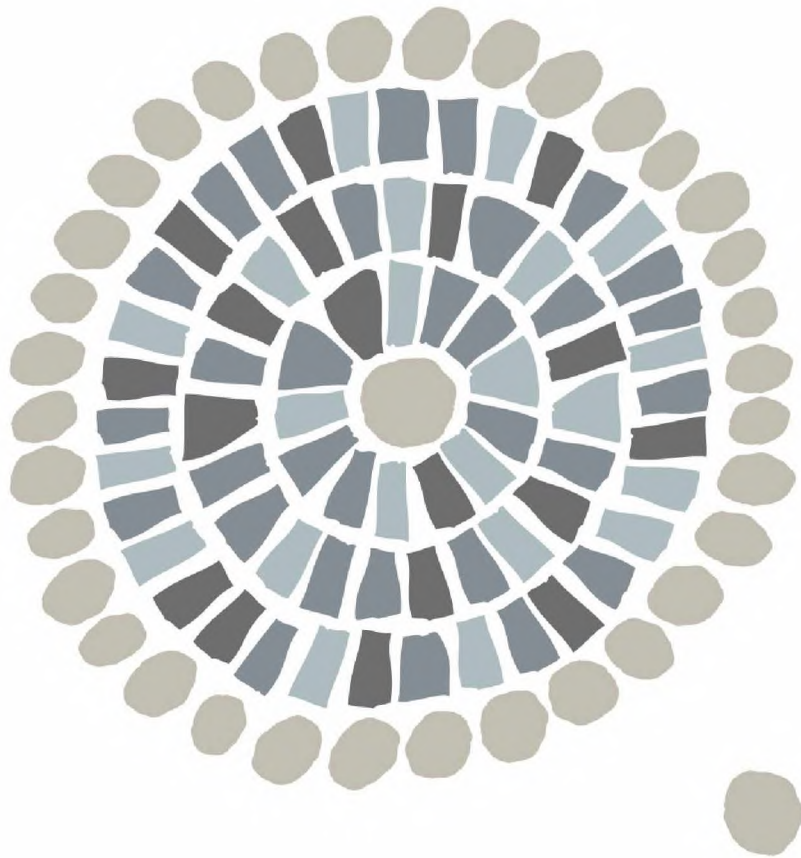


BALANCE

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SUPREME COURT
OF THE NORTHERN TERRITORY

~CENTENARY~
CELEBRATION
1911-2011

Parties of all sorts

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President,
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This edition of *Balance* is full of the stories of the party of the century – the 100 years of the Supreme Court of the Northern Territory. In keeping with this theme there are three other parties I will write about in this column:

- the constitutional convention;
- those of the political kind; and,
- that marking the extraordinary contribution that Barbara Bradshaw has made to the Law Society.

I will start with the constitutional convention.

The Constitutional Party

In his Kriewaldt address the Chief Justice of the High Court concluded with the following comments:

The Territory is, in one sense, poised to become a State. Whether it does, and when it does, and on what terms it does, will depend a great deal upon the people of the Territory. No doubt, there will be debate about the terms of a constitution. Should it simply reflect existing arrangements with room for change? Should it include some aspirational statements? Should it include provisions recognising Indigenous people and their connection with the land? Constitutions

are important, but whether they work well or not is critically dependent upon the people – the electors – those whom they elect and those who are appointed to operate constitutional institutions.

It is good to remember the words of Dr BK Ambedkar, who chaired the committee which drafted the Indian Constitution. On 25 November 1949, the day before that Constitution came into effect, he said:

I feel however good a Constitution may be, it is sure to turn out bad because those who are called to work it happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot.

The Northern Territory, in the hundred years of its existence as a Territory of the Commonwealth, has played a significant part in Australia's constitutional history. It has reached a stage in its constitutional development, when it is equipped with the constitutional infrastructure

necessary for statehood, an elected legislature, responsible government and a well-established and well-respected judiciary with one hundred years of history behind it. I expect that by the time the next centenary comes around, the Northern Territory will have many years of statehood behind it and, as a state, will have made its own contribution to constitutional practice and no doubt litigation in the field of Commonwealth/ State relations.

Not entirely coincidentally, on 17 June 2011 the Chief Minister, together with the Opposition leader and the Minister for Statehood, announced that nomination for election to the Territory Constitutional Convention were to open on 27 January 2012 with elections to take place (in conjunction with the local government elections) on 24 March 2012 and the Convention to open on 21 April 2012.

The announcement by the Chief Minister did get some brief coverage in the media on the day, but was lost within twenty four hours.

The first party I want to discuss is the Constitutional Convention. The primary motivation in discussing the Convention is to encourage Law Society members to nominate as delegates for reasons I will enlarge upon later. First I want to describe the structure and function of the

Convention.

Structure

The Convention will be comprised of voting delegates and non-voting panellists. The voting delegates will be elected at the election to be held on 24 March 2012. There will be two delegates elected from each existing Northern Territory Legislative Assembly electorate. In addition, each electorate will return one "reserve" delegate who is (I understand) entitled to attend and speak at the Convention, but not vote unless one of the two voting delegates resigns during the course of the Convention process. Voting for the elected delegates will take place in conjunction with (i.e. using a separate ballot paper) the local

government elections scheduled for that day and will similarly be compulsory.

Sitting Territory and Commonwealth parliamentarians will be ineligible to stand as voting delegates. Further (again I understand), there is to be prohibitions on electronic broadcast advertising (etc - Internet?) for the Convention election.

The non-voting panellists are described by the Constitutional Convention Committee as "a person who is either representing a body or

is present as an individual. Their role is to participate in debate, advise the convention delegates and shape resolutions". The panellists then, have speaking but not voting rights. They are seen as coming from two broad streams; "technical and legal" and "social and economic". Examples of panellists

Convention of approximately 100.

The Convention is scheduled to proceed in two sittings. The first session will be in Darwin at both the Convention Centre and Parliament House from 21 April – 29 April 2012. The second will be in Alice Springs at a time yet to be determined in 2013.

Functions

The function of the first Convention sitting is to produce a draft constitution. I understand it is intended that a preliminary draft of a constitution will be prepared by a consulting academic for initial consideration by the first sitting in order that the Convention is not left attempting to draft a document from scratch.

It is intended that the draft of the Constitution prepared by the first sitting will then be the subject of consultation and debate in the period between the first and the second Convention sittings. The second sitting of the Convention is intended to confirm a final form of the Constitution which will ultimately be the

subject of a plebiscite. However, this is not the extent of the second sittings function.

Section 121 of the (Commonwealth) *Constitution* provides as follows:

The Parliament may admit



are nominees of industry bodies, the Land Councils and constitutional law experts.

While I understand there is no firm figure on the number of panellist to be invited, it is expected to be in the order of 25 – 30, making a total

to the Commonwealth or establish new states, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament as it thinks fit.

There is (of course) no direct authority of the interpretation of s 121. Quick and Garran note that the provision was styled from a provision of the United States' constitution, and the "terms and conditions" of admission to the Union had included for example, a prohibition on slavery.

In the context of the admission of the Northern Territory as a state of the Commonwealth, the issue of the extent of representation in the Senate will of course figure in debate. So too, may a number of other matters. Continuing the limitations on the executive authority of the Territory contained in s 31 of the *Northern Territory (Self Government) Act 1978* (Cth.) is another possibility.

At this point the technicalities of statehood interweave with the politics of the process.

Technically, statehood for the Territory would be achieved by an Act of the Commonwealth Parliament presumably scheduling the

"Territory Constitution". Of course, the content of such an Act (and its schedule) is under the absolute control of the Commonwealth Parliament. Whether or not a draft Territory Constitution has enjoyed overwhelming support at a plebiscite of Territory voters, the final form of the Territory Constitution is at the sole discretion of the Commonwealth.

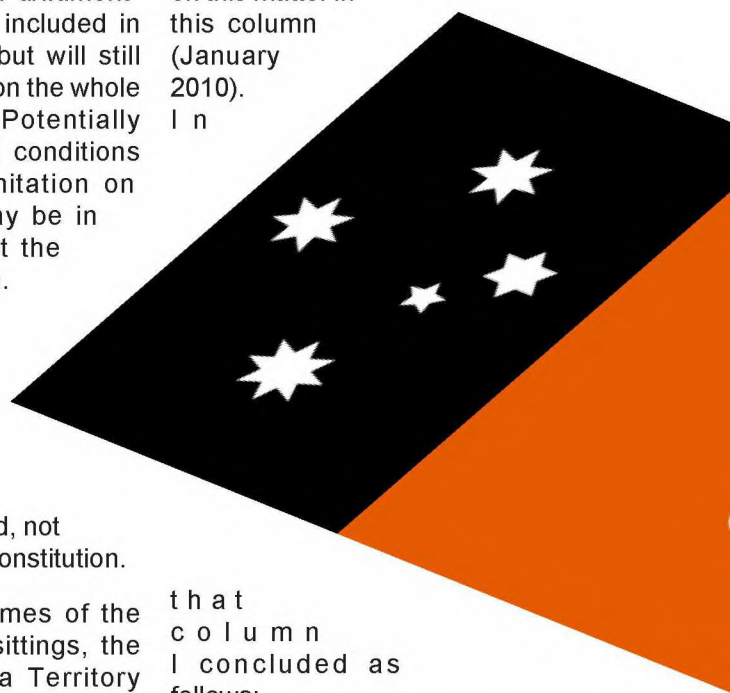
Further, issues such as "*the extent of representation in either House of the [Commonwealth] Parliament*" would not usually be included in a state constitution, but will still impact significantly upon the whole statehood debate. Potentially also other terms and conditions (for example the limitation on executive power) may be in the Act itself and not the scheduled Constitution.

A crucial function of the second Convention sittings then is to make recommendations on the *politics* of statehood, not just the *words* of the Constitution.

Subject to the outcomes of the second Convention sittings, the expectation is that a Territory plebiscite seeking endorsement of the statehood process would then be held. Of course, even presuming all of these steps run smoothly the

ultimate decision as to whether statehood is granted and what form it takes will remain with the Commonwealth parliament. The Commonwealth government has thus far failed to provide any definite view on the issue of s 121 terms and conditions.

Of course, I am always aware of the not unreasonable scepticism many hold in relation to the prospects and benefits of statehood. I have previously written on this matter in this column (January 2010). In



that column I concluded as follows:

Achieving statehood may do little more than ensuring the new state Territory can stand as an equal partner against the "imperial march" of cooperative federalism and a new state Territory will remain the smallest and easiest to target of those states. It would, though, mean that when the Commonwealth did its political arithmetic prior to taking an interventionist action it, and the other states, would have to accept that the proposed action was a further erosion of constitutional federalism. To that extent statehood may be nothing more than a state of mind, but then again

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It is incumbent upon both political parties to propose policies that will overcome this problem and forswear the temptation to descend into the law and order auction.



so is the rule of law.

I continue to maintain this view today. This is why to me the Constitutional Convention is a significant event worthy of attention. The decision to exclude sitting parliamentarians from standing as a delegate may be explicable in trying to ensure the perception of the

Convention as free from party politics. However, it also has the

descending into a law and order auction. Where each political party tries to curry favour with the electorate by showing that they are "tougher on crime" than their opponents. There will be an election in the Territory in the next fifteen months and now is the time that the political parties are gearing up for the contest.

It is in this context that recent statements by the shadow Attorney-General again raising the notion of mandatory sentencing should be seen. Similarly the Government's

recent actions in criminalising bail breach and in preventing access by to the new

SMART Court by those charged with

a violent offence above simple assault have the

flavour of a bid in the pre-election auction.

The Government's actions are perhaps all the more stark as, in many respects this Government has shown a refreshingly sensible approach to many law and order issues. Examples of this sense can be seen in the emphasis given to community-based corrections in the "new era in corrections" policy. Similarly the commitment to achieve alcohol reforms without criminalising alcoholism deserves substantial praise. The very fact of the efforts to reduce the burden of alcohol abuse on the criminal justice system (and the broader society) is also worthy of praise. These issues are not easy for governments. It is far easier for an opposition to call for mandatory sentencing and the "monstering" of itinerants than

it is for a Government to say that offenders should be rehabilitated in the community and not locked up.

Perhaps unfairly, the good sense showed by Government in so many respects means that when less than sensible proposals are put, one tends to judge them more harshly. This noted, frank comment on legislative reform proposals is a necessary role of the profession and its representative organisations. I noted in a media release last month that the Territory prison population had increased 5.4% in the last 12 months. The level of incarceration is creating a financial and social burden that the Territory will not be able to continue to bear. It is incumbent upon both political parties to propose policies that will overcome this problem and forswear the temptation to descend into the law and order auction.

The Good Bye Party

31 May 2011 was not just the centenary of the Supreme Court of the Northern Territory. It was also the day that Barbara Bradshaw concluded her term as Chief Executive Officer of the Law Society, after over eight years of tireless work. The Council was pleased to take Barbara to dinner at the conclusion of her last Council meeting.

Barbara has left the Law Society to take up the position of Director of Legislative Reform at the Northern Territory Department of Children and Families. It seems that the representation and regulation of the local profession has ceased to provide the challenge to Barb that

consequence of limiting the pool of experienced,

realistic delegates. Lawyers by their training are equipped to participate effectively in such foray. I would urge members to consider participation in the Convention process through nomination as a delegate.

The Political Party

In his comments at the ceremonial sitting marking the centenary of the Supreme Court Chief Justice Riley warned of the risk of politicians



The profession owes an enormous debt of gratitude to Barb. Barb's role in safely steering the Society through the seemingly endless rounds of legal profession regulatory reform may not be fully understood by us all, but should not be underestimated by any of us.



it once had. Perhaps we had all become too quiescent!

The profession owes an enormous debt of gratitude to Barb. She was of course an extraordinarily effective CEO in the management of the secretariat and the running of the Society. Much more than this though, Barb's role in safely steering the Society through the seemingly endless rounds of legal profession regulatory reform may not be fully understood by us all, but should not be underestimated by any of us. If it were not for Barb's efforts, the Territory profession would not now (and apparently after the next round of reform) have the independence that springs from the self regulatory model that the Territory has preserved when many others have not.

Beyond the borders of the Territory, Barb's contribution on the national stage was such as to be specifically noted and applauded by the Law Council of Australia at the last meeting of Directors.

Personally, I have immensely enjoyed working with Barb during the whole of my eight years on Council. I will miss the opportunity for our frequent discussions on the politics of the Society, the Law Council, the Territory and the nation.

I am confident that all the other Presidents that have worked with Barb: Ian Morris, Merran Short, Allison Smart and Duncan McConnel, would join with me in extending a heartfelt thankyou to her. I am sure these views are shared by the profession which she has served so effectively.

And welcome...

Finally, a very warm welcome goes to the Society's new Chief Executive Officer, Megan Lawton. For those of you who have not met Megan, by way of introduction:

Megan has come to the Society after serving as the Legal Officer with the Northern Territory office of

the Australian Health Practitioners Regulation Agency (AHPRA). AHPRA is the national agency responsible for regulating 10 health professions which commenced a scheme of national regulation on 1 July 2010. Prior to that Megan worked for the Health Professions Licensing Authority (HPLA), commencing early 2007. This experience in the processes (and downfalls) of a transition to national regulation will be of particular advantage in responding to the current national legal profession reform proposals.

Born in Darwin, Megan has also worked as a solicitor in the litigation division of several local firms. Prior to commencing legal practice Megan was the Chief Analyst in a lobbying firm in Canberra and undertook some of her legal studies at ANU, although she completed her honours degree at Charles Darwin University. Admitted in 2002, Megan also holds a Bachelor of Arts from La Trobe University. ●



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