembly. The federal parliament's power to override Territory laws would remain intact as it exists today.*²⁹

The bill was subsequently passed during November 2011 and it removed s.9 of the *Northern Territory Self Government Act*.

During November 2011 information sessions for people interested in nominating to be candidates for election at the convention were held and were well attended in some areas. Television commercials and print commercials commenced³⁰.

Then they stopped.

²⁸ Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010

Report page 16

²⁹ Page 19

³⁰ See attachment 4.

Stumbling Blocks to 2012

On 30 November 2011 the debate in the Legislative Assembly to consider the second reading of the *Constitutional Convention (Election) Bill (Serial 178)* resulted in the passage of the bill subject to undertakings that the election of delegates would not take place in conjunction with the local government elections on 24 March 2012.

The Electoral Commissioner had briefed the Government and Members of the Assembly against the holding of the election on the same day as the local government elections on logistical grounds. His view was that different electoral boundaries may be confusing.

Notwithstanding that advice, the Government took a decision to pursue the joint election on the basis of reducing costs³¹. The proposal to hold the election in conjunction with the local government elections was based on an effort to share costs and minimise the number of times Territorians were required to attend the ballot box in the space of a single year³².

The crumbling support for the outcome of the legislation and the proposed timing may also have suffered from the lack of ongoing discussion between the Government and Opposition as a consequence of no specific ministerial portfolio agency existing to drive these normal processes. There was no government agency tasked to provide instructions to the parliamentary counsel (unusually this fell to the Assembly committee staff) or draft a second reading speech and there were no portfolio specific agency officers and ministerial staff to brief Assembly Members on a Bill being introduced by the Chief Minister.

Officers of the Assembly resisted requests to draft the Chief Minister's second reading speech (which eventually fell to the Department of Justice some days prior to introduction) however at the direction of the Speaker, Assembly committee staff briefed Opposition Members on the Bill just prior to the debate.

At the briefing the Assembly staff encountered political questions from Opposition Members on the specifics of the legislation and policy background matters which, while arising from the work and recommendations of a Committee, could only be properly answered by a representative of Government. These questions therefore went unanswered.

The Assembly debate revealed a disagreement between the Government and the Opposition, (supported in their concerns by the Member for Nelson, an independent member, holding the crucial 13th vote in a 25 member Assembly) about the proposal to hold the election for delegates in conjunction with the scheduled local government elections³³.

Concerns were aired that holding the election of delegates in an election year for both the Territory and Local Government might politicise the convention process and confuse electors.

Then Leader of the Opposition stated in the debate:

[when the] air is clear and the two issues have been settled - local government and Territory parliament - then it is the position for the Territory parliament, the Twelfth Assembly, to permit, with as much space as possible and as early as possible, the next phase to occur without delay.

³¹ Estimates from the Northern Territory Electoral Commission on the costs for a standalone election have varied between more than \$1million to nearly \$2million.

³² 2012 Local Government elections and Legislative Assembly elections included.

³³ A decision of Government, the Statehood Committee made no specific recommendation for or against a conjoined election. Popular election of delegates was also proposed in the 1999 Report cited above.

1978 to Today – Lesser Citizens Still

Since the implementation of the *Northern Territory (Self Government) Act* on July 1 1978, still celebrated by firecrackers, (although it's doubtful whether many of today's young pyrotechnical experts understand the genesis of their 'right' to fireworks) there have been a few setbacks over nearly 35 years and those watching the fireworks in 1978 might have been surprised to have been told back then that Statehood would remain elusive for so long into the future.

The *Self Government Act* has been amended since 1978, rather famously in 1996 with the insertion of s.50A prohibiting euthanasia laws as follows:

(1) Subject to this section the power of the Legislative Assembly conferred by section 6 in relation to the making of laws does not extend to the making of laws which permit or have the effect of permitting (whether subject to conditions or not) the form of intentional killing of another called euthanasia (which includes mercy killing) or the assisting of a person to terminate his or her life.

(2) The Legislative Assembly does have power to make laws with respect to: (a) the withdrawal or withholding of medical or surgical measures for prolonging the life of a patient but not so as to permit the intentional killing of the patient; and (b) medical treatment in the provision of palliative care to a dying patient, but not so as to permit the intentional killing of the patient; and (c) the appointment of an agent by a patient who is authorised to make decisions about the withdrawal or withholding of treatment; and (d) the repealing of legal sanctions against attempted suicide.

During 2007, and remaining under the 2012 replacement legislation, Australian Government ministerial power explicitly trumps Territory Ministers in terms of policing, alcohol and censorship laws notwithstanding that all of these are powers conferred explicitly on Territory Ministers by Clause 4 of the *Northern Territory (Self Government) Regulations 1978*.

The Australian Indigenous Affairs Minister has power to declare geographical regions to prohibit pornography in certain areas under the *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* s.100A (1): *The Indigenous Affairs Minister may, by legislative instrument, determine that an area in the Northern Territory is a prohibited material area.*

Police and liquor included in the Regulations as within the authority of the Territory Executive are specifically targeted by the *Stronger Futures in the Northern Territory Act 2012* which provides for *Modification of the NT Liquor Act and NT Liquor Regulations in alcohol protected areas* in Division 2 of the Act.

While a small victory in 2011 saw the removal of s. 9 of the *Self Government Act* as outlined above, arguably the Northern Territory has not reached a level of self governing maturity contemplated in 1978 and is in fact in a less favourable self governing position.

The Territory Assembly is answerable to the people of the Territory and it is a fairly well understood democratic principle that it is the people living in the Territory who should decide the fate of their local lawmakers and their various laws.

While the Territory is often considered 'remote' by those residing in the SCaM³⁴ it is perhaps Canberra which is remote in distance and remote in accountability to Territorians with just

³⁴ Sydney Canberra Melbourne triangle.

four members out of the 226 representatives and senators and the ongoing ability to override the laws and policies of the 25 elected Territorians sitting in the Assembly.

A radioactive waste facility is coming to the Territory, notwithstanding Northern Territory Legislation passed in 2005 which bans such a facility in this jurisdiction.

While there is clearly a need to store radioactive waste somewhere, it is coming to the Territory because it is an easy choice. South Australia had been the settled location for the facility but that was abandoned after a court case which required the Australian Government to properly acquire the land earmarked and so was dismissed as the choice just ahead of the 2004 Federal Election.

Rather than jeopardising the balance of the 23 Members and Senators from South Australia who may assist in forming government, a mere four from the Northern Territory may protest but won't cause much pain in the numbers on the floor of the Houses in Canberra, and they certainly would not be the cause of a change of government.

The Northern Territory is perhaps the convenient laboratory for the Australian Government after all.

As Prime Minister Howard was quoted as saying on 21 June 2007: "Why now and why in the Northern Territory? Because we can..."³⁵

Statehood for the Northern Territory represents a key opportunity for the people of the Northern Territory to test the Australian Government on productive partnerships in the Australian federal system based on an informed policy position developed and made known to all Australians about what the terms and conditions of Northern Territory Statehood would be.

Law academic Professor Anne Twomey, says Australians have been brought up to regard federalism as an archaic, inefficient and uncompetitive encumbrance that is holding us back economically and socially, yet elsewhere in the world federalism is considered flexible and competitive in a global economy³⁶.

The Statehood Committee members were of the view that that federalism works well when it is allowed to promote regional and local solutions for local and regional problems and allows policy innovation to flourish within a unified but diverse structure. Some of the members of the Statehood Committee held a firm view that the Commonwealth intervention in 2007 was an inefficient approach to addressing the critical matters of concern within the Northern Territory and has not yielded the policy outcomes that were used to justify the approach.

Conclusion

Is it too difficult to engage the public on constitutional reform? And what lessons are to be learnt from the 2005-2012 experience?

Engagement is difficult as demonstrated by the recent agreement to defer the proposed changes to the Australian Constitution to recognise Aboriginal peoples which had been slated for a 2013 referendum³⁷. The Territory experience however shows continued and concerted engagement can be effective but momentum needs to be maintained and an end date is important.

³⁵ Cited in the Sydney Morning Herald (SMH) of that date

³⁶ Anne Twomey *Federalism – The Good, the Bad and the Opportunities* Australian Policy On-Line 26 April 2007.

³⁷ *Timing Rarely Right for Referendum* Michelle Grattan SMH September 23 2012

That is perhaps the key lesson learnt. Years of discussion might be counterproductive and leads to disengagement. Electors are sophisticated and cynical enough to know that talk is important but that talk is also not an outcome in and of itself.

Did Territorians make a mistake voting *no* in 1998?

It is worth asking if the vote had been *yes*, what would have been the difference today?

While you can't argue with the result, it is worth considering in the cold light of day whether those 'deal breakers' at the time which led to the *no* result have led to 'buyers regret'.

The deal breakers still exist. During the 2010 public forums some people said they supported Statehood but would never vote to support a 'lesser Statehood' with fewer than an equal number of Senators. Other said they didn't want to reward a government they didn't like by making the Chief Minister the Premier.

When asked to consider the ramifications of these views a question was left with some of the 2010 Forum participants whether if the 1998 model of Statehood they disliked for reasons associated with lack of consultation or personality politics may have evolved by 2012 into something the Territory could be proud of and put it in a stronger and more influential position or at least on a more equal footing?

Personal Thoughts

Since 2005³⁸ the writer of this paper has been employed to assist the program for the constitutional development of the Northern Territory and has listened with interest to those who proudly declare they are strong supporters of Statehood but were part of the 51.3% who voted *no* in 1998.

I did not live here at the time and have no particular view on the personalities who were involved but have been told often enough the then government appeared entrenched in power with no alternative and there was some delight in giving the government of the day a kick in the pants by voting *no* to inform them they could not have it all their own way.

With the benefit of hindsight, and at the risk of being labelled a dreadful southerner and blow-in, my personal view is:

Statehood is the foundation stone of equal democracy for the Territory's Australian citizens and while it is not going to directly improve roads, educate children and build hospitals, we should beware of our personal prejudices about office holders of the day and the various deal breakers because they will only get in the way of that equality being eventually realised.

³⁸ Excluding January 2008 to September 2009