The Enigmatic Parliament — Why the Northern Territory could Never Achieve Statehood

Robyn Smith*

The Northern Territory public service was established by Ordinance[1] of the Legislative Assembly which received assent on 22 December 1976. This was in preparation for self-government, which was to commence on 1 July 1978 pursuant to the Commonwealth's *Northern Territory (Self-Government) Act*, section 13 of which established the Legislative Assembly of the Northern Territory.

The *Public Service Ordinance* of 1976 repealed a range of related legislation dating from 1928 to 1974 and established five departments: Chief Secretary; Finance and Local Government; Law; Transport and Industry; and Community Services[2]. It also established a number of Commissions and Boards.

The Commissioner of Police, whilst a departmental head, was appointed under the then *Police and Police Offences Ordinance*. The *Public Service Ordinance* designated the Speaker of the Legislative Assembly equivalent to a departmental head:

> 19 (8) The Speaker of the Legislative Assembly has all the powers of, or exercisable by, a Departmental Head under this Ordinance and the regulations so far as relates to employees employed as staff of the Legislative Assembly as if those employees were in a Department for which he is responsible.[3]

This, technically at least, gave rise to the absurdity that the Speaker of the Legislative Assembly was answerable to the Public Service Commissioner. Most certainly, this would not have been the only absurdity encountered in the years preceding 1978 when the Northern Territory was making the transition from a Legislative Council to self-government with a fully functioning Legislative Assembly.

* Executive Officer to the Clerk of the Legislative Assembly of the Northern Territory. Robyn holds a Bachelor of Arts (Anthropology and Journalism), a Master of Cultural Heritage and is finalising a PhD on Northern Territory political history.

Australasian Parliamentary Review, Spring 2010, Vol. 25(2), 63–7.

On 1 July 1978, the *Public Service Ordinance* became the *Public Service Act* (as was the case for all existing legislation in the Northern Territory) and the Speaker remained, for all intents and purposes, the equivalent of a departmental head.

On 21 August 1980, the Chief Minister introduced the *Public Service Amendment Bill* which, by section 18A, created the Department of the Legislative Assembly and which:

> … vests the Speaker with ministerial and necessary Public Service Commissioner-type powers and the Clerk of the Assembly with Chief Executive Officer powers in respect of the deemed department. It also provides for the Clerk and Deputy Clerk of the Assembly to be appointed by the Administrator on a recommendation of the Speaker.[4]

Chief Minister Everingham said the legislation would 'remove any suspicion of political interference' in the Assembly and accorded with Australian parliamentary practice. Everingham noted that the amendment was in similar terms to section 9 of the Commonwealth *Public Service Act*.

The Leader of the Opposition, Jon Isaacs, said:

> The opposition supports the creation of this independent department. From our dealings with the officers of the current Legislative Assembly, we know that they will fiercely guard the independence of the new department.[5]

Accordingly, the present Clerk of the Legislative Assembly was appointed pursuant to section 18A of the *Public Service Act* by His Honour the Administrator, Austin Asche, on 24 May 1993 when the former Clerk, Guy Smith, retired.

Then something incredulous happened. In July 1993, the *Public Service Act* was repealed and replaced by the *Public Sector Employment and Management Act* (PSEMA), which removed – deliberately or inadvertently – both the independence of the Legislative Assembly and appointment of the Clerk and Deputy Clerk by the Administrator.

It is the case that historically successive Northern Territory governments had a cavalier, or minimalist, attitude to accountability and appropriate separation. For example, until the election of the Martin Labor Government in 2001, the Northern Territory Electoral Office was placed under the Department of the Chief Minister. Martin established it as an independent Commission. Similarly, until 2001, the Northern Territory had no Freedom of Information legislation and no Estimates Committee process. Such former attitudes make it difficult to adjudge whether the radical change in status of the Legislative Assembly was deliberate or simply an oversight.

The bill itself made sweeping changes to several legislative instruments governing public sector organisations and consolidated that legislation into a single principal act. It also dealt with structural changes and devolution of some powers from the Commissioner for Public Employment to Chief Executive Officers of agencies.

The Minister for Public Employment, Shane Stone, sought and was grated leave for his second reading speech to be incorporated into the *Parliamentary Record*. That speech was silent on the issue of the status of the Legislative Assembly. It claimed extensive consultation throughout the public sector and with unions and that, 'No aspect of the bill could be described as radical.'[6]

Of course, that claim is arguable in respect of omission from the bill of the Legislative Assembly. As well:

> Thus, there can be no objection to the single-employer concept, which is a major feature of the bill, because it allows the individual agencies sufficient scope to deal with agency-specific issues in a manner suited to the agency's needs and objectives.[7]

This was not particularly the case for the Legislative Assembly. The bill was withdrawn and re-introduced by the new Minister for Public Employment, Fred Finch, when the Assembly next sat in February-March 1993. During his second reading speech, Minister Finch said:

> Since the Public Sector Employment and Management Bill and the Public Sector Employment and Management (Transition and Savings) Bill were introduced into the Assembly on 26 November 1992, further significant consultation has occurred.[8]

This speech, too, was silent on the matter of the Legislative Assembly and concentrated on changes that had been made to the first introduced bill, most of which concerned removing principles which had been included in the earlier bill and which potentially conflicted with other legislation. In closing, Finch claimed, 'The bill represents the future legislative provisions and directions of the government's most important asset — the employees of the public sector.'[9] What the bill did not do was consider an appropriate position for the Legislative Assembly which was swept into the generic abyss of the greater public sector and whose employees were theoretically obliged, by virtue of the subsequently introduced *Public Sector Principles and Code of Conduct*, to observe.

Support to Government of the Day

> Employees shall provide full support to the Government of the day regardless of which political party or parties are in office.[10]

This is a little understood absurdity arising from the legislation. Assembly employees are daily in breach of this section of the Code of Conduct and will continue to be until the issue is addressed. Similarly, Schedule 1 of PSEMA identifies and quarantines the Auditor-General and Ombudsman as Officers of the Parliament, but not the Clerk and Deputy Clerk of the Legislative Assembly.

In what appears to have been a self-perpetuating succession of misunderstanding arising from PSEMA over 17 years, a 2006 public sector document explains:

> With this influx of new Ministers, ministerial staff and senior public servants there is a possibility that some newcomers may not have a clear understanding of the doctrine of the separation of powers…[11]

Indeed. It has been amply and oft demonstrated that there is less than a clear understanding across the whole of the public sector including at its highest levels. It is the case that officers of the Assembly occasionally receive, and routinely ignore, directives from the Department of the Chief Minister about the mandatory requirement to use government branding on corporate livery. It is also the case that officers of the Assembly regularly receive Cabinet Submissions for comment. Naturally, it is inappropriate for parliamentary officers to comment on matters of government policy.

There are other problems associated with being part of the generic abyss. For example, parliamentary officers who take up positions with Members of Parliament under contract are entitled to return to their substantive positions pursuant to the terms of PSEMA. That might be appropriate and acceptable in the wider public sector, but it is inappropriate and unacceptable in a parliamentary environment.

The Legislative Assembly's peculiar – and unique – status for a Westminster parliament was discovered only recently during the course of research in response to a query from another parliament in which we confidently claimed that the Clerk is appointed by the Administrator (and, technically, we were correct because the current Clerk *was* appointed by the Administrator).

The mystical and indeterminate disappearance of former section 18A has been brought to the attention of the Office of the Commissioner for Public Employment, which, this year, has engaged in a 'minor' review of the Act. As the section has been missing from legislation in the Northern Territory for some 17 years (a generation of employees), officers at OCPE had trouble coming to terms with the nature of the Assembly's predicament and have sought an opinion from the Solicitor for the Northern Territory, which, we are confident, will support 600-odd years of Westminster practice and a proper separation of the parliament from the Executive.

The Legislative Assembly's ultimate goal is a Parliamentary Services Act which, until now, has been dismissed as almost a frivolous notion intended to satisfy the whimsical fantasies of a small group of public sector separationists. This cannot be considered an unachievable ambition and is, of course, supported by a wealth of parliamentary authority, including:

> The historical distinction between Parliament and Government is of particular importance to the staff of the House. The Clerk and his or her staff are, above all, servants of the House and must exhibit at all times complete impartiality in dealing with all sections of the House. Distinctively, as ongoing staff of the House, their role transcends the contemporary and the temporary.[12]

It is logical that the status of Northern Territory institutions would be a prime consideration for the Australian government if and when it is asked to consider terms and conditions for a grant of statehood in the Northern Territory. At present, we can not be said to make the grade. ▲

End Notes

[1] Serial 62 of 1976
[2] Section 17(3).
[3] *Public Service Bill* 1976, Serial 159
[4] *Northern Territory Parliamentary Record*, 21 August 1980; 65
5 *Northern Territory Parliamentary Record*, 18 November 1980; 126
[6] *Northern Territory Parliamentary Record*, 17 November 1992; 7249
[7] Ibid
[8] Northern Territory Parliamentary Record, 2 March 1993; 7672
[9] Ibid; 7675
[10] *Northern Territory Public Sector Principles and Code of Conduct*; 8
[11] *Northern Territory Public Sector Governance Arrangements, Employment and Management Legislation*, 2006; 3
[12] *House of Representatives Practice*, 5th edn, 2005; 203.