

Representation of the new State and the status of Commonwealth legislation

Future representation of the new State in the Federal Parliament

- 6.1 Following the transfer of the Northern Territory to the Commonwealth in 1911, residents of the Territory lost their voting and representation rights.¹ Unlike the original states, which must have a minimum of five members of the House of Representatives and six Senators each, there is no constitutionally guaranteed minimal level of representation in the Federal Parliament for the territories.
- 6.2 Section 122 of the Constitution enables the Commonwealth to determine the extent of representation in the territories as it sees fit. Continued political agitation brought the Commonwealth to pass the *Northern Territory Representation Act 1922* which provided the Territory with its first House of Representatives member, but without the power to speak or vote.
- 6.3 Restricted voting rights for the Territory member were introduced in 1936, and expanded to matters relating to the Territory in 1957. The Territory member was for the first time able to exercise full voting rights in 1968 under the *Northern Territory Representation Act 1968*.

¹ However, prior to 1911 most Territory residents were of Aboriginal or Asian ancestry and unable to effectively exercise their voting rights. See Professor Carment, *Submission No. 2*, p. 3.

- 6.4 The *Senate (Representation of Territories) Act 1973* enabled the representation of the Territory in the Senate, notwithstanding a failed High Court challenge in 1975.² The Act provided representation of two Senators each from the Northern Territory and the Australian Capital Territory with full voting rights. The first two Senators from the Territory were elected in 1975.
- 6.5 Unlike Senators from states, the length of the term of Territory Senators was fixed in line with House of Representative elections. The Committee heard that the number of Territory Senators was deliberately set at two to ensure that, with the proportional representation voting system, both major parties would be represented. This result was considered to be 'proper' and 'more democratic'.³
- 6.6 Representation of the Territory in the Federal Parliament is an issue that states would be interested in as any changes to the current arrangements may impact on the level of their representation. Political parties would also be interested in the issue of representation of the potential new State as different approaches may impact on their representation in Parliament and potentially the composition of government.

House of Representatives

- 6.7 Section 24 of the Constitution sets the parameters for the number of members of the House of Representatives:

The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.

The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:

(i) a quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators;

2 *Western Australia v. Commonwealth* (1975) 134 CLR 201.

3 Senator Crossin, *Submission No. 4*, pp. 1-2.

(ii) the number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

But notwithstanding anything in this section, five members at least shall be chosen in each Original State.

- 6.8 Section 48(2B) of the *Commonwealth Electoral Act 1918* specifies that the Northern Territory and the Australian Capital Territory shall have at least one MP. The need for further MPs from the Territories is then determined by the Commonwealth Election Commissioner 13 months following the first meeting of a newly elected House of Representatives, by dividing the Territory population by the national quota.⁴
- 6.9 In 1999 the Northern Territory entitlement quota increased to warrant the creation of an additional seat in the Northern Territory and the seats of Lingiari and Solomon were created. In the February 2003 determination, the Northern Territory entitlement quota fell below the minimum required for the second seat by 295 people, a figure within the Australian Bureau of Statistics margin of error. The *Commonwealth Electoral Act 1918* was then amended to set aside the determination of the Commonwealth Electoral Commissioner and maintain the two seats in the Northern Territory until the time of the next determination.⁵
- 6.10 The seminar discussion and submissions concerning the representation of the new State in the House of Representatives tended to centre on questions of population and the constitutional requirement of the quota and the applicability of the requirement that original states should have a minimum of five members.
- 6.11 Some seminar participants argued that equality with existing states required equal representation rights in the Federal Parliament. According to Hon Justice Mildren:

4 The national quota is determined by dividing the national population by twice the number of Senators from the states (excluding Senators from the territories). The population of the territories are not included in the national population statistics. See Joint Standing Committee on Electoral Matters, *Territory Representation, Report of the Inquiry into increasing the minimum representation of the Australian Capital Territory and the Northern Territory in the House of Representatives*, 2003, p. 17.

5 *Commonwealth Electoral Amendment (Representation in the House of Representatives) Act 2004*.

... the act of admission should make it clear that the Northern Territory is admitted on the same terms and conditions as if it were an original state so that the constitutional protections given to the original states under section 7 of the Constitution, ensuring that all states have an equal number of senators being not less than six is maintained, and also ensuring that at least five members of the House of Representatives are elected from the Northern Territory, vide section 24 of the Constitution.⁶

6.12 The Statehood Steering Committee also submitted that there were constitutional doubts that the new State could be treated any differently from the 'original states' on the issue of representation.⁷

6.13 By contrast the Hon Justice Asche put the view that the current Northern Territory population does not warrant the provision of five members of the House of Representatives.

In proportionate numerical terms, therefore, there can be no justification for increasing the number of seats available to the Territory in the House of Representatives, if the Territory became a state, because to do so would be to give the Territory voters a proportionally greater franchise than voters elsewhere in Australia.⁸

6.14 Providing five seats for the new State would result in an average enrolment per electoral division of 22,586, according to the present Northern Territory population. Five House of Representative seats for the new State would be an apparent over-representation of the population compared with average number of electors per member in other states, as outlined in table 6.1 below.

6 The Hon Justice Mildren, *Transcript of Evidence*, 15 November 2006, p. 37. Mr Tollner MP also expressed a similar view, see *Transcript of Evidence*, 15 November 2006, p. 59.

7 Statehood Steering Committee, *Submission No. 1*, p. 11.

8 The Hon Justice Asche, *Transcript of Evidence*, 15 November 2006, p. 62.

Table 6.1 Average enrolment per electoral division in each state and territory

| State/territory: | Seats: | Average enrolment: | State/territory: | Seats: | Average enrolment: |
|-------------------|--------|--------------------|------------------------------|--------|----------------------|
| New South Wales | 50 | 86,582 | South Australia | 11 | 95,629 |
| Victoria | 37 | 89,454 | Tasmania | 5 | 68,562 |
| Queensland | 28 | 88,415 | Australian Capital Territory | 2 | 113,771 ⁹ |
| Western Australia | 15 | 83,249 | Northern Territory | 2 | 56,465 ¹⁰ |

Source *Parliamentary Handbook of the Commonwealth of Australia* 2005

6.15 The table above suggests that the Northern Territory, and to a lesser extent, Tasmania, benefit from the arrangements for representation in the House of Representatives as their average enrolment per electoral division is lower than other states. In effect, a vote in the Northern Territory or Tasmania carries more weight than a vote in other states. Indeed, the argument that the Australian Capital Territory is under-represented in the House of Representatives is not without merit as it has the highest average enrolment per electorate.¹¹

6.16 Representation in the House of Representatives is also linked to the number of Senators from each state by the nexus provision of s. 24 of the Constitution.

Senate

6.17 Section 7 of the Constitution guarantees a minimum of six Senators for each of the original states:

Until the Parliament otherwise provides there shall be six senators for each Original State. The Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal representation of the several

9 Relative population growth in the mid 1990s nudged the Australian Capital Territory over the quota for three MPs for the 1996 federal election. The population growth of the ACT then stabilised to warrant the return to two MPs from the 1998 federal election.

10 The Northern Territory has the lowest enrolment and voter turnout of all Australian jurisdictions.

11 Small population fluctuations in the smaller jurisdictions such as the NT and the ACT can have a major impact on their level of representation in the House of Representatives. The 2005 determination of the Commonwealth Electoral Commissioner found the Australian Capital Territory only about 17,000 people short of the quota for a third MP. In 2003 the Commission found the NT 285 people short of the quota for its second MP (as discussed in paragraph 6.9 above).

Original States shall be maintained and that no Original State shall have less than six senators.

- 6.18 In 1983, the number of Senators for each state was increased to 12. The prospect of 12 Senators for the Northern Territory was not on the agenda in the lead up to the 1998 referendum. In October 1998, the then Chief Minister of the Northern Territory, the Hon Shane Stone stated, 'we've never sought 12 Senators, no one seriously has ever put that proposition from the Northern Territory'.¹²
- 6.19 The Committee heard that two additional Northern Territory Senators upon statehood would be a reasonable starting point, based on the argument that the population is roughly a third of that in Tasmania, and therefore the Territory should have a third of the Senate allocation for Tasmania. Two additional Senators for the new State would bring the total to four and roughly equal to the representation level of Tasmanian Senators.¹³
- 6.20 The representation of the new State in the Senate could increase over time in line with population increases and economic development, to the point where it reaches the representation of other states, currently 12:
- The terms and conditions of admission of the new state could contain a formula for an increase in the number of senators as demographic and economic circumstances warrant it.¹⁴
- 6.21 If the population benchmark for the grant of 12 Senators to the new State were set at the population of Tasmania, then according to the population projections of the Australian Bureau of Statistics, the new State would not achieve equality in the Senate before the year 2050 (see table 6.2 below).

12 The Hon Shane Stone MLA, Chief Minister of the Northern Territory, Joint Press Conference with the Prime Minister, the Hon John Howard MP, 11 August 1998.

13 Senator Crossin, *Transcript of Evidence*, 15 November 2006, p. 20.

14 Senator Crossin, *Transcript of Evidence*, 15 November 2006, p. 19. This view is consistent with the Statehood Steering Committee proposal for 'eventual equality'.

Table 6.2 Population projections for the Northern Territory and Tasmania

| | At 30 June 2004 | At 30 June 2021 | At 30 June 2051 ¹⁵ |
|--------------------------|-----------------|-----------------|-------------------------------|
| Hobart | 202,200 | 220,200 | 219,600 |
| Total Tasmania | 482,200 | 504,000 | 453,000 |
| Darwin | 109,400 | 149,700 | 232,000 |
| Total Northern Territory | 199,800 | 250,900 | 350,000 |

Source Australian Bureau of Statistics, *Population Projections Australia 2004-2101*, 2005 Cat No. 3222.0

6.22 An alternative view put before the Committee was that the number of Senators should not be tied with population:

... if you are saying that we cannot have 12 senators based on our population, then surely if we have only two senators Tasmania should now have only four and South Australia should have only 10.¹⁶

6.23 The Hon Justice Asche argued that a fixed date must be set for full equality so the process 'can be seen as a predictable and ascertainable future event rather than contemplating an indecisive series of possible compromises'.¹⁷

6.24 According to Senator Crossin a possible timeframe for the new State to reach equal representation in the Senate (assuming four Senators are granted upon statehood) would be:

A further four senators ... could be added in, say, 12 years time and a further four senators similarly added in another 12 years time. This would then result in equality with the original states based on the present figure of 12 senators for each state but would take 25 years to achieve.¹⁸

6.25 The Hon Justice Mildren noted that some State populations (Tasmania and Western Australia) at 1901 did not differ greatly from the current Northern Territory population. The new State, he argued, should therefore have a minimum of six Senators to be consistent with the

15 The projections assume the following mid-range national trends: fertility rate of 1.7 babies per woman, net overseas migration rate of 110,000 persons per year, and life expectancy at birth of 84.9 years for males and 88 years for females. The figures also include net interstate migration.

16 Mr Wood MLA, *Transcript of Evidence*, 16 November 2006, p. 77.

17 The Hon Justice Asche, *Transcript of Evidence*, 15 November 2006, p. 63.

18 Senator Crossin, *Transcript of Evidence*, 15 November 2006, p. 19.

minimum Constitutional requirements for the 'original States' and the principle of equality among states.¹⁹

- 6.26 The immediate introduction of six to twelve Senators from the Northern Territory upon statehood would have major implications for the redistribution of House of Representative electorate boundaries across the country with the creation of up to 10 additional seats, in accordance with the nexus provision of Section 24 of the Constitution.²⁰
- 6.27 Hon Justice Mildren also noted that the risk of setting a lower level of representation for the Territory compared with the original states was that it may lead to further compromise on other terms and conditions of statehood. Such compromises would produce a 'second-class state'.²¹
- 6.28 It was suggested to the Committee that a proposal for two additional Senators upon statehood would be in accordance with a sense of 'compromise, cooperation and realism'.²²
- 6.29 Furthermore, there does not appear to be popular support for immediately introducing 12 Senators in the Northern Territory upon the grant of statehood:
- I say to people, 'Do you want equal Senate representation?' They say to me, 'You've got to be joking. Feed more politicians? Is everybody going to be born a senator in the Territory? Get real.' I would then ask, 'How many senators do you think you need?' They would reply, 'Two or four. We don't really care.'²³
- 6.30 According to the *Commonwealth Electoral Act* 1918 formula for determining the number of House of Representative electoral divisions, the creation of two additional Senators from the Northern Territory may require the creation of two additional electoral divisions in New South Wales, and one additional electoral division each in Victoria, Queensland and South Australia, based on 2005 population data (see Appendix F).

19 The Hon Justice Mildren, *Transcript of Evidence*, 15 November 2006, p. 37.

20 The Constitutional uncertainty over the application of Section 24 to new states was discussed in Chapter 4.

21 The Hon Justice Mildren, *Transcript of Evidence*, 15 November 2006, p. 48.

22 Senator Crossin, *Transcript of Evidence*, 15 November 2006, p. 32.

23 Mrs Bradley, *Transcript of Evidence*, 15 November 2006, p. 32.

6.31 Moreover, if the Northern Territory and Commonwealth Governments negotiated a minimum of five MPs from the Territory following statehood (the minimum for other states), a further three electoral divisions would need to be created in the Northern Territory.

6.32 The Statehood Steering Committee regards the representation of the new State in the Federal Parliament as an issue to be negotiated between the Northern Territory and Commonwealth Governments. It also considers that the principle of state equality is more important than the implementing arrangements in relation to representation in the Federal Parliament:

The SSC supports equality. Whether this is eventual or immediate is less important than the principle at stake. Anything less than a partnership with the other States in a federation will in the eyes of many Territorians probably not be worth fighting for.²⁴

6.33 The Committee also heard that a deeper issue concerning representation in the Senate is that the current provision of 12 Senators is superfluous and s. 27, and by implication, s. 24 of the Constitution, needs to be amended:

The only real reason there are 12 senators per state is to create enough members in the lower house, in the House of Representatives, because section 27 requires a 2:1 ratio. In this day and age that is illogical. As the population of Australia grows, do we keep growing the senate to do no more work and for no more purpose ...²⁵

6.34 The Committee sees some merit in this argument but considers that this is a much wider issue beyond the concern of Northern Territory statehood.

The view of the Committee

6.35 As the granting of five seats to the new State would further increase the uneven distribution of voters in electorates, or malapportionment, in seats among the states in the House and potentially undermine an argument for equal treatment, the Committee considers that it is appropriate for the Northern Territory to retain two members of the House of Representatives upon statehood. The question of

24 Statehood Steering Committee, *Submission No. 1*, p. 11.

25 The Hon Mr Hatton, *Transcript of Evidence*, 15 November 2006, pp. 33-34.

representation of the new State in the House should then be considered by the Australian Electoral Commission at an appropriate time.

- 6.36 The Committee also considers that it is not appropriate for the Northern Territory to gain an additional 10 Senators immediately following statehood. An allocation of 12 Senators from a new state with a population of around 200,000 would present an unacceptable level of malapportionment and would be unlikely to gain the support of the Australian Parliament.
- 6.37 A more reasonable approach would be to grant the new State an additional two Senators with the possibility of additional Senators in the future subject to certain time and/or population requirements as agreed between the Territory and the Commonwealth.
- 6.38 If the Northern Territory gained two additional Senators following statehood, the nexus provision of the Constitution, may require the creation of a further four members of the House of Representatives.²⁶ The new electoral divisions would be created outside the Territory.

The impact on other territories

- 6.39 The Committee heard that Northern Territory statehood may lead to claims of under-representation of the people of the Australian Capital Territory in the Federal Parliament:

In the event that the Northern Territory were to become a state, there would be a significant argument from the people of the ACT about us being overrepresented and them being underrepresented if we were to be given additional senators and they were not.²⁷

- 6.40 The Committee notes that the Australian Capital Territory could appear to be under-represented if the new State had four Senators. In any case, the projected population growth of the Australian Capital Territory compared with the projected population decline of Tasmania over the next 50 years, suggests that questions over the adequacy of representation of the Australian Capital Territory in the

26 It is not clear that the nexus provision would apply in the case of a new State.

27 The Hon Mr Snowdon MP, *Transcript of Evidence*, 14 November 2006, p. 6.

Federal Parliament will continue regardless of Northern Territory statehood.²⁸

- 6.41 The Australian Capital Territory was established under s. 125 of the Constitution specifically to set up a national seat of government. Like the Northern Territory, the Australian Capital Territory is subject to Commonwealth legislation under s. 122. Unlike the Northern Territory, the Australian Capital Territory is also subject to Commonwealth power under s. 52(i) as it is the seat of government. Section 125 is worded in such a way to suggest that that Territory cannot proceed to statehood.²⁹ Furthermore, in the *Capital Duplicators case*, the High Court indicated that the Australian Capital Territory cannot proceed to statehood.³⁰

Future status of Commonwealth legislation applying to the Northern Territory

- 6.42 The Northern Territory is generally treated in the same manner as states in Commonwealth legislation. Interpretation provisions in many Commonwealth Acts provide that 'a State will include the Australian Capital Territory and the Northern Territory'. Nonetheless the Territory has historically been subject to greater Commonwealth legislation than the original states:

The reality is that since 1911 much Commonwealth legislation and administration has necessarily intruded into the territory further than it could have done in the states.³¹

- 6.43 To some extent, the future status of Commonwealth legislative regimes currently applying to the Northern Territory will depend on the nature of the terms and conditions of the grant of statehood negotiated between the Northern Territory and Commonwealth Governments.

28 Australian Bureau of Statistics projects that in 2051 Tasmania may have a population of 453,000 and the Australian Capital Territory may have a population of 401,600, whereas the Northern Territory may have a population of 350,000. See ABS, *Population Projections Australia 2004-2101*, 2005 Cat No. 3222.0.

29 C. Saunders, *The Australian Constitution* (annotated), Constitutional Centenary Foundation, 1997, p. 118.

30 Mr Pauling *Transcript of Evidence*, 15 November 2006, p. 52; *Capital Duplicators Pty Limited and another v. Australian Capital Territory and another*, (1992) HCA 51, 177 CLR 248, FC 92/037.

31 The Hon Justice Ashe, *Transcript of Evidence*, 15 November 2006, p. 64.

6.44 Amendments will be required to legislation that applies specifically to the Northern Territory or applies generally throughout Australia but has an extended application to the Northern Territory. In 1996, the Northern Territory Statehood Working Group identified 28 pieces of major legislation in this category.³² Figure 6.3 below is an updated version of this list.

Figure 6.1 Significant Commonwealth legislation relating to the Northern Territory³³

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- Aboriginal Land Rights (Northern Territory) Act 1976
 - Administrative Decisions (Judicial Review) Act 1977 – Sect 3; Sect 19A; Sect 19B; Schedule 3; Notes
 - Atomic Energy Act 1953 – Sect 5; Sect 6; Sect 41A; Sect 41C
 - Bankruptcy Act 1966 – Sect 5; Sect 8; Sect 17B; Sect 116
 - Coastal Waters (Northern Territory Title) Act 1980
 - Coastal Waters (Northern Territory Powers) Act 1980
 - Commonwealth Authorities (Northern Territory Pay-Roll Tax) Act 1979
 - Commonwealth Electoral Act 1918- Sect 4; Sect 4B; Sect 5A; Sect 7; Sect 38A; Sect 40; Sect 44; Sect 46; Sect 47; Sect 48; Sect 48A; Sect 49; Sect 55A; Sect 56A; Sect 76A; Sect 79; Sect 84; Sect 86; Sect 90B; Sect 93; Sect 97; Sect 112; Sect 122; Sect 154; Sect 164; Sect 353; Sect 394; Notes
 - Environment Protection (Alligator Rivers Region) Act 1978 – Long title; Sect 3; Sect 18; Sect 21; Sect 28; Sect 29; Sect 30; Sect 31; Sect 32; Sect 33; Sect 36
 - Environment Protection (Northern Territory Supreme Court) Act 1978
 - Family Law Act 1975 – Sect 22; Sect 26H; Sect 31; Sect 60G; Sect 69H; Sect 69N; Sect 97; Sect 112AN
 - Housing Loans Guarantees (Northern Territory) Act 1959
 - Judiciary Act 1903 – Sect 40; Sect 48; Sect 55D; Sect 55H; Sect 55I; Sect 55N; Sect 55 ZF; Part IXA; Sect 78AA
 - Lands Acquisition Act 1989 – Sect 4; Sect 6; Sect 134
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32 Northern Territory Statehood Working Group, *Final Report*, 1996, p. 31.

33 Parliamentary Library, January 2007. The list includes Commonwealth legislation which applies specifically to the Northern Territory or which applies generally throughout Australia but has an extended application to the Northern Territory.

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- Lands Acquisition (Northern Territory Pastoral Leases) Act 1981
 - Northern Territory Acceptance Act 1910
 - Northern Territory Acceptance Act 1919
 - Northern Territory Grant (Electricity) Act 1989
 - Northern Territory (Self-Government) Act 1978
 - Northern Territory Grant (Special Assistance) Act 1983
 - Northern Territory (Lessees' Loans Guarantee) Act 1954
 - Northern Territory (Commonwealth Lands) Act 1980
 - States and Northern Territory Grants (Rural Adjustment) Act 1979
 - States and Northern Territory Grants (Rural Adjustment) Act 1985
 - Trade Practices Act 1974 – Sect 2B; Sect 4; Sect 4N; Sect 29AA; Sect 44AB; Sect 44AAJ; Sect 44E; Sect 44G; Sect 44H; Sect 44M; Sect 44N; Sect 46B; Sect 51; Sect 86A; Sect 87A; Sect 87AB; Sect 87ZA; Sect 95A; Sect 95C; Sect 95D; Sect 95C; Sect 95 Y; Sect 150A; Sect 150L; Sect 152AD; Schedule
 - Workplace Relations Act 1996 - Sect 4; Sect 116; Sect 130
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6.45 In addition to the major amendments required to Commonwealth legislation concerning the Northern Territory, a number of minor amendments will also be required to a variety of Commonwealth Acts. Appendix G provides an indicative list of other Commonwealth legislation that may require minor amendments following a grant of statehood. Each Act would need to be considered individually to determine the nature of amendment required.

6.46 If the Northern Territory changed its name following statehood the volume of changes required to Commonwealth legislation would dramatically increase.

