

# **Submission by Dr Sev Ozdowski OAM, Human Rights Commissioner, to the Joint Standing Committee on the National Capital and External Territories inquiry into Norfolk Island Electoral Matters**

## **1. Introduction**

The Committee is asked to inquire into and report on ‘the consistency of the laws relating to eligibility to vote and candidature for the Legislative Assembly of the Territory of Norfolk Island with other Australian jurisdictions, in particular: (a) whether Australian citizenship should be a requirement for eligibility to vote for, or be elected to, the Legislative Assembly; (b) the time period before which an Australian citizen resident in the Territory can enrol to vote for the local legislature.’

The Human Rights and Equal Opportunity Commission is responsible, among other things, for monitoring Australia’s compliance with the *International Covenant on Civil and Political Rights (Human Rights and Equal Opportunity Commission Act 1986 (Cth), Schedule 2)*.

The objective of this submission is to alert the Committee to relevant human rights and their potential impact on the issues before the Committee. No concluded view is expressed on either question.

## **2. Human rights relevant to question (a)**

### **The current situation**

At present entitlement to vote for the Legislative Assembly on Norfolk Island is dependent on length of residence rather than citizenship, ancestry or immigration status. These voting rights were effectively conferred by the *Norfolk Island Act 1979 (Cth)* (‘the Act’) which provided for the creation of the Legislative Assembly of Norfolk Island without imposing citizenship requirements upon electors.<sup>1</sup> Section 31 of the Act stipulated that the election of the Legislative Assembly was to be governed by enactments passed by the Assembly itself.

Subsequently, the *Legislative Assembly Act 1979 (Norfolk Island)* was passed. That Act stipulates residency requirements for electors but no citizenship requirements. Any person is eligible to enrol if he or she has been present on Norfolk Island for a total of 900 days in the four years immediately preceding the date of the application to enrol.<sup>2</sup>

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1 Members of the Assembly were originally required, under the Commonwealth’s Norfolk Island Act, to be Australian citizens. However, that requirement was abolished by the Commonwealth Parliament in 1985 (see *Statute Law (Miscellaneous Provisions) Act (No. 1) 1985*).

2 *Legislative Assembly Act 1979 (NI)*, section 6.

It appears from the preamble to the Act that Australia's approach reflected, in part, the perceived need to grant rights of self-government to a population which included persons with a 'special relationship' to Norfolk Island (being the descendants of the settlers from Pitcairn Island). Some 46% of Norfolk Islanders are of Pitcairn descent. About 81% are Australian citizens and about 16% are New Zealand citizens (1996 Census). A pre-requisite of Australian citizenship will have the immediate effect of disenfranchising at least the approximately 16% of Norfolk Islanders with New Zealand citizenship.

## **International Covenant on Civil and Political Rights**

The right to vote is essential to the existence of a democratic society, which, in turn, is essential to the full and free enjoyment of human rights. The *Universal Declaration of Human Rights* (1948) stipulates that 'everyone has the right to take part in the government of his country, directly or through freely chosen representatives' (article 21.1).

*The will of the people shall be the basis of the authority of government: this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures* (article 21.2).

This principle is reformulated in the *International Covenant on Civil and Political Rights* as a right of 'every citizen'. Australia has been a party to this Covenant since 1980. Article 25 stipulates

*Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:*

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;*
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*
- (c) To have access, on general terms of equality, to public services in his country.*

The Human Rights Committee, elected by the Covenant parties to monitor and promote compliance with its terms, has elaborated on the import and meaning of article 25 in a General Comment issued in 1996.

*Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant.*<sup>3</sup>

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3 General Comment No. 25 (1996). General Comments are issued by the Human Rights Committee under article 40.4 of the Covenant.

## Removing fundamental rights once granted

The fact that article 25 guarantees the franchise to citizens does not imply that non-citizens must be denied that right. The Human Rights Committee has recognised that some states parties may and do enfranchise others, such as permanent residents.<sup>4</sup>

Moreover, the fact that the Covenant does not recognise the right of non-citizens to vote cannot now be used by Australia as a 'pretext' for removing that right from non-citizens on Norfolk Island. Voting is a fundamental human right currently enjoyed by Norfolk Island residents. Article 5.2 of the Covenant stipulates that 'there shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party ... pursuant to law, conventions, regulations or custom on the pretext that the ... Covenant does not recognize such rights ...'.

Further, Australia is constrained from acting discriminatorily by article 26 of the Covenant. It provides:

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

## Nationality discrimination

Is nationality or citizenship an 'other status' protected against discrimination by article 26? In *Gueye et al v France*<sup>5</sup> the Human Rights Committee found that the term 'or other status' includes nationality. In that case, the complainants were retired soldiers of Senegalese nationality who had served in the French army prior to Senegal's independence from France. For 14 years after Senegalese independence the French government paid them a pension on the same basis as former soldiers of French nationality. However, in 1974 and 1975 legislation was introduced which had the effect of freezing the complainants' pensions at 1974 levels (while the benefits of former soldiers of French nationality continued to increase).

The Human Rights Committee characterised the central issue as being whether the differentiation on the basis of nationality was based upon reasonable and objective criteria.<sup>6</sup> In concluding that it was not so based, the Human Rights Committee said:

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4 General Comment No. 25 (1996), paragraph 3.

5 Communication No. 196/1983.

6 See also *Lovelace v Canada*, Communication No. 24/1977, in which the Committee required Canada to justify the denial of freedom of residence (article 12) in the interests of protecting a minority (article 27) with 'a reasonable and objective justification ... consistent with the other provisions of the Covenant'.

*In determining whether the treatment of the authors [ie the complainants] is based on reasonable and objective criteria, the Committee notes that it was not the question of nationality which determined the granting of pensions to the authors but the services rendered by them in the past. They had served in the French Armed Forces under the same conditions as French citizens; for 14 years subsequent to the independence of Senegal they were treated in the same way as their French counterparts for the purpose of pension rights, although their nationality was not French but Senegalese. A subsequent change in nationality cannot by itself be considered as a sufficient justification for different treatment, since the basis for the grant of the pension was the same service which both they and the soldiers who remained French had provided ...*

The facts underlying the *Gueye* case are analogous to the facts in the current situation which also deals with:

- rights previously conferred on individuals for reasons totally unrelated to nationality
- which rights are now sought to be revoked in respect of some of those individuals
- solely on the basis that those individuals are not Australian citizens.

Having created a right to vote without reference to nationality in recognition of the special circumstances of the residents of Norfolk Island, it would arguably breach Covenant article 26 to disenfranchise certain beneficiaries of that right now solely on the basis that they are not Australian citizens. As was the case in *Gueye*, there would simply be no nexus between the origins of the right and the further citizenship qualification now to be imposed.

### **Possible justification – conformity with other federal law**

Imposing a citizenship requirement for Norfolk Island Legislative Assembly voters will not enhance their voting rights in respect of Australian federal elections. Norfolk Islanders who are Australian citizens (some 81% of residents at the date of the 1996 Census) do not enjoy equivalent voting rights with other Australian citizens. Although they are entitled to enrol to vote in federal elections, they are not obliged to do so. Therefore, the suggested change would not achieve full uniformity and consistency between the Norfolk Island and federal franchises.

The 'special' franchise for the Norfolk Island Legislative Assembly is not without counterparts elsewhere in Australia. There are other 'governing' groupings established by Australian law to which election is based on a franchise different from that in the Commonwealth Electoral Act. These

include ATSIC regional councils<sup>7</sup> and Local Aboriginal Land Councils in NSW.<sup>8</sup>

In its report *Territorial Limits: Norfolk Island's Immigration Act and human rights* (1999; [http://www.humanrights.gov.au/human\\_rights/other/h5\\_8\\_4.html](http://www.humanrights.gov.au/human_rights/other/h5_8_4.html)) the Commission concluded that 'while the Commonwealth Parliament has conferred a measure of self-government on Norfolk Island, this has no implications for the status of Norfolk Island in international law and in no way alters the Island's status as a territory of Australia' (page 8). The Commission noted that 'the constitutional status of Norfolk Island has not been the subject of definitive decision by the High Court' (page 36) but found that 'for the purposes of the [Covenant] and other human rights treaties, Norfolk Island is part of the 'territory' of Australia and the Commonwealth is responsible for the full extension to the Island of its human rights commitments' (page 37).

This analysis affirms the Commonwealth's responsibility to protect the human rights of Norfolk Islanders and founded the Commission's recommendation that extension of the Covenant right to freedom of movement and residence to Norfolk Island requires repeal of the Island's own Immigration Act.

However, as noted above, these arguments do not necessarily justify the Commonwealth in removing a right enjoyed for at least 20 years by non-citizens in respect of the local legislature which governs the isolated island on which they live.

The Commission would expect the Commonwealth to provide a justification for removing the franchise from non-citizen Norfolk Islanders which pursues a Covenant objective or which is at least consistent with the Covenant. It is difficult to see what that objective might be. One possible justification is the protection of the culture of Pitcairn descendants on Norfolk Island. It may be, for example, that the minority Pitcairners are being overwhelmed by other interests under the current regime.

### **Possible justification – protection of the Pitcairn minority**

In *Territorial Limits* the Commission rejected claims made by and on behalf of Norfolk Islanders that they are 'indigenous' and/or that they are a distinct 'people' (pages 47-48). The object of this claim was to qualify for the right of self-determination of peoples set out in article 1 of the Covenant.

The Commission did concede, however, that Norfolk Islanders, or at least those of Pitcairn descent (almost one-half of Island residents), probably constitute a 'cultural or ethnic minority' for the purposes of article 27 of the Covenant (pages 44-46). Article 27 protects the right of members of ethnic, religious and linguistic minorities to enjoy their own culture, profess and

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7 *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth), section 101: adds Aboriginality and residence within the region to the requirement that the elector be on the Commonwealth electoral roll.

8 *Aboriginal Land Rights Act 1983* (NSW), section 7: no electoral roll requirement.

practise their own religion and use their own language. This right is not restricted to citizens (in contrast with the right to vote in article 25).<sup>9</sup>

The Human Rights Committee has noted that, for individual members of a minority to enjoy these rights 'in community with others', it will often be necessary for affirmative action on the part of the state party to ensure the survival of the culture, religion and/or language.

*Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group.*<sup>10</sup>

According to the Committee, in some cases 'positive legal measures of protection' may be needed including measures to ensure the effective participation of members of minority communities in decisions which affect them.<sup>11</sup>

The grant of a large measure of self-government to Norfolk Island by the *Norfolk Island Act 1979* (Cth) responded at least in part to the desire of Islanders to control their own destiny.

To the extent that the existing self-government regime applying to Norfolk Island enhances the survival prospects of a 'minority' (whether defined as all Island residents or only those of Pitcairn descent), the Commonwealth is arguably constrained by article 27 from disenfranchising some members of that minority from the only effective self-government mechanism which can operate to promote and protect its culture. As noted above, some 16% of Norfolk Island residents are New Zealand citizens. If the protected minority is defined as all Island residents, then the proposal will see one in every six of them lose their entitlement to participate in decisions which affect them. If a proportion of Pitcairners are also New Zealand citizens and the protected 'minority' is defined as Pitcairners, then again a proportion will lose that entitlement. This is an entitlement that should not be dependent on citizenship.

On the other hand, as recognised above, the current electoral regime may be operating to the detriment of a 'minority' the Commonwealth is obliged to protect and the objective of reform may be to enhance that minority's capacity to protect and promote its culture. Removing the franchise from a proportion of Island residents may be an appropriate and precisely targeted mechanism

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9 Human Rights Committee, General Comment No. 23 (1994), paragraph 5.1: 'The terms used in article 27 ... indicate that the individuals designed to be protected need not be citizens of the State party ... A State party may not, therefore, restrict the rights under article 27 to its citizens alone'.

10 General Comment No. 23 (1994), paragraph 6.2.

11 General Comment No. 23 (1994), paragraph 7.

for achieving that objective. That seems unlikely, however, given the likelihood that non-Pitcairn Australian citizens would continue to outnumber the Pitcairners.

In this connection it should also be noted that the minority rights protected by article 27 are not absolute. They are not to be 'denied' but at the same time they are not protected from every impact.<sup>12</sup>

### **3. Human rights relevant to question (b)**

At present, by reason of the residency requirement in the *Legislative Assembly Act 1979* (NI), an Australian citizen relocating to Norfolk Island is effectively deprived of the right to participate in public affairs at a local level for a period of at least 900 days.<sup>13</sup>

The Human Rights Committee has made clear that the right to participate in public affairs guaranteed by Covenant article 25 extends to all levels of government.

*The conduct of public affairs, referred to in paragraph (a), is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels.*<sup>14</sup>

The Committee has also addressed the issue of lawful restrictions on the right to vote. While residency could be a ground for restricting the right to vote, the Committee emphasised that any restriction must be reasonable.

*If residence requirements apply to registration, they must be reasonable, and should not be imposed in such a way as to exclude the homeless from the right to vote.*<sup>15</sup>

It has been suggested that the *Legislative Assembly Act 1979* (NI) should impose similar residency provisions to those applying at a Commonwealth level: a minimum of two years residency in Australia in the previous five years.<sup>16</sup> However, it would arguably be unreasonable to impose a local residency requirement that effectively treats Australian citizens relocating to Norfolk Island as though they were citizens of a foreign state.

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12 Human Rights Committee in *Lansman v Finland*, Communication No. 511/1992. See also *Lubicon Lake Band v Canada*, Communication No. 167/1984, *Kitok v Sweden*, Communication No. 197/1985 and *R L v Canada*, Communication No. 358/1989.

13 Section 6.

14 General Comment No. 25 (1996), paragraph 5.

15 General Comment No. 25 (1996), paragraph 11.

16 Views of the Norfolk Island Government as reported in 'Norfolk Island Amendment Bill 1999', Bills Digest 11, 1999-2000. See also section 93 *Commonwealth Electoral Act 1918* (Cth) and section 13 of the *Australian Citizenship Act 1948* (Cth).

It has also been suggested that relaxation of the residency requirement might

*permit a number of transient Australian citizens to swamp a small electorate, as a constituency neither well versed in the distinctive ways of the Island nor committed to its long term interests.*<sup>17</sup>

This appears to raise issues of minority rights under article 27 of the ICCPR. However, as noted above, such rights are not absolute. Moreover, article 27 minority rights must be exercised consistently with other ICCPR rights (including those provided for in article 25).<sup>18</sup>

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17 Views of Norfolk Island Government as reported in “*Norfolk Island Amendment Bill 1999*”, Bills Digest 11, 1999-2000.

18 See *Lovelace v Canada*, Communication No. 24/1977.