

**Launch of Graham Nicholson's book
*Lectures on Northern Territory Public Law***

Chief Justice Michael Grant

**Nitmiluk Lounge, Level 4, Parliament House
7 July 2016**

The grant of self-government to the Northern Territory in July 1978 was a bold and novel experiment. Section 122 of the *Constitution*, which provides for the Commonwealth Parliament to make laws for the government of any territory accepted or acquired by the Commonwealth, appears in Chapter VI, entitled "New States". Both the *Constitution of the United States* and the *British North America Act 1867* (Imp) contained "territories" clauses which were used as models for s 122. Territories within the contemplation of those clauses were peripheral areas administered by the United States and Canada in accordance with long-standing British colonial practice; usually to exploit their resources or strategic location, and often in preparation for their eventual admission as new states or provinces. The colonial practice was that such territories were subject to the exclusive legislative authority of the federal government, were generally denied self-government, and had populations which might not be accorded full citizenship rights or representation in the institutions of government.

Against that background, the expectation in 1901 was that British New Guinea, Norfolk Island, Lord Howe Island and Fiji, together with the Northern Territory of South Australia, would become Commonwealth territories. Moreover, there was no intention on the part of the framers of the *Constitution* that upon acquisition or acceptance these places would necessarily enjoy the benefit of metropolitan institutions such as parliamentary representation or a criminal justice system which provided for trial by jury. There is very little discussion in the Constitutional Debates concerning the nature or prospective evolution of territories, beyond a consensus that the Commonwealth Parliament should have the broadest power to make such provision for the territories as it saw fit. The plenary nature of that power notwithstanding, it is unlikely that the framers of the *Constitution* had within their contemplation the creation of a self-governing territory.

That absence of intention notwithstanding, it is now accepted by the High Court that the grant of self-government has created a new self-governing polity under the Crown with separate political, representative and administrative institutions; a representative of the Crown in right of that polity; and a Legislative Assembly with power to make laws for the peace, order and good government of the Territory which is a plenary power of the same quality as that enjoyed by the legislatures of the States. While those features of self-government would now appear to be beyond question, the interaction between s 122 and the other provisions of the *Constitution*, for which no express provision is made in the document, is far from settled. So, too, is the Territory's future constitutional development far from settled. It has been said that the exercise of judicial authority in the Territory and its relationship with Chapter III of the *Constitution* is a matter involving "baroque complexities and many

uncertainties". The extent to which the Commonwealth's legislative authority in respect of territories is subject to the various constitutional guarantees has been the subject of conflicting theories and decisions. The response of the Commonwealth Parliament to the enactment of euthanasia legislation by the Territory operates as a reminder of the fragility of the grant of self-government. The 1998 Statehood referendum, and the recent renewal of the push for Statehood, has focused attention on the constitutional and politico-legal issues that must be addressed before that process may be brought to fruition.

These are among the issues addressed by Mr Nicholson in the series of lectures he has delivered over the past decade as part of the Law Society's continuing professional development program. Those papers form this compilation, and there is no person better qualified than Mr Nicholson to speak in this field. He is Australia's leading expert on the constitutional structure and history of the self-governing Northern Territory. As the modest biographical note at the start of this compilation records, Mr Nicholson first came to work in the Territory in 1974 and assisted in planning for self-government. More accurately, he was active and instrumental in the dealings with the Commonwealth which led to the enactment of the *Northern Territory (Self-Government) Act 1978*. Following the grant of self-government, he was appointed as the new body politic's first Crown Solicitor. Together with the Territory's first Solicitor-General, Ian Barker QC, he set up structures that are still in place today dealing with such fundamental constitutional matters as the Administrator's satisfaction that the subject matter of legislation falls within the scope of the Territory's executive authority.

Mr Nicholson subsequently held appointment as Crown Counsel for the Territory for almost 20 years, during which time he was the academic and intellectual architect of the submissions made by the Territory to the High Court concerning the Territory's constitutional structures and its place within the broader Australian *Constitution*. During his time as Crown Counsel, he was one of the Territory's principal sources of advice in relation to legislative and executive proposals which involved constitutional issues. The opinions he wrote as Crown Counsel are a continuing source of reference and guidance for public lawyers in the Territory.

In addition to his legal professional duties, Mr Nicholson has also been active as a researcher and academic. He co-edited "Selected Constitutional Documents on the Northern Territory", which is the definitive compilation of primary source documents in relation to the Northern Territory's constitutional history. He contributed substantially to the text "Australia's Seventh State" (1988: North Australia Research Unit), which is the seminal text in relation to proposals for a grant of Statehood to the Northern Territory. He was the legal adviser to the Legislative Assembly Select Committee on Constitutional Development, and drafted the bulk of the Discussion Papers and the Draft Constitution leading up to constitutional convention and referendum on Statehood in 1998, and was subsequently legal adviser to the Statehood Steering Committee established under the auspices of the Legislative Assembly Legal and Constitutional Affairs Committee. Mr Nicholson was also a lecturer in Constitutional Law for many years at the Charles Darwin University, and subsequently an Adjunct Professor with the institution. He has published extensively in relation to the Northern Territory's constitutional position.

I have attended most of the lectures comprising this compilation. Revisiting the papers for the purpose of preparing this speech has been both informative and interesting. They provide a valuable resource and the Law Society is to be congratulated for collating and publishing them in this form.
