

Norfolk Island and the Commonwealth

The constitutional status of Norfolk Island

- 2.1 The Commonwealth position on Norfolk Island's constitutional status is unequivocal, and has been supported by successive governments. The submission of the Department of Transport and Regional Services (DOTRS), with which the responsibility for external territories lies, states that:

Norfolk Island has been an integral part of the Commonwealth of Australia since 1914 when it was accepted as a Territory under the authority of the Commonwealth, pursuant to section 122 of the Constitution.¹

- 2.2 According to the Commonwealth Grants Commission:

Commonwealth governments of both political persuasions have taken the position that Norfolk Island is Australian sovereign territory and will remain so. 'Internal self government' seems to have been interpreted, in relation to State and local government-type powers, as giving the Norfolk Island Government a range of powers similar to the Northern Territory and the ACT ... There has never been any intention that the range of powers of the Norfolk Island Government be extended to all matters other than foreign affairs, defence and coinage, along the lines of the 'free

¹ Department of Transport and Regional Services, Submissions, p 94. (Page numbers refer to the consolidated volume of submissions.)

association' arrangement the Cook Islands and Niue have with New Zealand.²

- 2.3 The Committee is aware that there is a small but vocal group of people on Norfolk Island who dispute that Norfolk Island is a part of Australia. This view was strongly promoted in a newspaper entitled *The Norfolk Island News* which was published sporadically from the mid 1970s until the 1990s. The view is also promoted by the Society of Pitcairn Descendants. The Society, membership, which is very loosely defined, told the Committee that it does not claim to speak on behalf of all Pitcairn descendants, who comprise approximately 43 per cent of the present population.³
- 2.4 The Committee believes from the evidence that it heard that the view is held by a minority, quite possibly, as suggested by the Commonwealth Grants Commission, promoted in some instances by those who stand to make personal gain:
- Some other residents want to maintain or enhance the Island's independence from Australia. The reasons for this may not be confined to the historical or cultural, but could also be, as suggested by Nimmo, the monetary advantages that the Island presently affords them.⁴
- 2.5 For the purpose of this inquiry, the Committee believes that debate on the issue is not relevant. It is not mentioned or implied in the terms of reference. There is value, however, in the context of the inquiry, in clearly stating that the Committee accepts the judgement of the High Court and other authorities that Norfolk Island is part of Australia.⁵

2 Commonwealth Grants Commission, *Report on Norfolk Island 1997*, p 17.

3 Information provided by Mr Lisle Snell, President, and Mr Kenneth Nobbs, Vice-President, to the Committee at the public hearing on Norfolk Island helped to clarify the society's membership but gave no indication of how many Norfolk Islanders of Pitcairn descent might actually support the views expressed by Mr Snell and Mr Nobbs. See Transcript 22 March 2001, pp 35-37.

4 Commonwealth Grants Commission, *Report on Norfolk Island 1997*, p 18.

5 The High Court decided in 1976 that Norfolk Island was a part of the Commonwealth of Australia. (*Berwick Limited v R R Gray, Deputy Commissioner for Taxation (1976) 133 CLR 603*) The 1999 Human Rights and Equal Opportunity Commission report on Norfolk Island noted on p 8 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.'

It had been argued in a submission to the HREOC that 'Norfolk Island is not part of the Commonwealth of Australia, but a dependent territory under the authority of the Commonwealth of Australia' (Submission No. 4 to HREOC inquiry, letter from Ric Robinson, President of the Association of Norfolk Islanders, p 8). The United Nations defines dependent territory as: 'a territory which is geographically separate and is distinct ethnically and/or

2.6 The Chief General Counsel, Henry Burmester QC, in an opinion on the Constitutional Status of Norfolk Island, 18 October 1999, stated that:

there is no basis on which one can conclude that the High Court would accept an argument that a territory like Norfolk Island was outside or not constitutionally an integral part of the Commonwealth of Australia. To the extent that the territories power has been considered in recent years by the High Court, the tendency has been to apply to Territories whether external or internal constitutional safeguards or guarantees that were previously thought to apply only to the States. I consider the basic premise on which Professor Crawford proceeds is not supported by authority. The status of Norfolk Island as authoritatively determined in the *Berwick* case remains good law.⁶

2.7 The submission from the Department of Transport and Regional Services states that:

The fact that Norfolk Island has achieved a measure of self-government *is of no greater significance* than the self-government conferred by the Australian Parliament on the Northern Territory and the Australian Capital Territory.⁷

The governance of Norfolk Island

2.8 The Commonwealth's law making power in regard to Norfolk Island (sections 52 and 122 of the Constitution) is not constrained,⁸ and the Commonwealth has ultimate responsibility for the Territory's good governance and for ensuring representative democracy and proper financial management. Importantly, it also remains responsible for

culturally from the country administering it.' (General Assembly Resolution 1541 (XV), 15 December 1960.)

This notion had previously been rejected by the Senate Standing Committee on Foreign Affairs and Defence, which noted in its 1975 report, *United Nations Involvement with Australia's Territories*, that the Island's population 'is ethnically and culturally akin to that of the mainland' and that Norfolk Island's 'economic and social links are with Australia' (p 112).

6 Opinion, Constitutional Status of Norfolk Island, 18 October 1999, Exhibit 1. Mr Burmester's opinion was sought in response to an August 1999 opinion from Professor James Crawford of the University of Cambridge, on the constitutional relationship between Norfolk Island and the Commonwealth of Australia, requested by the Government of Norfolk Island and submitted to the Joint Standing Committee on the National Capital and External Territories on 15 September 1999.

7 Department of Transport and Regional Services, Submissions, p 94.

8 Commonwealth Grants Commission, *Report on Norfolk Island 1997*, p 16.

ensuring that Norfolk Island laws comply with Australia's obligations under international law.

- 2.9 Since 1979, the Island has been governed under the provisions of the *Norfolk Island Act 1979* (Cth), which provides the basis of the Island's legislative, administrative and judicial systems. The Act devolved power to Norfolk Island to elect its own government, to have its own administration and to have major responsibility for raising its own revenue. The government consists of a nine member Legislative Assembly, elected for three year terms.
- 2.10 The Act granted a greater degree of self government than had been recommended by the 1975-76 Royal Commission into the Island's future status, headed by Sir John Nimmo.⁹ The Nimmo Report recommended, among other things, that all Commonwealth legislation apply on Norfolk Island. Under the 1979 Act, Commonwealth legislation does not extend to Norfolk Island unless it is specifically expressed to do so. If it does apply, it overrides local law.
- 2.11 The powers of the Norfolk Island Government incorporate the functions of both local and state governments, in a manner similar to the Northern Territory or the Australian Capital Territory, but they also include a range of functions which are exercised exclusively by the Commonwealth in mainland Australia. The Act divides the legislative functions and responsibilities of the Assembly into Schedule 2, which includes matters normally performed by state and local governments, and Schedule 3, which covers matters normally reserved for the Commonwealth, such as customs, quarantine, immigration and social security.
- 2.12 Bills passed by the Legislative Assembly are presented to the Administrator for assent. The Administrator is appointed by the Governor-General and is responsible to the Commonwealth Minister responsible for territories. The Minister retains the power to veto legislation on Schedule 3 matters.
- 2.13 The preamble to the 1979 Act stated that it should be reviewed after five years to decide whether self government should be extended. Although many additional powers have subsequently been transferred to the Norfolk Island Government, no review of the act has been undertaken.
- 2.14 In 1996-97 the Commonwealth Grants Commission (CGC) undertook a comprehensive and independent inquiry into Norfolk Island's economic capacity, financial and administrative arrangements and government
-

⁹ J. Nimmo, *Report of the Royal Commission into Matters relating to Norfolk Island, October 1976*, AGPS, Canberra 1976 (the Nimmo Report).

services, which was intended to provide, among other things, a basis for review of the Norfolk Island Government's range of powers and functions under the Act.

- 2.15 Notwithstanding the already substantial transfer of additional powers,¹⁰ the Grants Commission noted that during its conferences on the Island in 1996-97 the view was expressed that the Commonwealth was moving away from the intention of the Act to 'achieve, over a period of time, internal self government', and was attempting to move in the direction of greater control. Ambiguity of interpretation of what is meant by 'internal self-government' lies chiefly with Commonwealth level powers, rather than with state or local government level powers. The CGC observed that:

The attitude towards Commonwealth type powers is less clear. While none have been resumed, Commonwealth control over some of these powers has been tightened and devolution of others resisted.¹¹

- 2.16 Given the very large number of additional responsibilities which have been devolved to Norfolk Island since 1979, particularly in the 1980s, the Committee accepts that the rate of transfer has now slowed considerably. The Committee was advised by DOTRS that, in discussions on the transfer of additional powers, the Commonwealth Government is guided by various considerations, including whether the powers are normally exercised at a state and territory level, whether the Norfolk Island Government has the capacity to discharge its obligations and the degree of support within the community.¹²

Responsibility for electoral matters on Norfolk Island

- 2.17 The Commonwealth has ultimate responsibility for the development of electoral systems and electoral laws on Norfolk Island. The electoral

10 The Department of Transport and Regional Services provided the following information about the transfer of powers:

Since the commencement of the Norfolk Island Act in 1979 when there were 42 items in Schedule 2 and four in Schedule 3, a total of 61 additional matters have been transferred to the responsibility of the Norfolk Island Government. Existing items were also varied as part of that process. Each extension or variation of power was the result of consultation and consideration at Departmental and Ministerial level (not by Parliament). At the end of the most recent transfer process, in 1992, 19 powers were added to Schedule 2 of the Act.

Department of Transport and Regional Services, Submissions, p 100.

11 Commonwealth Grants Commission, *Report on Norfolk Island 1997*, p 17.

12 Department of Transport and Regional Services, Submissions, p 107.

provisions for Norfolk Island's Legislative Assembly are contained in both the *Norfolk Island Act 1979* (Cth) and in a Norfolk Island act, the *Legislative Assembly Act 1979*.

- 2.18 The Commonwealth Parliament has in the past utilised its powers to ensure that Norfolk Island has a fair and representative electoral system which caters appropriately for minority groups. In 1980, for example, following advice from the Australian Electoral Commission and the Attorney-General's Department, it rejected two Norfolk Island Assembly bills which sought to change the requirements for candidates and the voting method to a method that had inadequate means of ensuring fair representation.¹³

The current situation

- 2.19 Current electoral arrangements on Norfolk Island raise serious concerns. The DOTRS submission states that:

Essentially, Australians in a part of Australia are not entitled to enrol to vote until they have met the 900 day over the past four (4) years residency qualification and people who are not Australian citizens are entitled to stand for election to a Legislative Assembly in an Australian Territory. This qualifying period for enrolment on Norfolk Island far exceeds the one (1) month that applies to the Commonwealth and in all States and Territories on the mainland. Tasmania has a qualifying period of six (6) months.

The Legislative Assembly of Norfolk Island is the only Australian State or Territory legislative body where non-Australian citizens are entitled to vote and stand for election. There is no requirement to declare citizenship when enrolling to vote - voting rights are related to period of 'residency', not citizenship.¹⁴

- 2.20 Under the proposed provisions in the rejected 1999 bill, only Australian citizens would have been eligible to enrol and stand for election to the Legislative Assembly. An 'ordinary resident' qualifying period of six months for enrolment was proposed, and the enrolment rights of those currently on the electoral roll would have been preserved. Since Australian law does not require a person to renounce any other citizenship, dual citizenship, combined with the 'grandfather clause',

13 For further information on Commonwealth intervention, see Attachment H of the DOTRS submission, p. 122-132.

14 Department of Transport and Regional Services, Submissions, p 93.

would have provided security of voting rights and existing citizenship for all those currently entitled to vote.

- 2.21 The Committee is aware that some submitters, including some members of the last Assembly, believe that any electoral changes should be made by the Norfolk Island Government through amendments to its *Legislative Assembly Act 1979*. While this is clearly possible, and perhaps preferable, the Committee is aware that a succession of Norfolk Island governments has rejected electoral changes proposed by the Commonwealth. Consequently, the likelihood that a Norfolk Island government would act unilaterally to implement such changes, which this Committee considers to be fundamental to a strong democracy, is remote.

Relations between Norfolk Island and the Commonwealth

- 2.22 A witness to the 1999 Senate inquiry, Mr Gilbert Jackson OA, who was born on the Island in 1920 and was a member of the Assembly from 1979 to 1985, referred to strong anti-Australian feeling which he believed had contributed significantly to the Norfolk Island Government's rejection of any attempts to change the electoral laws on the Island.

Candidates who have stood for the assembly over the years have said in their policy statements that they will go all the way for independence if elected ... And these people are still peddling the anti-Australian scare campaigns ... We still have members [of the Assembly] who operated those schemes [bottom-of-the-harbour] as residents on the island, and some of them are violently anti-Australian.¹⁵

- 2.23 A witness to this inquiry who supports the idea of electoral reform, Mr Michael King, a former Chief Minister of Norfolk Island, was critical of those who promote the misconception that Norfolk Island is not part of Australia and who seek to inflame anti-Australian attitudes. He suggested that the bluff should be called of those who threaten to pursue independence from Australia in international courts:

the further along the road to self-government we get, there seems to be increasing momentum to move further away from Australia. Some of our legislators have the wrong idea, an ill-informed idea, about self-government – that it means that, at the end of this road

15 Mr Gilbert Jackson, Spokesperson, Yes Voters to Norfolk Island Amendment Bill 1999, Senate Legal and Constitutional Committee inquiry, Transcript, 5 July 1999, p 12.

to self-government, we will be cut loose from Australia to drift off into the Pacific, and they will not have it any other way.

A threat is made in here, which is not veiled in any way, shape or form, when they say, 'You buggers stay away or we're going to take you to the highest courts in the world to determine this issue once and for all.' A lot of us wish that we could do that ... suppose the international courts found that we were not an integral part of the Commonwealth of Australia and that, therefore, Australia should do whatever was necessary to give effect to that ... two-thirds of the island would probably pack up and leave.¹⁶

- 2.24 In its 1999 report, *Territorial Limits: Norfolk Island's Immigration Act and Human Rights*, the Human Rights and Equal Opportunity Commission made the observation:

In some senses at present Norfolk Island residents have the best of both worlds. They are exempt from the income and other taxes levied on mainland Australians but because they are Australian citizens they can rely on Australia to assist them when they are in need. The Island's Government, without income tax revenue, does not offer the range of social security benefits, health care and community services found in mainland Australia. When Island residents need those services they come to the mainland and obtain them, even though they contribute little or nothing to the government revenues that are required to provide them.

...The Commission considers ... that there will continue to be uncertainty, inequity and, potentially, human rights violations until the issue [of Norfolk Island's constitutional status] is addressed and resolved directly once and for all. Norfolk Islanders may properly be required to choose between, on the one hand, maintaining their present high degree of independence but in future without the benefits of Australian citizenship and, on the other hand, accepting that the Island is part of Australia and so accepting the full range of rights and responsibilities of Australian citizenship.¹⁷

- 2.25 The Committee notes both the strong position taken by some Islanders and the Human Rights and Equal Opportunity Commission, but does not consider that addressing the electoral issues under scrutiny in this inquiry

16 Mr Michael King, Transcript, pp 28-29.

17 *Territorial Limits. Norfolk Island's Immigration Act and Human Rights*, report of the Human Rights and Equal Opportunity Commission, March 1999, pp 36-37.

will affect the already well advanced level of self government. The Commonwealth has made it clear that self government for Norfolk Island is desirable and that further progress will be made, provided the Norfolk Island Government exerts itself to meet its existing fiscal and social obligations to the community. The Committee is anxious to encourage increased cooperation between the Commonwealth and Norfolk Island governments and would be disappointed if Norfolk Islanders should ever be required or feel obliged to choose between increased independence and the benefits of citizenship. The Committee believes that the Commonwealth has and will continue to have the legitimate right to intervene if it believes that an issue of national and international importance is at stake.

2.26 The Committee has been aware of some anti-mainland sentiment expressed in both submissions and correspondence as well as in the local press. It is, however, heartened to note that the majority of candidates for the Assembly election on 29 November 2001 noted in their policy statements that they valued maintaining or re-establishing a good relationship with the Commonwealth Government. Four new members were elected to the nine member Assembly, at least three of whom expressed strong support for fostering a good relationship with the Commonwealth.

2.27 Ms Chloe Nicholas, who became Deputy Speaker in the 10th Assembly, began her policy statement with strong support for an improved relationship:

I'm standing for election this time around because, like many of us, I'm disturbed by the apparent anti Australian flavour of the immediate past Assemblies ... It's my belief that Norfolk Island's relationship with Australia should be based on co-operation rather than confrontation. Let me be quite clear – I'm not suggesting integration. Co-operation and the resulting climate for negotiation is what is needed.¹⁸

2.28 Mr Ivens Buffet, who was subsequently elected with the third highest number of votes and is currently the Minister for Land and the Environment, said:

It is my view that there are two key players or partners in Norfolk Island's governance. One is the Norfolk Island Legislative Assembly (representing the community and the wishes and aspirations of all Norfolk Islanders). The other is the

18 Ms Chloe Nicholas, statement in *The Norfolk Islander*, 17 November 2001.

Commonwealth Government (represented by the Federal Minister responsible for Territories).

I believe that it is timely to recognise this partnership and to put in place systems to address the differences between the two – both actual and perceived. Talking to the Commonwealth does not automatically mean income tax or the erosion of self-government as some in Norfolk Island may allege.¹⁹

- 2.29 Mr Buffett outlined a number of suggestions for achieving this aim. While they are not directly related to this inquiry and notwithstanding that the Commonwealth will always retain the right to raise unilaterally a matter which is considered to be of national importance, the Committee is pleased to note Mr Buffett's constructive suggestions.²⁰

19 Ivens (Toon) Buffett, statement in *The Norfolk Islander*, 24 November 2001.

20

1. Seek a partnership between the Norfolk Island Legislative Assembly and the Commonwealth Government as early as possible in the life of the Assembly.
2. Seek to identify those issues to be addressed as part of that partnership and to publicise them and consult the community.
3. Seek the Commonwealth Government's agreement that it will not act in a way that would raise constitutional issues – either by design or by error.
4. Seek to suspend long-winded discussion and expenditure of limited public funds on the pursuit of constitutional issues until the Legislative Assembly can really say that we are financially and administratively effective in carrying out our current responsibilities to the Norfolk Islanders.
5. Seek a written and public agreement between the Legislative Assembly and the Commonwealth Government on how the partnership will operate.
6. Seek to ensure that the Chief Minister in the 10th Legislative Assembly takes carriage of this matter as his or her principal task.