

Improving the Quality of Governance

As Members of the Legislative Assembly we recognise that our actions have a profound impact on the lives of all Saskatchewan people. Fulfilling our obligations and discharging our duties responsibly requires a commitment to the highest ethical standards.¹

- 3.1 In every jurisdiction, government has become an increasingly complex enterprise with multiple objectives and responsibilities.² The involvement of politics, whether it is based on party, family, union, or commercial interests creates an incentive to underplay problems and to only portray achievements.³ By necessity, the Committee was given a wide remit to consider the quality of the existing Norfolk Island political system and legal framework and the capacity of the present arrangements to deliver effective democratic government and long term sustainability to the Island community.
- 3.2 The term 'governance' is used with increasing frequency to describe a range of phenomena from efficiency of public sector management; the system of government; the relationship between elected representatives and the public and the interaction of traditions, values

1 *Preamble, Code of Ethical Conduct for Members of the Legislative Assembly, Saskatchewan, Canada* – Cook, Submissions, p. 405.

2 Sturgess, G.L., *Principles and Benchmarks of Good Governance*; Paper Presented to the 10th Anniversary of ACT Self-Government Conference, Canberra, 11-12 May 1998.

3 Sturgess, G.L., *Principles and Benchmarks of Good Governance*; Paper Presented to the 10th Anniversary of ACT Self-Government Conference, Canberra, 11-12 May 1998.

and institutions that shape society.⁴ 'Good governance', is concerned with the nature of the interaction and processes between institutions and the public and assumes certain values are central to representative democratic government.⁵ These values can be summarised as:

- transparency;
- accountability;
- efficient and effective public administration;
- the ethical use of public resources;
- individual liberty;
- participation in public affairs;
- equity; and
- social inclusion.⁶

3.3 Underlying the values of accountability and transparency is the expectation and requirement that government authority will be exercised according to law. In other words, judicial and administrative decisions will be made according to law rather than on an arbitrary personal basis, elected officials are subject to the law in the same way as ordinary citizens and fundamental liberties and rights will be protected by the law.⁷

3.4 The problems of governance on Norfolk Island identified by the Committee and a host of other inquiries and reports stretching back to 1856 are the legacy of the small, isolated and insular nature of the Island community coupled with irresponsible and short sighted policymaking by colonial and then Commonwealth authorities. The history of Norfolk Island is replete with accounts depicting the community as either an 'isle of saints' or being so closely intertwined

4 Verspaandonk, R. 2001, *Good Governance in Australia*, Research Note No. 11 2001-02, Information and Research Services, Department of the Parliamentary Library, Canberra.

5 Verspaandonk, R. 2001, *Good Governance in Australia*, Research Note No. 11 2001-02, Information and Research Services, Department of the Parliamentary Library, Canberra.

6 Sturgess, G.L. *Principles and Benchmarks of Good Governance*; Paper Presented to the 10th Anniversary of ACT Self-Government Conference, Canberra, 11-12 May 1998.

7 In other words, the existence of a rule of law is not sufficient in itself. Contemporary views on the rule of law include a notion that the law must also conform to basic principles and be implemented in a non-discriminatory manner. See also Gaze B. & Jones M. 1990, *Law Liberty and Australian Democracy*, The Law Book Company Ltd, Sydney, pp. 27-28.

that it was impossible to govern according to basic principles of justice and order.⁸ In hindsight, it seems clear that successive Federal Governments have failed to appreciate and learn from this history. At the time a form of internal self-government was granted by the Federal Parliament, the focus was on devolution and ceding of responsible government. Notwithstanding the plethora of independent reports before and since 1979 pointing to a lack of administrative and financial capacity within the Territory public sector, the need for greater accountability and transparency and an increasing need for Federal intervention, the expansion of the Norfolk Island Government's power and responsibilities, through additions to Schedule 2 of the *Norfolk Island Act 1979 (Cth)* and transfer of assets, have been pursued without any consideration of the need to counterbalance these powers with 'good governance' measures.⁹ These transfers have taken place despite the documented evidence that the Island's micro community lacks the capacity to exercise appropriately what have traditionally been the powers and responsibilities of State or Federal Governments.

Re-examining the Commonwealth's Role

3.5 Federal Government policy with respect to Norfolk Island is essentially twofold. On one hand, there is the stated policy aim of

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- 8 Hoare M. 1999, *Norfolk Island: A Revised and Enlarged History 1774 -1998*, 5th Edition, Queensland University Press, Queensland, pp. 105-6. In 1895, Viscount Hampden, Governor of the Colony of New South Wales, reported to the Colonial Office in London that the administration of justice, in the hands of a magistrate selected from and elected by the community was unsatisfactory. He considered that the experiment from 1856 to 1895 had failed, and that immediate steps should be taken to enforce the law and encourage the introduction of new settlers. The New South Wales government agreed to take over Norfolk Island and in 1897 the Order in Council of 24 June 1856 was revoked and all powers of government transferred from the Norfolk Island Governor to the Governor of New South Wales. The UK Colonial authorities, acting through New South Wales, introduced a new system of laws for the Island and appointed external magistrates who then exercised both judicial and civilian functions to administer the Island. A Royal Commission in 1926 subsequently identified various shortcomings in both civil and judicial decision-making being vested largely in the one person or Office and further reforms followed to separate these two functions.
- 9 See, for example, Butland, G. 1974, *Report to the Department of the Capital Territory of the Australian Government on a Long Term Population Study of Norfolk Island*, p. 12; Nimmo, J. 1976, *Report of the Royal Commission into Matters relating to Norfolk Island*, Australian Government Publishing Service, Canberra; Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, pp. 25-6; and *Focus 2002 – Sustainable Norfolk Island*, 10th Legislative Assembly, Norfolk Island.

ensuring greater recognition and opportunities for the Norfolk Island community and ensuring that Norfolk Island, like other Australian Territories, provides for its residents “the same opportunities and responsibilities as other Australians enjoy in comparable communities”.¹⁰ On the other, there is the policy, which has been in place since 1914 that Norfolk Island shall be self-funding and therefore be exempt from Federal taxation and Federal funding, services and assistance.¹¹ Federal Government programmes and services, thus, generally do not extend to the Island on the basis that the community itself is largely responsible for the funding and delivery of government services on Norfolk Island.¹²

- 3.6 These two policies appear mutually exclusive. By denying the Norfolk Island community effective access to Federal agencies, programmes and services, the Federal Government is effectively denying the Island community access to the only real means of ensuring that Island residents enjoy the same opportunities and responsibilities as other Australians. As explained elsewhere in this report, the Island faces significant problems now and in the future with respect to public infrastructure and delivery of key government services and programmes. The Norfolk Island Government and community for a variety of reasons are ill-placed to address these problems alone, both now and in the future.
- 3.7 The policy that Norfolk Island’s exemption from Federal taxation means exemption from Federal programmes and services also appears fundamentally flawed. In direct contrast to this policy, significant funding and non-financial assistance has and is being provided by the Federal Government to the Norfolk Island Government and community, albeit on an ad hoc basis.¹³ In addition, the Norfolk Island Government and community are eligible to apply for funding under significant Federal Government programmes and have done so successfully to date.¹⁴ Yet, at the same time, the Island

10 Department of Transport and Regional Services, Annual Report 2001-02, p. 138.

11 Department of Transport and Regional Services, Submissions, p. 49.

12 Mr John Doherty, Transcript, 25 July 2003, p. 14; Department of Family and Community Services, Submissions, p. 189.

13 Department of Transport and Regional Services, Submissions, pp. 146-150.

14 Department of Transport and Regional Services, Submissions, pp. 146-150. See http://www.dotars.gov.au/terr/norfolk/fed_assistance.htm; The Hon. Wilson Tuckey MP, Minister for Regional Services, Territories and Local Government, Media Release, 20 August 2003, *Norfolk Island Airport Runway to receive \$5.8 million facelift* – the Federal Government is contributing an interest-free loan of \$5.8 million to resurface the airport runway.

Government and community are excluded from applying for assistance under many other Commonwealth programmes or are denied services by other Commonwealth agencies. This exclusion is ostensibly on the basis that the Federal Government has exempted the Island from Federal income tax and/or the community has the means to pay for the particular services or programmes itself.¹⁵ It is this flawed policy which has often resulted in Norfolk Island being excluded from Commonwealth legislation under which a particular grant or programme is provided and therefore rendered ineligible for Federal assistance. As mentioned elsewhere in this report, legislation – like policy – can and should be changed when and where required.

3.8 There is no apparent coherent or clearly understood policy approach to the Territory across the Federal Government, with separate programmes and policies being applied on an ad hoc and inconsistent basis by individual agencies. As explained above, exception also appears increasingly to becoming the rule given the growing need for Federal funding and assistance by the Island community. The Commonwealth's stated policy to date of 'no taxation means no Federal assistance' now appears outdated, confused and inconsistent when compared against the reality of current Commonwealth practice and responses to Norfolk Island issues and the Island community's current and future needs.

3.9 It is only in recent times that an attempt was made by the then Territories Minister to enunciate a set of Commonwealth responsibilities and interests with respect to Norfolk Island.¹⁶ Most importantly, the Minister outlined the Commonwealth's contingent liabilities for Norfolk Island. In the event that the Territory's resources prove insufficient, the Federal Government has an obligation to assist.¹⁷ The Federal Government, thus, provides a 'safety net' for Norfolk Island, and has a responsibility to ensure Norfolk Island remains a viable community.¹⁸ While an important and worthwhile first step, the then Minister's statement is, of itself, insufficient. In

15 In its 1997 report, the Commonwealth Grants Commission estimated that the Norfolk Island Government "could raise over 60% more revenue than it actually does". Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, p. 164.

16 The Hon. Wilson Tuckey MP, Minister for Regional Services, Territories and Local Government, 28 September 2002, *The Norfolk Islander*, Vol 37, No. 44.

17 The Hon. Wilson Tuckey MP, Minister for Regional Services, Territories and Local Government, 28 September 2002, *The Norfolk Islander*, Vol 37, No. 44.

18 The Hon. Wilson Tuckey MP, Minister for Regional Services, Territories and Local Government, 28 September 2002, *The Norfolk Islander*, Vol 37, No. 44.

light of the failing infrastructure, falling service standards, regressive nature of the local tax regime and the fact that the Norfolk Island Government has been grappling with tax reform for over a decade with no apparent outcome despite recognising the urgent need for reform, there is an overwhelming need for a comprehensive reassessment of Federal Government policy towards Norfolk Island.

3.10 The Committee notes that this is not a new phenomenon as far as Norfolk Island is concerned. In 1976, the Nimmo Royal Commission concluded:

Most of the matters treated in this Report as requiring attention could and should have received that attention a decade ago at least and probably earlier. That they were not attended to and that a Royal Commission was necessary in order to focus attention upon them is a regrettable commentary on the failure of successive Australian governments to lay down clear policies for the Island.¹⁹

The main blame for the Island's problems does not rest in the Island. Most of the long-standing ones have had their genesis and perpetuation in slothful and inept mainland administration, which has proved itself unable to activate the seemingly clogged processes of government and to achieve successful solutions to the Island's obvious difficulties. It deserves to be stated that in spite of the sterling and most conscientious work by some individual Administrators in the Island, Australia's administration of Norfolk Island has been singularly unimpressive at the policy level.²⁰

[There has been a] complete absence of any written, agreed, long-term [Commonwealth Government] policies for the Island, to which successive Governments and Administrations alike could have adhered and progressed over the years. Norfolk Island has been allowed to stumble along since 1914 without any clear idea of government intentions in vital areas. Year by year ad hoc decisions have resulted in forces other than government gradually usurping

19 Nimmo, J. 1976, *Report of the Royal Commission into Matters relating to Norfolk Island*, Australian Government Publishing Service, Canberra, p. 77.

20 Nimmo, J. 1976, *Report of the Royal Commission into Matters relating to Norfolk Island*, Australian Government Publishing Service, Canberra, p. 77.

the influence and lead which Australia itself should have provided.²¹

With the exception of the then Minister Tuckey's recent initiative mentioned above, it would appear successive Federal Governments have learnt little from the past.

- 3.11 There is a need now for a new 'whole of Government' framework to be established for all Federal agencies in relation to Norfolk Island, as a precursor to Federal Government action to prevent Norfolk Island falling further behind and necessitating further, ongoing Commonwealth assistance.²² Without this reassessment and implementation of a new policy framework by the Federal Government, key Commonwealth agencies can reasonably be expected to fall back on the simplistic response that 'they don't pay tax therefore they should be excluded from our programmes'. The Committee's report will, then, suffer the same apparent fate as the plethora of earlier reports and inquiries recommending urgently needed reform.
- 3.12 Existing Federal Government policy with respect to Norfolk Island and its exclusion from Commonwealth programmes and services must be re-examined, with a view to determining a clear and coherent policy framework and objectives with respect to Norfolk Island. The Federal Government must also consider the Island community's

21 Nimmo, J. 1976, *Report of the Royal Commission into Matters relating to Norfolk Island*, Australian Government Publishing Service, Canberra, p. 345.

22 One example is the reseal of the Norfolk Island Airport runway. In 1982, the Commonwealth Government provided a \$7.4M capital injection (i.e. in 1980 prices) to upgrade the Norfolk Island Airport. This package included a longer runway, improved landing aids, pavement strengthening, and enlargement of the terminal. Independent reports confirm that these improvements provided the basis for the tourism led economic resurgence or boom enjoyed by Norfolk Island. (See Treadgold, M. L. 1988, *Bounteous bestowal: The Economic History of Norfolk Island*. Pacific Research Monograph, National Centre for Development Studies, Research School of Pacific Studies, ANU, pp. 259, 263). Facilities at the airport were also improved by Federal authorities prior to its transfer to the Norfolk Island Government in 1991. A further Commonwealth grant of \$2.5M was also provided to the Norfolk Island Government in 1991 to meet costs associated with the next reseal of the runway. The Federal Government also agreed not to recover the \$2.5M by imposing charges on the airline industry and, thereby, avoid any adverse impact on tourism and the Island economy. In addition, the Federal Government funded independent feasibility studies that confirmed that the Norfolk Island Government funding and operation of the Airport was economically viable. Transfer of the airport provided the Territory Government with a significant and constant revenue stream (such as landing charges). Yet despite all this, the Commonwealth had to respond to the Norfolk Island Government's request in 2002 for a \$7M interest free loan to pay for the next upgrade of the runway – something that independent reports suggest the Norfolk Island Government should have been able to plan for and pay for itself.

current and future needs for Commonwealth financial and non-financial assistance in key areas. That is:

- whether Commonwealth programmes and services ought to be extended to Norfolk Island and, if so, which;²³ and
- the need for Commonwealth financial assistance to assist the Norfolk Island community meet the Island's public infrastructure requirements, both now and in the future.

With that in mind, the Federal Government must develop a policy and programmes for Norfolk Island with clearly defined goals, clear and detailed terms and conditions, effective reporting and monitoring provisions and effective means of ensuring that desired outcomes for Commonwealth programmes, services and assistance are actually achieved.

- 3.13 The Committee stresses that any reassessment is, in the first instance, a matter for the Federal Government alone, given its role and responsibilities for the Island community. Consultation with the Island community may assist to provide finality to any legislative package determined by the Federal Government for implementation by it.

Recommendation 2

- 3.14 **That the Federal Government reassess its current policies with respect to Norfolk Island and the basis for the Territory's exclusion from Commonwealth programmes and services, with a view to determining:**
- **a clearly understood and consistent rationale and framework for Commonwealth funding, advice and assistance that will be provided across government to the Norfolk Island community;**
 - **a means of assessing Norfolk Island's need for Commonwealth financial and other assistance and of determining the extent of Commonwealth assistance or input to be provided, both now and in the future, and how it should be provided;**
 - **a clear and achievable end point or coordinated set of policy**

23 See recommendations 18 and 32, in relation to extending Medicare and Commonwealth Aged Care programmes to Norfolk Island, in Joint Standing Committee on the National Capital and External Territories, 2001, *In the Pink or in the Red?: Health Services on Norfolk Island*, Canprint, Canberra.

outcomes; and

- **the means of achieving those outcomes such as any preconditions that must be met before assistance will be provided, independent and external monitoring, and consideration of the various mechanisms for providing assistance such as an agreed plan with set time-lines and deadlines.**

Mechanisms of Good Governance

- 3.15 A range of laws and mechanisms have developed in Australia and other western democracies to institutionalise the principles of 'good governance'. Codes of conduct, registers of pecuniary and non-pecuniary interests and anti-corruption measures to ensure the probity and integrity of public office are now commonplace. Such measures cannot eradicate corrupt or unethical conduct but they "may deter such conduct, assist in its detection and impose appropriate safeguards".²⁴
- 3.16 Finance and performance audits, annual reporting and access to an Ombudsman are now routine ways of ensuring accountability to the public. Freedom of information and privacy laws regulate the accuracy and disclosure of personal information and provide access to public policies and guidelines of government agencies. Administrative tribunals provide merit review of decisions which affect the rights and entitlements of individuals and businesses. Whistleblower legislation protects public servants who disclose mismanagement, waste and corruption.
- 3.17 These mechanisms have evolved because the traditional forms of accountability through parliamentary conventions, periodic elections, a free media and an independent judiciary have failed to expose the "hidden exercises of power".²⁵ By contrast, the Norfolk Island system of government is almost entirely lacking such measures. In defence of the Norfolk Island system, Mr Geoff Bennett, argued that:

24 Carney, G. 2000, *Members of Parliament: Law and Ethics in Prospect*, p. 255.

25 Lewis, C. & Fleming, J. 2003, *The Everyday Politics of Value Conflict: External Independent Bodies in Australia*, in *Government Reformed: Values and New Political Institutions*, Ashgate, Aldershot, England, p. 167.

In many ways, we have checks and balances in place. The electorate here is pretty close ... if you are out shopping and the Chief Minister goes by you can grab him by the collar. You can walk straight into his office. You have accessibility that is unheard of elsewhere.²⁶

- 3.18 However, in the Committee's opinion, the very nature of the political system described by Mr Bennett, combined with the absence of formal and effective mechanisms of accountability and transparency, seriously undermine the quality of governance on the Island. Such deficiencies cannot be justified on the grounds of tradition and cultural distinctiveness of the descendants of the original Pitcairn families.
- 3.19 Devolution of government powers and responsibilities to small remote communities creates the opportunity for local participation and more responsive governance. But the close interrelationships between politics, administration, family and community life and business activity makes the need for transparency and accountability greater, not less. Some witnesses explained the current gaps in the system as a by-product of the small population which lacks the financial, human and administrative capacity to develop and implement a sophisticated legal infrastructure; others referred to the 'Norfolk Way' and a tendency to eschew the normal standards of accountability.
- 3.20 No single factor can explain an environment where maladministration and misuse of public office is allegedly widespread but immune from investigation, and where it is apparent that a fear of reprisal prevents people from speaking out.²⁷ The Island community's well documented lack of administrative and human resource capacity, coupled with the very real potential for vested interests and personal and political agendas in a small, isolated polity is a likely explanation.²⁸ Combined with interest in retaining the Island's exemption from income tax, voting blocs and the misplaced notion that external influences must be kept at bay to preserve the

26 Mr Geoff Bennett, Transcript, 15 July 2003, p. 55.

27 See Australian Law Reform Commission, 1994, Report No. 69, *Equality before the Law: Women's Equality*, Sydney, p. 265; and Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, pp. 205-8.

28 See Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, pp. 182-205; and NSW Independent Commission Against Corruption, November 2001, *Preserving Paradise - good governance for small communities - Lord Howe Island*, p.5. Available at <http://www.icac.nsw.gov.au>

“*uklan*” (*us*), these hitherto powerful influences have shielded entrenched interests from scrutiny and stymied reform.

- 3.21 There is ample evidence that Norfolk Island has serious structural problems, and there is a real and justifiable concern about the inability of the Norfolk Island Government to lead the Island toward a sustainable future.²⁹ While factions and divisions within the community are influential, in the end, the lack of good governance is the result of a lack of local leadership. Democratic accountability in Norfolk Island must start at the top of the political system. It is no longer enough to simply chant the mantra of self-government. Ultimately, public confidence in the Norfolk Island Government and the legitimacy of the existing model of self-government will depend on the performance of those elected to govern.³⁰ The Federal Government also has a responsibility to ensure the people of Norfolk Island have effective accountable government.

Codifying Ethical Conduct

- 3.22 The evidence received by the Committee suggests there is a popular perception within the Island community that, in the conduct of official duties, some Members of the Legislative Assembly and the Executive Council, are influenced by their private commercial interests or the interests of family or business associates.³¹ It was suggested that this community of interest often drives debate on matters of public interest, affects voting patterns and influences legislative priorities. The existence of this perception itself has the tendency to undermine public confidence in the Norfolk Island system of government.
- 3.23 The conduct of leaders, as representatives of the people and as holders of public offices, requires the highest level of integrity and trust. The small and isolated community of Norfolk Island has as much right as communities elsewhere in Australia to the highest standards of ethical conduct by their public officials. Such standards are the norm across Australia at the local government level – arguably

29 See, for example, Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra; and John Howard & Associates, 1998, *Norfolk Island Administration: Strategic Review*, Sydney.

30 Carney, G. 2000, *Members of Parliament: Law and Ethics* in *Prospect*, p. 255.

31 See also the evidence of Mr Richard Cottle, Proprietor, Norfolk Island Block Factory, to the Committee during the Review of the Annual Reports of the Departments of Transport and Regional Services and Environment and Heritage for 2001-02. Mr Richard Cottle, Transcripts, 18 February 2003, pp. 19-25.

the level of government with the greatest impact on citizens' daily lives. In New South Wales, for example, the *Local Government Act 1993* (NSW) applies to all local governments without exception regardless of size or remoteness. The NSW legislation deals with conduct generally, requires each Council to develop a Code of Conduct, imposes duties of disclosure in writing and at meetings and provides a mechanism to deal with complaints through a Pecuniary Interest Tribunal.³²

3.24 In 1997, the Commonwealth Grants Commission commented on the lack of any formal mechanisms to deal with conflicts of interest and recommended changes to the *Norfolk Island Act 1979* (Cth).³³ In 1998, John Howard and Associates referred material published by the NSW Independent Commission on Corruption (ICAC) to the Norfolk Island Legislative Assembly and Administration as the basis for preparing guidelines for ethical conduct for Assembly Members and public officials.³⁴

3.25 Standards of conduct for public sector employees are now enshrined in the Norfolk Island *Public Sector Management Act 2000*,³⁵ and a Code

32 *Chapter 14 - Honesty and Disclosure of Interests, Local Government Act 1993* (NSW) places obligations on councillors, council delegates and staff of councils to act honestly and responsibly in carrying out their functions. The Act requires councils to adopt a code of conduct for councillors, staff and other persons associated with the functions of councils. However, the Act does not affect any other duties imposed by other laws or any offences created by other laws. The Act requires that the pecuniary interests of councillors, council delegates and other persons involved in making decisions or giving advice on council matters be publicly recorded and requires them to refrain from taking part in decisions on council matters in which they have a pecuniary interest. The Act enables any person to make a complaint concerning a failure to disclose a pecuniary interest and provides for the investigation of complaints. The Act also establishes the Local Government Pecuniary Interest Tribunal. The Tribunal is empowered to conduct hearings into complaints and to take disciplinary action against a person if a complaint against the person is found to be proved. Penalties for breach of disclosure requirements (Section 482) are counselling, reprimand, suspension from civic office for up to 2 months and disqualification from civic office for up to 5 years.

33 Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, pp. 186, 218.

34 John Howard & Associates, 1998, *Norfolk Island Administration: Strategic Review*, Sydney, p. 48. See also NSW Independent Commission Against Corruption, November 2001, *Preserving Paradise - good governance for small communities - Lord Howe Island*, p. 5.

35 Section 8 of the *Public Sector Management Act 2000* (NI) requires public sector employees to treat the community and other employees with respect, act fairly and with integrity, manage resources efficiently and prudently, use information obtained in the course of employment only in accordance with the requirements of the employment, and perform their duties in a careful and diligent manner using reasonable skill and comply with the Act and regulations and other relevant laws.

of Conduct for public servants has been developed.³⁶ The new Act requires the Chief Executive Officer to report annually on measures taken to ensure observance of the public sector general principles and employment standards.³⁷ It also requires ad hoc disclosure of direct or indirect pecuniary and non-pecuniary interests of members of the Public Service Board.³⁸

- 3.26 It is too soon to assess the impact of the Territory's new public service legislation. But the utility of such measures will be undermined unless rules for ethical conduct are applied to all levels of public sector management and governance, and modelled by the political leadership. The Committee is disappointed that successive Territory Assemblies have deliberately chosen not to impose equivalent standards upon Members of the Legislative Assembly and the Executive Council.
- 3.27 The matter was considered as part of deliberation on the creation of an Assembly Charter during the life of the 7th Assembly in 1996.³⁹ In 2000, the Legislative Assembly *Select Committee to inquire into Allegations of Political Interference and Intimidation* recommended that a Code of Conduct be developed for Members of the Legislative Assembly.⁴⁰ The issue was promoted again by the Hon. Adrian Cook, QC, MLA in 2001.⁴¹ In March 2002, it was raised by Mrs Vicky Jack

36 See Chapter 5 - *Conducting Ourselves Professionally in our Work*, in Norfolk Island Administration, Human Resources Policies and Procedures Manual (as determined by the Legislative Assembly on 21 February 2001).

37 Subsection 25 (1) (a), *Public Sector Management Act 2002* (NI).

38 Section 15, *Public Sector Management Act 2000* (NI). Board members are prohibited from taking part in the deliberation or decision making of the Board on matters in which they have any direct or indirect financial or personal interest.

39 Norfolk Island Legislative Assembly, November 1996, *Report of the Committee Established By the Legislative Assembly of Norfolk Island to Define the Roles and Responsibilities of Members of the Legislative Assembly of Norfolk Island*. Attachment 4 to the Report was the Code of Conduct for the Legislative Assembly of Saskatchewan. Note that a Charter and a Code of Conduct are not the same. A Charter is a statement of principle about the obligations of the council/assembly to the community and the manner in which it will discharge those obligations. See, for example, Section 8, *Local Government Act 1991* (NSW). Available at http://www.autstlii.edu.au/au/legis/nsw/consol_act/lga1993182/s8.html

40 That recommendation referred in particular to Members' dealings with staff of the Territory public service and the community at large and noted the existence of such codes in other jurisdictions.

41 See also *A Charter for Norfolk?*, in *The Norfolk Islander*, 20 January 2001, Vol. 36, No. 9, p. 1, in which Mr Cook expressed his concern that the Ninth Legislative Assembly has lost the confidence of the community in its ability to govern effectively the Island's affairs and stressed the urgency of a code of conduct as a fresh start for Norfolk Island. In that edition, the Code of Conduct of the Isle of Man and the Assembly of Saskatchewan, Canada were reproduced as a basis for public discussion.

MLA in the context of preliminary discussion on an Ombudsman for Norfolk Island.⁴² In his evidence to the Committee, Mr Cook suggested that:

one of the major opportunities for advancement in self-government in Norfolk Island would be the introduction of a charter which sets out the principles of good governance which the community wishes to have itself governed by and to put in place codes of conduct acceptable to the community.⁴³

- 3.28 As of November 2003, there is no Charter of the Assembly, no Code of Conduct for Members of the Legislative Assembly, no Register of Pecuniary or Non-Pecuniary Interests and no independent enforcement mechanism. This situation stands in stark contrast to the other Australian States and Territories where codification of ethical conduct and statutory duties of disclosure of interests have become the norm.⁴⁴
- 3.29 The Committee believes that an enforceable Code of Conduct for Members of the Legislative Assembly as part of Norfolk Island's self-government arrangements is of the utmost importance for Norfolk Island and well over-due. But, as experience elsewhere has proven, it will only bear fruit if it is monitored and implemented by an independent office holder such as an Ombudsman.
- 3.30 The *Norfolk Island Act 1979* (Cth) should, therefore, be amended to include a duty for Members to conduct themselves honestly and with impartiality in the interests of the community as a whole in accordance with the Code of Conduct. The Code of Conduct should be developed, by the Federal Government, and entrenched by adoption as a Schedule to the Act.⁴⁵ The Code must be specific

42 The matter was raised in the Assembly by Mr Brown MLA and Mrs Jack MLA on 27 March 2002. See Norfolk Island Legislative Assembly, *Hansard*, 27 March 2002 p. 201.

43 The Hon. Adrian Cook, QC, Transcript, 15 July 2003, p. 68.

44 See Preston, N. March 2001, *Codifying Ethical Conduct for Australian Parliamentarians 1990-99*, in *Australian Journal of Political Science*, Vol. 36, No. 1, pp. 45-59. On 20 June 2003, the Northern Territory Chief Minister, the Hon. Clare Martin MLA, moved that a draft Code of Conduct and Ethical Standards be referred to the Northern Territory Legislative Assembly Standing Orders Committee for inquiry and report. The Committee's reporting date is February 2004. At the time of writing there is no Code of Conduct for Members of the Legislative Assembly in the ACT. However, the ACT Legislative Assembly Standing Committee on Administration and Procedure has tabled two reports on the issue and recommended that a Code of Conduct be adopted.

45 The adoption of a Code of Conduct should not delay amendments to the *Norfolk Island Act 1979* (Cth) recommended elsewhere in this report.

enough to give clear direction to Assembly Members and provide certainty for all as to what is and is not acceptable behaviour. An alleged breach should be subject to investigation by the Commonwealth Ombudsman. The Ombudsman should be empowered to refer the Assembly Member and a Statement of Reasons to Crown Counsel where any prima facie case exists.

- 3.31 Jurisdiction to enforce the Code should be conferred upon the Supreme Court of Norfolk Island sitting as a Leadership Tribunal. The tribunal should not be bound by the rules of evidence, but its procedures must comply with the principles of natural justice. A proven breach should be subject to penalties set out in the Act, including disqualification of serving Assembly Member(s) in the case of a substantial or multiple breach of the Code.

Recommendation 3

- 3.32 **That, consistent with other Australian jurisdictions, the *Norfolk Island Act 1979 (Cth)* be amended to:**
- **adopt a Code of Conduct for Members of the Legislative Assembly as a Schedule to the Act;**
 - **introduce a duty for Members of the Legislative Assembly to act in an honest and impartial manner in the interests of the whole community and in conformity with the Code of Conduct;**
 - **specify penalties in the Act including disqualification from office for wilful or serious breach of the Code;**
 - **confer jurisdiction on the Commonwealth Ombudsman to investigate alleged breaches; and**
 - **confer jurisdiction on the Supreme Court of Norfolk Island, constituted as a Leadership Tribunal, to enforce the Code.**

The Disclosure of Pecuniary and Non-Pecuniary Interests

- 3.33 There are two main ways in which a disclosure of a conflict of interest can be made. First, by ad hoc declaration whenever a personal interest conflicts with the duties of public office. Second, by recording those

personal interests on a register of interests.⁴⁶ The first approach is the simplest and is intended to ensure declarations are made at the time the personal interest conflicts with the officeholder's public duties. The second approach enables potential conflicts to be identified before a conflict arises.⁴⁷

- 3.34 In the case of Norfolk Island, an ad hoc method was enshrined in the *Norfolk Island Act 1979* (Cth).⁴⁸ However, this only applies in a very limited range of circumstances – for example, there is no need to declare an interest in planning applications before the Territory Government or during debate in the Legislative Assembly on planning laws affecting that application. Sub-section 39 (3) of the Act prohibits Assembly Members, with a direct or indirect personal interest in a contract for goods or services with the Territory Administration or Federal Government from taking part in discussion of or voting on the matter. Any question concerning the application of sub-section 39 (3) is to be decided by the Assembly.⁴⁹
- 3.35 The statutory provisions are reflected, but not elaborated, in Standing Order 139 of the Legislative Assembly. As noted above, the Commonwealth Grants Commission pointed to the lack of formal mechanisms to deal with conflicts of interest as a matter of concern. The Committee is informed that, where there are gaps in local Standing Orders, it has been the stated practice of the Assembly to rely on the Practice of the Federal Parliament's House of Representatives. In the House of Representatives, the treatment of the personal and pecuniary interests of Members is governed by precedent and practice.⁵⁰ House of Representatives Standing Order 196 states that a Member may not vote in a division on a question in which he or she has a direct pecuniary interest, although the rule does not apply to a question of public policy.
- 3.36 Federal Ministers are required to make full declarations of their own private interests and those of their immediate families. In 1983, the

46 Carney, G. 2000, *Members of Parliament: Law and Ethics in Prospect*, p. 339.

47 Registers of interest are generally established by legislation and ensure transparency by being available for inspection by the public.

48 Subsection 39 (3) and (4), *Norfolk Island Act 1979* (Cth).

49 Subsection 39 (4), *Norfolk Island Act 1979* (Cth) states: "Any question concerning the application of subsection (3) of the Act shall be decided by the Legislative Assembly, and a contravention of that subsection does not affect the validity of anything done by the Legislative Assembly".

50 Section 44 and 45 of the Constitution and Standing Orders 1 and 196 and Resolutions of the House of Representatives.

Hawke Government instigated the practice of periodically tabling copies of Ministers' statement of their interests. Following adoption by the House in 1984 of standing orders and resolutions relating to the registration and declaration of Members' interests, details of the interests of Ministers from the House of Representatives have been included with those of other Members in the Register of Members' Interests tabled at the commencement of each Parliament.⁵¹

- 3.37 Witnesses claim the existing duty of disclosure within the Territory Government and Assembly is routinely ignored or misapplied with declarations of interest being made at the end of debate or before debate, but with the Member of the Legislative Assembly continuing to participate in the discussion.⁵² The Chief Minister and other Assembly Members expressed the view that conflicts of interest are difficult, if not impossible to avoid, and it is necessary for Members to contribute to debate even where a conflict exists.⁵³ Nevertheless, the Committee is of the opinion that removing the influence of those with a vested interest in the outcome of a debate is crucial, and the difficulty faced by the Norfolk Island Government is no different to that experienced at the local government level. In New South Wales and Queensland, councillors are required to declare their interest and are excluded from the meeting room entirely to avoid undue influence from their presence during debate.⁵⁴
- 3.38 The disclosure and exclusion requirements of the *Norfolk Island Act 1979* (Cth) are similar in terms to those found in the Northern Territory and Australian Capital Territory statutes of self-government.⁵⁵ Except that in those jurisdictions, and in all of the States and, as noted above, the Commonwealth, parliamentarians are

51 Harris, I. C, Fowler, P. E. & Wright, B. C. (eds) 2001, *House of Representatives Practice*, 4th Edition, Department of the House of Representatives, Canberra, pp. 71, 142.

52 Department of Transport and Regional Services, Submissions, p. 54. See also ABC Radio National Background Briefing, 30 March 2003, *Murder on Norfolk Island: One year later, who killed Janelle Patton?*

53 The Hon. Geoff Gardner MLA, Transcript, 25 July 2003, p. 42.

54 Section 451, *Local Government Act 1993* (NSW), requires disclosure of a pecuniary interest in any matter a council is concerned with and requires that the councillor or member must not be present at or in sight of the meeting of the council or committee; Section 244, *Local Government Act 1993* (Qld), requires that a councillor with a material personal interest must not be present at or take part in the meeting while the issue is being considered or voted on. A material personal interest arises when the person or an associate could reasonably expect to directly or indirectly gain a benefit or suffer a loss depending on the outcome of the issue (Section 6).

55 Section 21, *Northern Territory (Self-Government) Act 1978* (Cth); Section 15, *Australian Capital Territory (Self-Government) Act 1988* (Cth).

required to regularly place their interests on a public register.⁵⁶ Registers of interest have also been a requirement for local government councillors in all other jurisdictions of Australia for some years.⁵⁷ It is difficult to see any logical reason why the standards observed at all levels of government elsewhere in Australia should not apply to the Norfolk Island Government.

- 3.39 Disclosure of pecuniary interests such as sources of income, company positions, property transactions, debts, trusts, travel and gifts are common place. The declaration of non-pecuniary interests such as membership of company boards, professional associations and trade unions, and other kinds of direct or indirect benefits is routine in other jurisdictions.⁵⁸ Best practice also indicates that consequences for failing to comply should be clearly spelt out. In New South Wales, contravention of disclosure requirements can result in the Member's seat being declared vacant. In Victoria, infringement constitutes contempt of the Parliament and Members can be fined up to \$2000. Non-payment of the fine can result in the seat being declared vacant.
- 3.40 Methods of enforcement vary but "it is clear that some enforcement regime is necessary to ensure public confidence in this mechanism of

56 In the Northern Territory, registers of interest are regulated by the *Legislative Assembly (Register of Member's Interests) Act 1982* (NT). Proposed amendments will strengthen the requirement for annual registration and ad hoc declaration of Members' interests. Alleged breaches will be subject to independent investigation by the Auditor-General, as an officer of the NT Legislative Assembly. The penalty for proven breach of the registration of interest requirements by a serving Member will be decided by the Assembly. All other breaches of the Members' Code of Conduct will remain within the competence of the Legislative Assembly. In the ACT, declarations are required pursuant to the Assembly Resolution *Declaration of Private Interests of Members* (7 April 1992, amended 27 August 1998). See also *Members of Parliament (Register of Interests) Act 1978* (Vic); *Constitution (Disclosures by Members) Amendment Act 1981* (NSW); *Members of Parliament (Register of Interests) Act 1983* (SA); *Members of Parliament (Financial Interests) Act 1996* (WA); *Parliamentary (Disclosure of Interests) Act 1996* (Tas); and *Code of Ethical Standards: Legislative Assembly of Queensland* which includes a requirement for disclosure of interests.

57 See, for example, Section 244 (exclusion from meetings) and Sections 247-250 (registers of interest), *Local Government Act 1993* (Qld); Sections 444, 449 (disclosures and register of interests) and 451 (exclusion from meetings), *Local Government Act 1993* (NSW).

58 See, for example, the *Constitution (Disclosures by Members) Amendment Act 1981* (NSW), which provides for regulations to make it a requirement that NSW Parliamentarians disclose a wide range of pecuniary and non-pecuniary interests. Wilful contravention can result in the declaring of the Member's seat vacant. In Victoria, the *Members of Parliament (Register of Interests) Act 1978* requires Members to provide information on income sources, company positions and financial interests, political party membership, trusts, land, travel contributions, gifts and other substantial interests.

disclosure”.⁵⁹ A clearly established procedure which allows for complaints from the registrar and the public to a parliamentary committee is the approach taken in Queensland, at the Federal level and the UK House of Commons.⁶⁰ In New South Wales, complaints are dealt with through a Pecuniary Interest Tribunal and proposed amendments in the Northern Territory will subject alleged breaches to independent investigation by the Auditor-General.

- 3.41 It is now timely to amend the *Norfolk Island Act 1979* (Cth) to strengthen the requirement for ad hoc disclosure. The duty to disclose a conflict of interest should apply where a Member of the Legislative Assembly or an associate could reasonably expect to directly or indirectly gain a benefit or suffer a loss depending on the outcome of the issue. The Assembly Member should be excluded from the meeting and not be present during discussion or voting on the issue.
- 3.42 The Act should also be amended to require that a register of pecuniary and non-pecuniary interests be maintained by the Clerk of the Legislative Assembly (as Registrar) and provide for public inspection and publication of the register. The Act should impose a duty of regular registration, at least on an annual basis, of a specified list of interests and notification of changes to the register within 28 days.⁶¹ The list of interests should be adopted as a Schedule to the Act.
- 3.43 Given the small size of the Norfolk Island polity, the Committee believes that duties of disclosure will only be effective, if monitoring and enforcement is carried out by a body independent of the Territory’s Legislative Assembly and Government. Failure to disclose a conflict of interest should constitute a breach of the Code of Conduct. The Commonwealth Ombudsman should be empowered to investigate any alleged breach, and refer the Assembly Member and a Statement of Reasons to Crown Counsel where a prima facie case exists. The Supreme Court of Norfolk Island sitting as a Leadership Tribunal should be given the power of enforcement. A proven breach

59 Carney, G. 2000, *Members of Parliament: Law and Ethics in Prospect*, p. 366. Failure to comply is contempt of Parliament in the House of Representatives, the Senate, Queensland, Tasmania, Victoria, Western Australia and Northern Territory, and a summary offence in South Australia. At the Federal level public complaints can be considered by a parliamentary committee.

60 Carney, G. 2000, *Members of Parliament: Law and Ethics in Prospect*, p. 367.

61 The *Constitution (Disclosures by Members) Amendment Act 1981* (NSW) provides a useful model. This amendment inserted a new section, 14A, listing a combination of pecuniary and non-pecuniary items, into the *Constitution Act 1902* (NSW).

should be subject to penalties set out in the Act, including disqualification of a serving Member(s) for wilful contravention or a substantial breach of the duty to disclose.

Recommendation 4

3.44 That, consistent with other Australian jurisdictions, the *Norfolk Island Act 1979* (Cth) be amended to:

- **tighten the requirement for ad hoc disclosure of any material interest in which a Member of the Legislative Assembly, their immediate family or associate(s) will directly or indirectly benefit or suffer a loss depending on the outcome of debate;**
- **prohibit the Member of the Legislative Assembly from being present during the debate; and**
- **insert new provisions that:**
 - ⇒ **establish a register of pecuniary and non-pecuniary interests as part of the Code of Conduct;**
 - ⇒ **require annual declaration of a specified list of interests to be adopted as a Schedule to the Act;**
 - ⇒ **require notification of changes to the register within 28 days;**
 - ⇒ **establish penalties for proven breaches, including disqualification from office for up to 5 years for wilful or serious breaches;**
 - ⇒ **confer jurisdiction on the Commonwealth Ombudsman to investigate alleged breaches; and**
 - ⇒ **confer jurisdiction on the Supreme Court of Norfolk Island, constituted as a Leadership Tribunal, to enforce the disclosure requirements.**

The Need for a Standing Anti-Corruption Body

3.45 An enforceable code of conduct and register of interest for Members of the Legislative Assembly will address the wider requirement for ethical conduct and are useful anti-corruption measures. But neither a

conflict of interest nor a minor breach of a code of conduct necessarily amounts to corrupt conduct.⁶²

- 3.46 In the Territory public sector, conduct amounting to corruption can be dealt with as a breach of the Code of Conduct and Section 8 of the *Public Sector Management Act 2000* (NI). Breaches of the Code can result in disciplinary action and, in serious cases, termination of employment. However, there are two significant limitations in the existing system. Firstly, it does not cover the conduct of any other person within government or without who seeks to influence the public sector employee to act dishonestly or without impartiality. Second, as the title suggests, this legislation applies only to public servants, and not to Members of the Legislative Assembly.
- 3.47 The *Norfolk Island Act 1979* (Cth) currently provides that the Governor-General, acting on the advice of the Federal Government, can at any time withdraw the commission of the Administrator.⁶³ This power would be available, for example, if it were ever established that an Administrator had acted inconsistently with the Act or beyond the terms of his or her commission.⁶⁴ In addition, the Administrator – as the holder of an Office established by a Commonwealth law – is already subject to a suite of Commonwealth criminal and civil laws governing misuse and corruption in public office. The same is true of the Official Secretary. It appears contradictory that the nominal head of the Territory’s Government and the Territory’s public service should be subject to statutory based conduct requirements and to sanctions for breach of those requirements when Territory Ministers and Members of the Territory legislature – on whose decisions and actions the Administrator and the Territory public service depend - are not.
- 3.48 On the mainland, the Independent Commission Against Corruption (ICAC) in New South Wales, the Crime and Misconduct Commission (CMC) in Queensland and the Anti-Corruption Commission (ACC) in Western Australia all came about as a result of robust investigative journalism. Before those bodies existed, to get official action on corruption or misconduct required persistent and repeated follow

62 Moss I. 2000, *Corruption: The Media and the Watchdogs*, in Canberra Bulletin of Public Administration, No.97, pp. 39-43.

63 Section 6, *Norfolk Island Act 1979* (Cth), provides that the Administrator holds “office during the pleasure of the Governor-General”.

64 Section 7, *Norfolk Island Act 1979* (Cth) imposes on the Administrator a duty to exercise all powers and perform all functions that belong to the office or conferred by or under Territory law in accordance with the tenor of his or her Commission.

up.⁶⁵ It is fair to say the tradition of journalism on Norfolk Island is quite limited, if non-existent. Whilst the local newspaper and radio station provide a valuable service, there is little or no investigative journalism practiced on Norfolk Island. The Commonwealth Grants Commission concluded in 1997 that:

while the local newspaper and radio provide much information on important community and political issues, they hardly play any watch dog role in relation to performance of the Government and provide little avenue for public discussion. This is in contrast to most small communities on the mainland where the media, particularly the local press, play an important role in ensuring the accountability of councils and other representatives to their constituents.⁶⁶

- 3.49 There are, however, numerous allegations made in confidence to the Committee of conduct that covers the spectrum from minor to serious breaches of public office which fall into established definitions of corrupt conduct. For example, suspicion of unscrupulous or unlawful conduct, possible breaches of procurement guidelines, questionable release of public monies and the lack of internal systems are alleged to expose the Territory Administration to widespread rorting. It would be irresponsible for the Committee to ignore these concerns.⁶⁷ However, the Committee is also aware that the term corruption has strong emotive connotations and accusations of corruption have serious consequences for the alleged wrongdoer, his or her business and family interests.
- 3.50 The Committee has found the definition of corrupt conduct set out in sections 8 and 9 of the *Independent Commission Against Corruption Act 1988* (NSW) a useful benchmark for considering these allegations. Corrupt conduct can be summarised in the following terms:

65 Moss I. 2000, *Corruption: The Media and the Watchdogs*, in Canberra Bulletin of Public Administration, No.97, pp. 39-43.

66 Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, p. 204. See comment by Miss Alice Buffett that: "Anybody who speaks, loses their job", in Alcorn, G. *An island all adrift*, Sydney Morning Herald, 30 August 2003, p. 27. The office of *The Norfolk Islander* newspaper was burnt down in 1980 after the editor, Mr Tom Lloyd, published a critical article - see Elder, J. *The evil eating at an island's dark soul*, The Age, 14 April 2002; and ABC Radio National Background Briefing, 30 March 2003, *Murder on Norfolk Island: One year later, who killed Janelle Patton?*

67 These concerns are not new and are documented in earlier reports – see Chapter One for a list of reports.

- ⇒ Any conduct by any person that adversely affects, or could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority;
- ⇒ Dishonest or partial exercise of official functions by a serving public official;
- ⇒ Breach of public trust or the misuse of information acquired in the course of official functions by a serving or former public official; and
- ⇒ Official misconduct (including among other things, breach of trust, fraud in office and imposition), bribery, obtaining or offering secret commission, blackmail, fraud, theft, perverting the course of justice, embezzlement, tax evasion, illegal drug dealings, illegal gambling, bankruptcy and company violations, harbouring criminals, homicide or violence and the ancillary offences of conspiracy or attempt in relation to any of the above.⁶⁸

3.51 Under the New South Wales legislation, to be corrupt conduct the conduct must constitute or involve a criminal or disciplinary offence or constitute reasonable grounds for dismissing a public official.⁶⁹ In the case of a New South Wales Minister or Member of Parliament, the conduct must be a substantial breach of a Code of Conduct or conduct that brings the integrity of the office or Parliament into serious disrepute.⁷⁰ An ICAC report must include an opinion on criminal prosecution, disciplinary action, suspension or termination.⁷¹ At the local government level, the ICAC is authorised to recommend to the State Government consideration be given to dismissing an individual councillor or, in cases of systemic corruption, a whole council.⁷² This

68 Section 8, *Independent Commission Against Corruption Act 1988* (NSW).

69 Section 9, *Independent Commission Against Corruption Act 1988* (NSW). Criminal offence means a criminal offence under the law of the State or under any other law relevant to the conduct in question; and disciplinary offence includes any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law.

70 Section 9 (4), *Independent Commission Against Corruption Act 1988* (NSW). Whether the conduct is likely to bring the parliament into serious disrepute is measured by the objective standard of what the reasonable person would think.

71 Under section 74A of the *Independent Commission Against Corruption Act 1988* (NSW), the Commission is authorised to include in a report statements as to any of its findings, opinion and recommendations and the reasons thereof. The Commission must, in relation to each affected person, give an opinion on prosecution for a specific criminal offence, disciplinary action or dismissal of a public official.

72 Subsection 74C (1), *Independent Commission Against Corruption Act 1988* (NSW).

is reflected in the *Local Government Act 1993* (NSW) which provides that 'serious corrupt conduct' is a ground for dismissal of a local government councillor.⁷³ The New South Wales Governor, acting on the advice of the State Government, also has the power to declare all civic offices vacant where the ICAC has made a finding of systemic corruption or on the basis of another public inquiry.⁷⁴

- 3.52 In the Committee's view, there is a clear and urgent need to extend the jurisdiction of an existing anti-corruption body to public officials holding office under the *Norfolk Island Act 1979* (Cth) and Norfolk Island laws.⁷⁵ Access to an external independent anti-corruption body will allow significant and material allegations of corruption to be picked up quickly and prevent corrupt practices being hidden behind a façade of official concern.⁷⁶ An anti-corruption body can also provide education, assist with corruption prevention strategies, as well as conduct investigations. Given the prevailing conditions on Norfolk Island, the only way to guarantee the integrity of anti-corruption procedures is to apply the existing law, expertise and resources of an established independent institution such as the NSW Independent Commission Against Corruption. The Norfolk Island Government is already aware of the educational work performed by the Commission on Lord Howe Island.⁷⁷

73 In 2002, the *Local Government Amendment (Anti-Corruption) Act 2002* (NSW) amended the *Local Government Act 1993* (NSW) to enable prompt action to be taken against councils, councillors and council staff involved in serious corrupt conduct. Section 440B of the *Local Government Act 1993* (NSW) confers on the NSW Governor the discretion to dismiss a person and disqualify him or her from holding civic office for up to 5 years in certain circumstances. Grounds for dismissal include where the ICAC recommends dismissal following a report under Section 74C of the *ICAC Act 1988* (NSW). The Minister advises the Governor that the dismissal of the person is necessary in order to protect the public standing of the council concerned and for the proper exercise of its functions. Subsection 440B (2) of the *Local Government Act 1993* (NSW) protects the right of the person to be heard.

74 Section 255, *Local Government Act 1993* (NSW).

75 This should include the Administrator, Official Secretary, Members of the Legislative Assembly, Members of the Executive Council and public servants employed in the Territory Administration, persons holding office on statutory Boards and employees and management of Norfolk Island Government Enterprise Businesses and other statutory authorities.

76 Moss I. 2000, *Corruption: The Media and the Watchdogs*, in Canberra Bulletin of Public Administration, No.97, pp. 39-43.

77 NSW Independent Commission Against Corruption, November 2001, *Preserving Paradise - good governance for small communities - Lord Howe Island*.

Recommendation 5

- 3.53 That the *Norfolk Island Act 1979 (Cth)* be amended to engage an independent institution with jurisdiction to investigate allegations of 'corrupt conduct' within the Norfolk Island Legislative Assembly, Administration and all statutory boards and government business enterprises.

Recommendation 6

- 3.54 That, in order to implement Recommendation 5, the Federal Government negotiate with the Government of New South Wales with a view to amending the *Norfolk Island Act 1979 (Cth)*, as recommended above, to apply the *Independent Commission Against Corruption Act 1988 (NSW)* to the Norfolk Island Legislative Assembly, Administration and all statutory boards and government business enterprises.
- 3.55 The Administrator already has the power under the *Norfolk Island Act 1979 (Cth)* to dismiss a Member of the Executive Council where exceptional circumstances justify him doing so.⁷⁸ The current provisions are, however, too limited to serve the purpose envisaged by the Committee. The reality is that an Administrator, in accordance with his or her role as the nominal head of the Territory's Government, could reasonably be expected to seek and await advice from either the Federal Minister responsible for Territories, the Norfolk Island Government or Members of the Legislative Assembly before exercising the dismissal power.
- 3.56 The power to suspend, dismiss or disqualify a Member of the Legislative Assembly should also be conferred on the Administrator. The power should be available following a finding of serious corrupt conduct by the anti-corruption body and where the Federal Minister advises the Administrator that dismissal is necessary in order to

⁷⁸ Subsection 13 (2), *Norfolk Island Act 1979 (Cth)*. The Administrator may at any time terminate an appointment made under subsection 13 (1) if, in his opinion, there are exceptional circumstances that justify him doing so. The power is restricted to termination of an appointment to the Executive Council and does not result in suspension or dismissal from the Assembly. Nor does it equate with disqualification from holding office although, in some cases, the grounds for disqualification may overlap with the grounds for termination of appointment to the Executive Council.

protect the public standing of the Assembly and the proper exercise of its functions. In addition, the Administrator must have an express power to declare all Legislative Assembly positions vacant where a finding of systemic corruption is made by the anti-corruption body or on the basis of another public inquiry.⁷⁹

Recommendation 7

3.57 That, consistent with other Australian jurisdictions, the *Norfolk Island Act 1979* (Cth) be amended to:

- **extend the provisions of the Model Criminal Code with respect to corruption to Norfolk Island;**
- **provide that a substantial breach of the Code of Conduct amounting to corrupt conduct be grounds for disqualification from office as a Member of the Legislative Assembly, and empower the Administrator to declare the office vacant on the advice of the Federal Minister; and**
- **empower the Administrator to declare all offices of the Legislative Assembly vacant on the ground of systemic corruption on the advice of the Federal Minister having regard to a report of the above-mentioned investigative body (the NSW Independent Commission Against Corruption).**

An Administrative Law Package

3.58 The Committee is not an Ombudsman or Commission with powers to inquire into alleged maladministration. Many of the contentious matters raised with the Committee must therefore remain untested. The reassurance given by the Chief Minister that the Norfolk Island Government is open to external scrutiny is acknowledged and welcomed.⁸⁰ But the Committee is of the opinion that it is extremely unlikely that any such mechanism(s) will be introduced locally by the

⁷⁹ See Section 255, *Local Government Act 1993* (NSW).

⁸⁰ The Hon. Geoff Gardner MLA, Transcript, 25 July 2003, p. 42.

Norfolk Island Government in the near future despite appearances to the contrary.

- 3.59 All Commonwealth, State and Territory governments – except Norfolk Island – are subject to extensive administrative law arrangements. Local governments, and remote indigenous communities, land councils and other representative bodies are subject to laws that regulate the conduct of council business, impose audit requirements and are subject to an administrative law regime that institutionalises accountability in local decision making.⁸¹ By contrast, Federal administrative and auditing laws apply to the activities of Commonwealth agencies operating in the Norfolk Island jurisdiction, but not to the conduct of the Norfolk Island Government itself.
- 3.60 This situation is quite different to that which applied to the conferral of self-government on the Australian Capital Territory in 1988. The importance of institutionalising accountability and safeguarding the basic right to complain against government was recognised as an essential element of the law of self-government.⁸² Federal administrative laws covering judicial and merit review, Freedom of Information and the Ombudsman were applied as part of the transitional arrangements, and the Commonwealth Auditor-General is the Auditor-General for the ACT.⁸³ There is no fundamental legal, technical, policy or cultural reason why the same approach could not be adopted for Norfolk Island.⁸⁴

81 See, for example, the *Local Government Act 1993* (NSW); and *Local Government Act 1993* (Qld). Local governments exercise significant powers in small and remote communities which impact on land and development, utilities and infrastructure and the provision of basic services. They raise revenue through local rates and charges and manage multimillion dollar public works contracts. In rural and remote Australia, indigenous land councils and other representative bodies perform an extensive range of governance functions and manage budgets larger than that of Norfolk Island Administration.

82 See Section 26 of the *A.C.T. Self-Government (Consequential Provisions) Act 1988* (Cth), applying the *Administrative Decisions (Judicial Review) Act 1977* (Cth); Section 27 applying the *Administrative Appeals Tribunal Act 1977* (Cth); Section 28 applying the *Ombudsman Act 1976* (Cth); and Section 29 applying the *Freedom of Information Act 1982* (Cth).

83 Section 14 of the *A.C.T. Self-Government (Consequential Provisions) Act 1988* (Cth) provides that: “On and after Self-Government Day, and until otherwise provided by enactment, the Auditor-General for the Commonwealth shall be the Auditor-General for the Territory and each Territory authority and, for those purposes, shall exercise such powers as are provided by enactment”.

84 Attorney-General’s Department, Submissions, p. 572; Administrative Review Council, Submissions, p. 552.

Administrative Appeals

- 3.61 The evidence suggests considerable frustration within the Island community with the quality of public sector decision making, with the lack of arms-length administrative appeal mechanisms and with the consequent adverse impact on the rights and interests of individuals and businesses. Decision making in the areas of immigration, social security and medical benefits were highlighted as being of particular concern.
- 3.62 This is not a new issue for Norfolk Island. In 1991, the House of Representatives Standing Committee on Legal and Constitutional Affairs took a considerable amount of evidence about the adequacy of mechanisms available to Norfolk Islanders seeking reviews of administrative decisions.⁸⁵ A supplementary submission by the then Norfolk Island Government indicated that establishment of an Administrative Review Tribunal was to be considered. Nevertheless, the Standing Committee recommended extending the jurisdiction of the Commonwealth Administrative Appeals Tribunal (AAT) to decisions made under a Norfolk Island enactment and applying both the Commonwealth *Freedom of Information Act 1982* and *Ombudsman's Act 1976*, to ensure residents of Norfolk Island had increased access to review processes as a matter of priority. These recommendations were not implemented.
- 3.63 An Administrative Review Tribunal (ART) for Norfolk Island was established in 1996, but currently only decisions made under the Territory's land and broadcasting legislation can be reviewed by the ART.⁸⁶ In 1997, the Commonwealth Grants Commission recommended the jurisdiction of the ART be extended as soon as practicable.⁸⁷ However, more than 10 years after the Standing

85 House of Representatives Standing Committee on Legal and Constitutional Affairs, March 1991, *Islands in the Sun: The Legal regimes of Australia's External Territories and the Jervis Bay Territory*, p. 150.

86 *Administrative Review Tribunal Act 1996* (NI). The Tribunal can review (on merits) decisions made under the following Norfolk Island laws: *Crown Lands Act 1996*; *Land Administration Fees Act 1996*; *Land Titles Act 1996*; *Planning Act 1996*, *Billboard Act 1996*, *Public Health Act 1996*, *Public Reserves Act 1997*, *Trees Act 1997* and *Norfolk Island Broadcasting Authority Act 2000*. From July 2000 to June 2001 there were 17 applications received, involving 3 full days and 2 half days of hearings. The Chief Magistrate of the Australian Capital Territory is appointed as the President of the Tribunal.

87 Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, p. 205. A bill to amend the *Immigration Act 1980* (NI) by allowing ART review of decisions made by the executive member or authorised person has been drafted. Another bill amending the *Administrative Review*

Committee's report and its concern that this matter be dealt with as a matter of priority, the situation for the majority of residents of Norfolk Island remains unchanged. The Committee finds this shameful and unacceptable.

- 3.64 The current review arrangements on Norfolk Island are clearly unsatisfactory. The Committee has serious concerns in relation to the procedural aspects associated with seeking review by the Administrative Review Tribunal, such as the limited number of decisions subject to review, a lack of standing by affected residents to seek review, inadequate notification of decisions affecting residents and tight deadlines in which an application for review must be lodged. The Commonwealth Ombudsman noted that high quality merit review was not available to Island residents.⁸⁸ The Committee is also concerned that many Territory residents appear to be unaware of their review rights. Rationalisation of existing arrangements to bring greater transparency and consistency into the system is, therefore, essential.

Appeals under Territory Social and Health Services Legislation

- 3.65 Norfolk Island residents eligible for a pension or benefit under the *Social Services Act 1980* (NI) are also generally eligible for hospital and medical assistance. Claims for hospital and medical assistance are made to the Claims Committee established by the *Healthcare Act 1989* (NI).⁸⁹ Review of the decisions of the Claims Committee and Executive Members is available in the Court of Petty Sessions constituted as an administrative tribunal.⁹⁰ By contrast, applications for social service pensions and benefits are made under the *Social Services Act 1980* (NI) with the decision resting with the responsible Executive Member or authorised officer following the recommendation of the Norfolk Island Social Services Board.⁹¹ Review of a decision is by the Administrator.⁹²

Tribunal Act 1996 (NI) to include the position of 'Deputy President' of the ART, to be filled by a legally qualified local resident has also been drafted.

88 Professor John McMillan, Transcript, 25 July 2003, pp. 1-2; Commonwealth Ombudsman, Submissions, pp. 155-57.

89 Sections 22, 23 and 24, *Healthcare Act 1989* (NI).

90 Sections 31 and 32, *Healthcare Act 1989* (NI).

91 Sections 4, 11 and 15, *Social Services Act 1980* (NI).

92 Section 33, *Social Services Act 1980* (NI). The Administrator is required by Section 7 of the *Norfolk Island Act 1979* (Cth) to act on local ministerial advice. Social Services can be characterised as a Schedule 3 matter (see Item 10 in Schedule 3) in which case Section 7 of

- 3.66 The *Focus 2002 Report* recommended that the recommendations of the *Social Service Review Report* completed in April 2002 be adopted.⁹³ One of these recommendations is that the power to review a decision under the *Social Services Act 1980* (NI) be conferred on the Norfolk Island Administrative Review Tribunal.⁹⁴ The Committee believes that, in order to simplify the system, applications for pension related hospital and medical assistance should be made and processed in the same way as applications for pensions. However, it is essential that eligibility criteria and rights of review be clearly set out in the *Social Services Act 1980* (NI).
- 3.67 The continued involvement of a Social Services Board in the processing of individual claims is inappropriate and its wide ranging power of inquiry and investigation are more suited to that of an administrative tribunal.⁹⁵ It is also quite inappropriate for Members of the Legislative Assembly to be appointed to the Social Services Board which performs an executive/administrative function. The existing structure exposes issues of individual rights and entitlements to political influence and personal biases. The Committee believes that the Board should either be abolished or removed entirely from the process of deciding individual entitlements. If the Board is to remain, its role should be confined to that of an advisory committee with a responsibility to make recommendations to the Executive Member on questions of policy.
- 3.68 The power of the Executive Member responsible for social services to decide applications for pensions and benefits provided for under the *Social Services Act 1980* (NI) should be delegated to the responsible officer of the Administration. Internal review with an appeal to the Administrative Review Tribunal should raise the quality of decision making. The Committee, therefore, recommends the following

the Act requires the Administrator to act on advice from Norfolk Island Ministers subject to contrary advice from the Federal Minister – there is, thus, no independent review at all.

93 Recommendation 9, *Focus 2002 – Sustainable Norfolk Island*, 10th Legislative Assembly, Norfolk Island, p. 19.

94 Section 17.1, *Norfolk Island Social Services Act 1980 and Policy Review*, April 2002, Attachment 3, *Focus 2002 – Sustainable Norfolk Island*, 10th Legislative Assembly, Norfolk Island.

95 Under Section 11, *Social Services Act 1980* (NI), the function of the Social Services Board is to consider and make recommendations to the Executive Member concerning claims and concerning the exercise of any power by the Executive Member or by an authorised officer under this Act. The Board has also been provided with wide ranging powers of inquiry through Section 11(5) (6) of the Act.

measures be implemented, pending the outcome of the recommended review by the Federal Government on the extension of Commonwealth social and health services legislation and programmes to Norfolk Island.⁹⁶

Recommendation 8

3.69 That, regardless of the outcome of the recommended Federal Government review on extending Commonwealth social and health services legislation and programmes to Norfolk Island outlined in Recommendation 9, the Federal Government take all necessary steps in the intervening period to implement the following measures, including amendment of the *Norfolk Island Act 1979* (Cth) if required:

- **the Norfolk Island *Social Services Act 1980* and *Healthcare Act 1989* be amended to rationalise application procedures and clarify entitlements to pensions and benefits under the respective laws, including the right to review;**
- **the jurisdiction of the Norfolk Island Administrative Review Tribunal be extended to all decisions concerning pensions and benefits and related health and medical assistance matters; and**
- **subject to implementation of the proposed social services regime, the Norfolk Island Claims Committee and the Social Services Board be abolished.**

Adequacy of Social and Health Services Programmes

3.70 At the time of the Commonwealth Grants Commission Report in 1997, it was estimated that Norfolk Island social service benefits were approximately 80% of the level of Federal pensions and benefits. The Norfolk Island Government claims that pensions and benefits are now equivalent to 97% of mainland payments. Yet, Norfolk Island pensioners must cope with the higher costs of living on Norfolk Island, the regressive tax system, the problems being experienced with public health and aged care support services, and the costs of

⁹⁶ See Recommendation 2, paragraph 3.14.

specialist medical treatment not available on Norfolk Island.⁹⁷ The lack of reciprocal arrangements for the payment of social security benefits between the mainland and Norfolk Island and the high cost of pharmaceuticals is a serious cause for concern. As the population of Norfolk Island ages, the number of affected people is likely to increase.

- 3.71 Australian citizens and non-Australian residents are entitled to expect the equivalent levels of income support and medical benefits wherever they live in Australia. In its submission to the Joint Standing Committee on the National Capital and External Territories Inquiry into Health Services on Norfolk Island, the Department of Transport and Regional Services stated:

that people living in rural, regional and remote communities in Australia have a right of access to a level of primary and secondary health care and health insurance equal to those of their fellow Australians. This goal or principle of equality of access, irrespective of wherever Australians may be in Australia, is currently recognised by the Commonwealth in terms of its Regional Services policy and initiatives.⁹⁸

There are also numerous bilateral reciprocal agreements that ensure Australians living overseas have access to their entitlements.

- 3.72 There is, then, a fundamental inequity in a policy that ensures the pension rights of Australians living overseas is addressed, but ignores the situation of those living in a part of Australia. There is no fundamental legal, policy, technical or economic reason why Australians who move to Norfolk Island from other parts of Australia or *vice versa* should be disadvantaged by Government when exercising their democratic right to reside wherever they choose in

97 For comments on the regressive nature of the Norfolk Island taxation regime, see Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, p. 149. See also Joint Standing Committee on the National Capital and External Territories, 2001, *In the Pink or in the Red?: Health Services on Norfolk Island*; and 2002, *Norfolk Island Electoral Matters*, Canprint, Canberra, pp. 67-9.

98 Joint Standing Committee on the National Capital and External Territories Inquiry into Health Services on Norfolk Island, Department of Transport and Regional Services, Submissions, p. 73. See also Australian Health Ministers' Council, *Healthy Horizons - A Framework for Improving the Health of Rural, Regional and Remote Australians 1999-2000*; Ministerial Statement, *Regional Australia: Meeting the Challenges*, 11 May 1999; *Human Rights in regional, rural and remote Australia*, Address by Chris Sidoti, Human Rights Commissioner, 24 September 1998; and *Rural Health: A human right for rural people*, Address by Chris Sidoti, Human Rights Commissioner, March 1999.

Australia. As explained elsewhere in this report, the exclusion of Norfolk Island from key Federal programmes and services can no longer be justified by the crude and flawed argument that the income earned on the Island is exempt from Federal taxation. Nor can Federal Ministers and their Departments continue to justify inaction by reciting the mantra that the Commonwealth legislation under which Federal programmes and services are provided do not extend to Norfolk Island.⁹⁹ Legislation, like policy, can and should be changed, when and where required.

- 3.73 Similarly, one cannot dismiss Federal intervention and reform by reference to the Commonwealth Grants Commission finding that the Island community can raise sufficient taxes on-Island to pay for services to the community.¹⁰⁰ The Territory Government and community have been grappling with tax reform for a decade, without any apparent outcome.¹⁰¹ Despite the optimistic view expressed by Territory Government Ministers, there appears little prospect that this will change.¹⁰² Meaningful taxation reform on Norfolk Island will require assistance and input by Commonwealth agencies and, even with the latter, the development and implementation of a new taxation regime can reasonably be expected to take considerable time and effort.¹⁰³
- 3.74 Reform of service delivery on Norfolk Island in key areas such as social services, health and aged care is required now. As noted by the Grants Commission in 1997, the Federal Government is better placed to provide these services and, moreover, is ultimately responsible for ensuring that the Island community enjoy equivalent levels of

99 For the purposes of Commonwealth health and social services policies, Norfolk Island is “specifically excluded from the definition of Australia” in the Commonwealth’s social security, family assistance and health services legislation. Department of Family and Community Services, Submissions, p. 189.

100 Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, p. 218.

101 Norfolk Island Minister for Health and Community Services, the Hon. David Buffett MLA, stated that “the old taxing regime no longer copes” with community demand for an increasing range of government services and measures to address this are being examined. The Hon. David Buffett MLA, Transcript, 25 July 2003, p. 45.

102 The Hon. David Buffett MLA, Transcript, 25 July 2003, pp. 44-5. There is division within the Legislative Assembly, with some Assembly Members opposing tax reform despite the Norfolk Island Government recognising that Norfolk Island faces a fiscal crisis – see Norfolk Island Legislative Assembly Hansards 2003.

103 The phased introduction of the Federal income tax regime in the Indian Ocean Territories provides a useful example. In this case, there was an almost immediate extension of Federal social security and health services.

services and support to those enjoyed by their fellow Australians elsewhere.¹⁰⁴

- 3.75 As part of a wider review by the Federal Government of Commonwealth policy towards Norfolk Island, the Federal departments of Health and Aged Care and Family and Community Services must review the eligibility criteria for income support and medical and health benefits, and the level of such assistance required, on Norfolk Island, with a view to ensuring parity with the mainland. Following this review, the Federal Government needs to assess the capacity of the Norfolk Island community to sustain alone the cost of providing comparable levels of income support and health benefits, both now and in the future.
- 3.76 In the likely event that there is not a sufficient level of equivalence and current and future local capacity, the Commonwealth must resume responsibility for key government services and responsibilities. As recommended by the Committee in its earlier report on health services on Norfolk Island, Commonwealth legislation, such as the *Aged Care Act 1997* and the *Health Insurance Act 1973*, should be extended to cover Norfolk Island, to enable the Norfolk Island Government and community to access existing Federal programmes and initiatives designed to assist rural and remote communities.¹⁰⁵ In turn, both the Commonwealth and Norfolk Island Government and community must work together to reassess and implement an equitable taxation regime for the Island community and reform revenue collection to ensure the community makes an appropriate contribution to government services.¹⁰⁶

104 Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, p. 218.

105 Joint Standing Committee on the National Capital and External Territories, 2001, *In the Pink or in the Red?: Health Services on Norfolk Island*; and 2002, *Norfolk Island Electoral Matters*, Canprint, Canberra, pp. 95, 36.

106 The Commonwealth Grants Commission concluded that Norfolk Island has considerable untapped revenue sources that the Territory Government could access. In the areas that the Norfolk Island Government does tax, its tax rates were found to be more than twice that found on the mainland and its system of taxation is regressive, falling disproportionately on tourists and lower income earners. The Commission estimated that, in total, Norfolk Island could raise 60 per cent more revenue than it actually does. The Commission concluded that the Territory Government would only need to raise an additional 20% in revenue to meet its obligations to the Island community. Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, p. 164. See also statement by the Hon. David Buffett MLA, Transcript, 25 July 2003, p. 45.

Recommendation 9

3.77 That, as part of the wider reassessment proposed in Recommendation 2, the Federal Government review and assess the level of income support and health and medical assistance on Norfolk Island with a view to:

- ensuring parity with entitlements paid to Australian citizens and residents domiciled on the mainland, and
- identify which government services and responsibilities currently provided to the Island community by the Norfolk Island Government might be better provided by the Federal Government.

That the Federal Government report to the Federal Parliament on the outcomes of this review.

Recommendation 10

3.78 That, depending on the findings of the proposed review in Recommendation 9, the Commonwealth resume responsibility for social security and extend Medicare and the Pharmaceutical Benefits Scheme to Norfolk Island.

Immigration

3.79 Norfolk Island has its own entry permit system to control who is allowed to enter, reside and work on Norfolk Island. The Commonwealth *Migration Act 1958* does not extend to the Island. Instead immigration, including immigration by Australian citizens from other parts of Australia, is regulated by the Norfolk Island *Immigration Act 1980*. Under Norfolk Island's *Immigration Act 1980* (NI), an Immigration Committee provides reports, advice and recommendations to a Norfolk Island Minister on applications for entry and/or residency.¹⁰⁷ Decisions concerning temporary or general entry and residency are reviewable by the Federal Minister.¹⁰⁸ The

¹⁰⁷ Section 9, *Immigration Act 1980* (NI).

¹⁰⁸ Section 84, *Immigration Act 1980* (NI).

Administrator has the power to review any decision to refuse a visitor entry.¹⁰⁹

- 3.80 A number of witnesses have raised immigration as major source of concern. Accusations of racism, lack of transparency and personal bias are said to undermine the quality of decision making. Complaints were made that the residency requirements impede the sale of businesses and limit the stay of professionals. Some preliminary consideration was given to these matters by the Standing Committee on Legal and Constitutional Affairs in 1991 and the Commonwealth Grants Commission in 1997.¹¹⁰
- 3.81 In 1999, the Human Rights and Equal Opportunity Commission (HREOC) conducted a detailed examination of the immigration system.¹¹¹ This examination was prompted by complaints from Island residents that, among other things:
- the terms and application of the *Immigration Act 1980* and associated regulations and policies constitute a practice which is inconsistent with the rights of Australian citizens to freedom of movement and to choose their place of residence within the Commonwealth of Australia;
 - the operation of the policy relating to the issue of entry permits restricts the rights of people residing on Norfolk Island to sell their businesses and homes to whomever they choose; and
 - the operation of the policy relating to the issue of entry permits discriminates against would-be residents of Norfolk Island on the basis of factors such as their age, employment status, medical condition and previous criminal record.¹¹²

109 Section 85, *Immigration Act 1980* (NI). However, it is important to note the requirement under Section 7 of *Norfolk Island Act 1979* (Cth) for the Administrator to act on the advice of the Executive Council or the Federal Minister. See Footnote 92.

110 House of Representatives Standing Committee on Legal and Constitutional Affairs, 1991, *Islands in the Sun: The Legal Regimes of Australia's External Territories and the Jervis Bay Territory*, Australian Government Publishing Service, Canberra, p. 152; Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, p. 127. A more recent example is provided by Mr John Brown MLA who, in 2002, proposed legislation restricting people with HIV and Hepatitis C from migrating to the Island - see <http://www.lawlink.nsw.gov.au/adb.nsf/pages/norfolkislandban>

111 Human Rights and Equal Opportunity Commission, 1999, *Territorial Limits: Norfolk Islands Immigration Act and human rights*, J. S. McMillan Printing Group, Sydney.

112 Human Rights and Equal Opportunity Commission, 1999, *Territorial Limits: Norfolk Islands Immigration Act and human rights*, J. S. McMillan Printing Group, Sydney, p. 1.

- 3.82 The Commission recommended the Island's immigration regime be repealed and the Territory Government's power to legislate for immigration be revoked.¹¹³ The Commission found that the immigration regime violates Article 12 of the *International Covenant on Civil and Political Rights* (ICCPR) on the grounds that all Australians have a right to liberty of movement and freedom of choice of residence without discrimination and free from arbitrary decision making.¹¹⁴ The Commission also found that an objective and non-discriminatory immigration regime, different from Australia as a whole, may violate Article 12 because it is not necessary in order to protect the Island's environment or culture of the Pitcairn descendants. The Federal Government has yet to respond to this report.
- 3.83 The Committee is sympathetic to the objective of keeping the population to an appropriate size in line with the Island's environment and economic capacity, but cannot see the need to achieve this through an immigration regime. In the Committee's view, the cost of maintaining the system, the dissatisfaction with the decision making process and the violation of the rights of Australians outweigh the efficacy of this mechanism as a means of maintaining an appropriate population. The limited housing accommodation available, the high cost of travel to and living on Norfolk Island, and the administrative requirement for a passport to travel to and from Norfolk Island as it remains outside the Customs barrier, will deter an influx of outsiders.¹¹⁵ The Committee notes that the Indian Ocean Territories no longer have separate immigration regimes and have not been inundated with outsiders for similar reasons.¹¹⁶

Recommendation 11

- 3.84 **That, as recommended by the Human Rights and Equal Opportunity Commission, the Federal Government extend the operation of the *Migration Act 1958* (Cth) in full to the Territory of Norfolk Island, and**

113 Human Rights and Equal Opportunity Commission, 1999, *Territorial Limits: Norfolk Islands Immigration Act and human rights*, J. S. McMillan Printing Group, Sydney, p. 3.

114 Human Rights and Equal Opportunity Commission, 1999, *Territorial Limits: Norfolk Islands Immigration Act and human rights*, J. S. McMillan Printing Group, Sydney, p. 37.

115 The same requirement applies to the Indian Ocean Territories.

116 Another option would be a permit system, modelled on permit systems used in and controlled by Aboriginal communities, enacted under *Migration Act 1958* (Cth) and administered by the Department of Immigration, Multicultural and Indigenous Affairs.

that Schedule 3 of the *Norfolk Island Act 1979* (Cth) be amended to delete reference to ‘immigration’ and to remove from the Norfolk Island Legislative Assembly and Administrator their powers with respect to immigration.

Recommendation 12

- 3.85 That, as recommended by the Human Rights and Equal Opportunity Commission, the Federal Government take immediate steps to work with the Norfolk Island Government to develop and implement a regime to regulate the permanent resident population, temporary residency and tourist numbers by the lawful operation of land, planning and zoning regulations.**

The Right to Know – Freedom of Information

- 3.86** The right to freedom of information, or the right to know, has been increasingly accepted over the last 20 years as “a necessary adjunct to participatory democracy”.¹¹⁷ More than 40 countries provide access to government held information as a means of making government more accountable, preventing corruption, improving the quality of government decision making and enhancing participatory democracy.¹¹⁸ Freedom of information legislation is not a panacea for all ills, but it does provide one tool to promote transparency in administration.
- 3.87** There is no local freedom of information (FOI) legislation nor is there an FOI policy for Norfolk Island. In 1995, the Australian Law Reform Commission recommended the enactment of freedom of information legislation on Norfolk Island.¹¹⁹ In 2000, the Legislative Assembly passed a motion to provide for consideration to be given to enactment

117 Venkat, I. 2001, *Freedom of Information: Principles for Legislation*, in *Media Asia*, Vol. 28, No. 1, pp. 17-22. See also *The Public’s Right to Know: Principles on Freedom of Information Legislation* (London: Article XIX, 1999) < <http://www.article19.org/pubs/foiprin.htm>>.

118 In Australia see, for example, *Freedom of Information Act 1982* (Cth); *Freedom of Information Act 1982* (Vic); *Freedom of Information Act 1989* (NSW); *Freedom of Information Act 1989* (ACT); *Freedom of Information Act 1991* (SA); *Freedom of Information Act 1992* (Qld); *Freedom of Information Act 1992* (WA); *Information Act 2003* (NT).

119 Australian Law Reform Commission, 1995, Report No. 77, *Open Government: a review of the federal Freedom of Information Act 1982*.

of freedom of information legislation.¹²⁰ On 20 August 2003, the Chief Minister informed the Assembly that freedom of information legislation is being considered for Norfolk Island.¹²¹ However, in its submission to the Inquiry, the Norfolk Island Government does not discuss this issue.

- 3.88 An item listed as FOI/Good Government Package appears as a low priority in the consultation/pre-drafting section of the *Tenth Norfolk Island Legislative Assembly Legislative Programme* as of 7 July 2003, with no estimated completion date.¹²² Given the number of high and medium priority legislative projects, the limited number of in-house counsel and insufficient in-house legislative drafting capacity, it is unlikely that an FOI/Good Government Package will be achievable in the next 12 months.
- 3.89 While local cultural factors are important in shaping any piece of legislation, the essential elements of effective freedom of information laws are not unique to Norfolk Island.¹²³ As noted above, the requirement for freedom of information was safeguarded at the time self-government was conferred on the Australian Capital Territory by the application of the Commonwealth *Freedom of Information Act 1982*.¹²⁴ Similarly, by applying the *Freedom of Information Act 1982* (Cth) to Norfolk Island, it would give Island residents a right of access to their personal information and the ability to amend records that are or might be inaccurate. It would also impose a requirement to:
- publish internal Government information such as operational guidelines used in decision making;
 - give reasons for administrative decisions (made under Norfolk Island enactment);
 - make it an offence to alter or destroy government documents;

120 Moved by Mr John Brown MLA, Norfolk Island Legislative Assembly, *Hansard*, 16 August 2000. An FOI/Good Government Package appears in the *Tenth Norfolk Island Legislative Assembly Legislative Programme*, as at 6 June 2002, as the last item on a list of 10 matters outstanding from the Ninth Assembly, awaiting drafting instructions.

121 Norfolk Island Legislative Assembly, *Hansard*, 20 August 2003, p. 1063.

122 A total of 40 hours is allocated to drafting instructions to be complete by July 2003. There is no estimated completion date for the introduction of the Bill(s).

123 That is not to suggest that all aspects of Commonwealth Freedom of Information legislation should apply equally to Norfolk Island. For example, the exemption on the grounds of prejudice to international relations would not seem to be immediately relevant.

124 Since then the ACT has passed its own FOI Act which retains the Commonwealth Ombudsman as a mechanism of external scrutiny.

- provide an independent mechanism to resolve disputes about access to information; and
- include reports on activity under the Act in the annual report of the Administration.

3.90 In the Australian Capital Territory, a person has the option to apply to the Administrative Appeals Tribunal (AAT) or complain to the Ombudsman, who is then required to furnish a report before an application to the AAT can be made.¹²⁵ The Ombudsman may also represent a person in proceedings. This approach can reduce the need for litigation and would provide the option of off-Island scrutiny which, in the view of the Committee, is absolutely critical for Island residents.¹²⁶

The Right to a Review – An Ombudsman

3.91 In all jurisdictions in Australia, except Norfolk Island, citizens and residents have access to an Ombudsman to examine the conduct of Federal, State or Territory public administration and bodies discharging a public function. The role of the Ombudsman is to inquire into administrative processes in response to complaints of alleged maladministration and is distinct from merit review by an administrative tribunal. The Commonwealth Ombudsman also has the power to initiate ‘own motion’ inquiries where a policy or pattern of conduct indicates a systemic problem.¹²⁷ The Ombudsman is equipped with powers to compel production of documents and witnesses.¹²⁸ These investigative powers allow an independent person with statutory authority to scrutinise conduct that is otherwise hidden from public view. In addition to resolving complaints, the Ombudsman can provide useful feedback and guidance on good administrative practice and perform an important educative function. An Ombudsman enables complaints from the public to be dealt with cheaply and should remove the need for expensive litigation.¹²⁹

125 See Part 6, Sections 53 to 57, Role of the Ombudsman, *Freedom of Information Act 1989* (ACT).

126 Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, p. 217.

127 Section 5 (1) (b), *Ombudsman Act 1976* (Cth); Commonwealth Ombudsman, Submissions, p. 157.

128 Sections 13, 14, *Ombudsman Act 1976* (Cth); Commonwealth Ombudsman, Submissions, p. 159.

129 Professor John McMillan, Transcript, 25 July 2003, p. 2.

- 3.92 The lack of an Ombudsman on Norfolk Island was noted by the Commonwealth Grants Commission in 1997.¹³⁰ In the five years following, there has been little effort to investigate or establish arrangements for an Ombudsman function despite calls to do so by some Members of the Legislative Assembly.¹³¹ One issue is the real problem of cost and the need to maximise the efficient use of resources. There is also an international consensus that the proper use of the designation ‘Ombudsman’ can only be legitimately applied when the institution is an independent statutory authority free from direction of any public authority.¹³² In the Committee’s opinion, it is completely undesirable for an Ombudsman to be established by local legislation or appointed from the Island.
- 3.93 The Commonwealth *Ombudsman Act 1976* applies in all States and Territories, including Norfolk Island and Christmas and Cocos (Keeling) Islands, but is limited to the actions of Commonwealth agencies operating in those jurisdictions.¹³³ One important exception to this rule is the arrangement with the Australian Capital Territory. In that jurisdiction, the Commonwealth Ombudsman holds office as the Australian Capital Territory Ombudsman:
- under an arrangement pursuant to subsection 28(3) of the *ACT Self-Government (Consequential Provisions) Act 1988* (Cth) and funded through a Memorandum of Understanding.¹³⁴
- 3.94 It is estimated that the Ombudsman deals with approximately 500-600 complaints annually from the ACT.¹³⁵ On the basis of this experience,
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130 Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, p. 205.

131 See Norfolk Island Legislative Assembly, *Hansard*, 16 August 2000 and 27 March 2002.

132 See criteria for institutional membership of the International Ombudsman Institute. See also criteria adopted by Australian Ombudsmen in 1997. Commonwealth Ombudsman, Submissions, pp. 564, 567-69.

133 Commonwealth Ombudsman, Submissions, p. 155. Section 3 of the *Ombudsman Act 1976* (Cth) applies the Act to action taken by a Department or a ‘prescribed authority’, defined to mean an authority established under an enactment other than the *Norfolk Island Act 1979* (Cth). Consequently, action taken under the *Norfolk Island Act 1979* (Cth) or under law enacted by the Norfolk Island Assembly does not come within the jurisdiction of the Commonwealth Ombudsman. The Commonwealth Ombudsman also exercises powers and performs functions under the *Complaints (Australian Federal Police) Act 1984* (Cth), the *Telecommunications (Interception) Act 1979* (Cth) and the *Crimes Act 1914* (Cth).

134 Commonwealth Ombudsman, Submissions, p. 156. In 1989, the Australian Capital Territory implemented its own *Ombudsman Act* but retained the Commonwealth Ombudsman as the Ombudsman for the ACT. The creation of a separate Ombudsman office for a small jurisdiction such as the ACT was considered an unnecessary expense.

135 Commonwealth Ombudsman, Submissions, p. 158. Between 1990-91 and 2002-03 the Ombudsman received 55 complaints from Christmas Island and 2 from Cocos (Keeling)

no more than ten complaints per year could be anticipated from Norfolk Island.¹³⁶ In light of the small number of complaints likely from Norfolk Island, the Committee believes that extending the jurisdiction of the Commonwealth Ombudsman is the most efficient and effective way of providing external scrutiny of administrative practices to the Island. The Commonwealth Ombudsman has signalled his willingness to perform his functions in respect of Norfolk Island if called upon to do so.¹³⁷

- 3.95 Conferring jurisdiction on the Ombudsman for functions on Norfolk Island under the *Ombudsman Act 1976* (Cth), the *Freedom of Information Act 1982* (Cth) and for monitoring and oversight of a Code of Conduct and Register of Interests has the benefit of combining these roles into one office, thus ensuring a more efficient use of existing resources. This approach will give Island residents access to an external independent mechanism of review removed from the influences and pressures that exist in small isolated communities such as Norfolk Island.¹³⁸ It will also provide the Norfolk Island Government with access to a professional body of expertise and resources that cannot otherwise be expected in such a small jurisdiction.

Whistleblower Legislation

- 3.96 Over the past 10 years, Freedom of Information and Ombudsman arrangements have been complemented with legislation to protect public servants who ‘blow-the-whistle’ on wrong-doing. Public interest disclosure legislation:
- encourages a greater flow of information by trying to ensure that workers are not discriminated against or lose their jobs when reporting a concern about wrongdoing to the appropriate authorities or the public or media generally...¹³⁹
- 3.97 These legislative schemes are necessary to overcome the traditional culture of secrecy and the legal prohibitions placed on public servants from disclosing official government information that result in

Islands in relation to conduct under Commonwealth enactments - Commonwealth Ombudsman, Submissions, p. 565.

136 Commonwealth Ombudsman, Submissions, p. 158.

137 Professor John McMillan, Transcript, 25 July 2003, p. 2.

138 See NSW Independent Commission Against Corruption, November 2001, *Preserving Paradise - good governance for small communities - Lord Howe Island*.

139 Homewood, S. June 2003, *The Freedom of Information Act 2000 and whistleblowers in the UK*, in *Freedom of Information Review*, No. 105, p. 44.

punishment and victimisation. It has been reported that a “Queensland survey of 102 whistleblowers found 71 per cent had faced reprisals, including sacking, psychiatric referral, demotion and legal action”.¹⁴⁰

- 3.98 Most other jurisdictions in Australia have developed public interest disclosure legislation.¹⁴¹ Whilst there are variations across the jurisdictions, there are essential aspects common to most schemes. The laws protect public officials disclosing maladministration and corrupt or illegal conduct from victimisation and dismissal, provide for disclosure to and investigation by an independent statutory authority such as an Ombudsman or statutory Auditor-General, and require reports on whistleblower activity to be included in all annual reports. More recent models, such as those in Victoria and Tasmania, extend that protection to disclosures concerning Members of Parliament.¹⁴²
- 3.99 The Committee regards whistleblower legislation as an essential component of an anti-corruption strategy for Norfolk Island. The value of such legislation depends upon a number of factors. The nature of improper conduct that can be disclosed must be sufficiently broad to cover corruption and maladministration more generally.¹⁴³ It should include, but not be confined to, conduct that is a criminal or disciplinary offence. However, in order to attract protection and to discourage frivolous or vexatious disclosures, the disclosure should

140 Western Australian Attorney-General, Mr J McGinty, reported in Butler J. *New law ‘flawed’ on whistleblowers*, *West Australian*, 27 June 2003, p. 35. Traditionally, Australian political culture has followed that of the United Kingdom, which has secrecy as one of its key features and is reflected in numerous statutes. The common law of confidentiality and public interest immunity has also operated to restrain the release of official information. See Homewood S. June 2003, *The Freedom of Information Act 2000 and whistleblowers in the UK*, in *Freedom of Information Review*, No. 105, p. 44.

141 *Whistleblowers Protection Act 1993* (SA); *Public Interest Disclosures Act 1994* (ACT); *Protected Disclosures Act 1994* (NSW); *Whistleblowers Protection Act 1994* (Qld); *Whistleblowers Protection Act 2001* (Vic); *Public Interest Disclosures Act 2002* (Tas) received assent on 25 June 2002, but, as at 6 August 2003, has not been proclaimed to commence; *Public Interest Disclosure Act 2003* (WA). No legislation has yet been introduced in the Northern Territory, although it was ALP policy when in opposition in June 2000.

142 Section 3, *Whistleblowers Protection Act 2001* (Vic) defines public officer to include a Member of Parliament.

143 See, for example, Section 3 (1), *Whistleblowers Protection Act 2001* (Vic). For the purposes of that Act, corrupt conduct means conduct of a person (whether or not a public official) that does or could directly or indirectly adversely affect honest performance of a public official or public body’s functions; dishonesty or inappropriate partiality in performance of official duties; breach of public trust; misuse of information or material acquired in the course of performance of public functions; conspiracy or attempt to engage in corrupt conduct.

be required to have at least a 'reasonable belief' that the conduct can be properly described as improper. Disclosure to an external and independent body is essential and the legislation must specify legal protection from dismissal or other reprisals and penalties for victimising the discloser.¹⁴⁴

- 3.100 The Committee proposes that the ACT *Public Disclosures Act 1984* be applied to Norfolk Island and that the Commonwealth Ombudsman be granted jurisdiction to administer this applied law on Norfolk Island. The Commonwealth Ombudsman already has jurisdiction under the ACT legislation. This approach has the benefit of concentrating responsibility for all administrative and disclosures laws in one easily identifiable body.

Recommendation 13

- 3.101 **That the Federal Government apply an administrative law regime, based on the Australian Capital Territory model, to Norfolk Island to provide for independent and external scrutiny of administrative action, and that a *Norfolk Island (Consequential Provisions) Bill* be drafted and introduced to the Federal Parliament as matter of urgency to:**
- **extend the jurisdiction of the Commonwealth Ombudsman under the *Ombudsman Act 1976* (Cth) to conduct occurring under a Norfolk Island enactment or by a Territory authority;**
 - **apply the *Freedom of Information Act 1982* (Cth) or, subject to negotiation with the Australian Capital Territory, the *Freedom of Information Act 1988* (ACT);**
 - **apply the *Public Interest Disclosure Act 1988* (ACT); and**
 - **confer jurisdiction on the Commonwealth Ombudsman to deal with matters arising under freedom of information and whistleblower legislation.**

144 The recent Western Australian legislation has been criticised for requiring internal disclosure first and the lack of an independent body to receive and pursue whistleblower information, although certain disclosures can be made to the planned Corruption and Crime Commission and the Auditor-General. See Butler J. *New law 'flawed' on whistleblowers*, *West Australian*, 27 June 2003, p. 35.

Public Reporting

- 3.102 The *Norfolk Island Act 1979* (Cth) requires reporting on financial auditing and presentation of the Norfolk Island Government accounts. While financial accountability is of paramount importance, the Act lacks any guarantees of reporting by the Norfolk Island Government to the people of Norfolk Island and to the Commonwealth on its performance and operations.¹⁴⁵ Audit reports are a statutory requirement but limited to pro forma reports on the Territory's financial statements. Consequently, the audit reports provide little useful or meaningful information on the performance and efficiency of the Territory Administration. In the recent past, this function has been performed by a private auditor.
- 3.103 By contrast, the public office of the Auditor-General in mainland jurisdictions are closely linked to parliamentary public accounts committees and, together with the Ombudsman and administrative law, provide an important part of the institutional guarantee of accountability of the Government that extends beyond the traditional focus on financial compliance. In recent decades, the role of the Auditor-General has evolved, particularly with the development of performance auditing.¹⁴⁶ The *Best Practice Guidelines* published by the Commonwealth Auditor-General are an example of how the experience and expertise of the Australian National Audit Office (ANAO) is translated into a resource for public administrators.
- 3.104 Annual reports provide the community with information on the operations and activities of public administration and are a key part of the public accountability framework. They form an important part of the historical record of government and are basic sources of information for a wide range of people with varying interests.¹⁴⁷ With increasing public pressure to provide services for minimum cost in every jurisdiction, annual reports are being scrutinised more critically.¹⁴⁸ The increased use of strategic and corporate planning also means that governments should be in a position to report within

145 Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, p. 217.

146 Mulgan, R. June 2001, *Auditors-General: Cuckoos in the Managerialist Nest?* In *Australian Journal of Public Administration*, 60 (2), pp. 24-34.

147 Gifford, P. *Annual Reporting in the Public Sector: The Best is Yet to Come*, NSW Public Accounts Committee Public Seminar, 9 August 1995.

148 Gifford, P. *Annual Reporting in the Public Sector: The Best is Yet to Come*, NSW Public Accounts Committee Public Seminar, 9 August 1995.

a defined framework of objectives.¹⁴⁹ It is more than reasonable to expect the Norfolk Island Government to be subject to similar provisions and scrutiny.

3.105 There are a number of deficiencies in the present arrangements and weaknesses in the *Norfolk Island Act 1979* (Cth) that require attention. The specific details are discussed in more detail below but can be summarised as:

- the ad hoc appointment of an Auditor by the local legislature rather than a permanent appointment of the Commonwealth Auditor-General;
- a requirement for financial audits, but not audits on performance and efficiency;
- audit reports are forwarded to the Federal Minister, but not tabled in the Federal Parliament;
- no statutory requirement for an annual report to the Legislative Assembly or the Federal Parliament; and
- a lack of a scrutiny by a parliamentary public accounts committee.

Given the fundamental importance of public reporting to accountability of government, it is in the interests of the Legislative Assembly, the Federal Minister and the Federal Parliament to rectify the situation by establishing a more robust, transparent and durable system of checks and balances for Norfolk Island.

Auditing

3.106 A permanent statutory office of the Auditor-General exists in all States and Territories, except Norfolk Island. At the Commonwealth level and in all States, the ACT and the Northern Territory, the office of Auditor-General is established by separate legislation.¹⁵⁰ Between 1979 and 1988, the Commonwealth Auditor-General was appointed as Auditor for Norfolk Island under the *Norfolk Island Act 1979* (Cth). On several occasions throughout this period, the Audit Office reported serious deficiencies in the accounting of public funds and complained

149 Gifford, P. *Annual Reporting in the Public Sector: The Best is Yet to Come*, NSW Public Accounts Committee Public Seminar, 9 August 1995.

150 *Financial Administration and Audit Act 1977* (Qld); *Public Finance and Audit Act 1983* (NSW); *Financial Administration and Audit Act 1985* (WA); *Public Finance and Audit Act 1987* (SA); *Financial Management and Audit Act 1990* (Tas); *Audit Act 1994* (Vic); *Audit Act 1995* (NT); *Auditor-General Act 1996* (ACT); *Auditor-General Act 1997* (Cth).

about the lack of action to address the weaknesses in the system.¹⁵¹ Some examples of the range of matters raised in the early 1980s were the lack of prompt banking; defective reconciliation of paid accounts; breaches of the *Public Money's Ordinance Act 1979* (NI); inadequate disclosure of an Australian Government loan; anomalies in the Trust Fund; lack of disclosure of cash receipts and mismanagement of accounting procedures in the philatelic operations, the post office, customs, liquor trading and motor vehicle registration operations.¹⁵² The lack of progress on remedying the deficiencies was reported, with some apparent frustration, by the Audit Office to the Federal Parliament.¹⁵³

- 3.107 The Audit Office also complained of deficiencies in the Territory's legislation and argued that the provisions needed substantial upgrading if the audit function was to operate with maximum effectiveness.¹⁵⁴ One of the major deficiencies was the absence of any requirement for the Auditor-General to examine and formally report upon the Administration's financial statements. The Audit Office noted that "without such a requirement a major area of managerial performance is exempt from audit security".¹⁵⁵
- 3.108 In 1983, an agreement between the Audit Office and the Norfolk Island Government was entered into which dealt with the audit of the Administration's financial statements, the form of the audit report,

151 For the financial year ending on 30 June 1981, the Audit Office made the following comment on the accounting practices of the Norfolk Island Administration: "Notwithstanding that a departure from elementary accounting practice was involved, the Administration view was that the reconciliations were in accord with normal accounting procedures". Parliamentary Papers 69/1982, March 1982, pp. 92 -94.

152 The Audit Office reports that, for example, substantial shipping losses had not been accounted for and did not appear in the financial statements for liquor trading. The costs of the lost goods was included with purchases and sales revenue reflects the proceeds of any successful claim (the success rate was not high), distorting liquor trading results. Parliamentary Papers 69/1982, March 1982, p. 94.

153 Parliamentary Papers 69/1982, March 1982, p. 94; Parliamentary Papers 236/1982, September 1982, p. 43; Parliamentary Papers 234/1983, September 1983, p. 166; Parliamentary Papers 20/1984, March 1984, p. 169; Parliamentary Papers 263/1985, September 1985, p. 133; Parliamentary Papers 235/1986, September 1986, p. 147.

154 Parliamentary Papers 69/1982, March 1982, pp.94; Parliamentary Papers 236/1982, September 1982, p. 43; Parliamentary Papers 234/1983, September 1983, p. 166. Section 63 of the *Norfolk Island Act 1979* (Cth), repealed in 1988, stated that: The accounts of the Territory shall, notwithstanding any enactment, be subject to inspection and audit by the Auditor-General for the Commonwealth.

155 Parliamentary Papers 69/1982, March 1982, p. 94.

and tabling arrangements.¹⁵⁶ The Agreement required the Speaker to table the audit report within two sitting days of the Assembly.¹⁵⁷ Audits of the public accounts for the years ended 30 June 1983 and 1984 were carried out under this Agreement.

- 3.109 Problems arose again in 1986 when, after a change in Government on the Island, the tabling requirements of the Agreement and the *Public Moneys Ordinance 1979* (NI) were breached by the diversion of the audit report for 1984-85 to the Executive Member responsible for Finance.¹⁵⁸ The audit report on the Island's public accounts for the year ended 30 June 1985 was not tabled in the Legislative Assembly until 4 February 1987. The delay was explained by the Norfolk Island Government's wish to have "perceived anomalies in the audit report put right before making it public".¹⁵⁹ This matter was reported to the Federal Parliament in the Annual Report of the Auditor-General in which he stated:

Notwithstanding the expressed wish of the Norfolk Island Government, the non-tabling of the audit report in the Legislative Assembly, for whatever reason, breached an important principle – that of direct communication between the external auditor and the legislative body concerning the accountability of the Government in its Administration.¹⁶⁰

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- 156 Parliamentary Papers 78/1987, March 1987, p. 100. The Agreement was executed to overcome deficiencies in the *Norfolk Island Act 1979* (Cth) which failed to include a requirement for the Auditor-General to examine and report formally to the Legislative Assembly upon the financial statements prepared by the Executive Member responsible for Finance.
- 157 Sub-section 36C (7), *Public Moneys Ordinance 1979* (NI) required the Executive Member to table, at the next meeting of the Assembly, the audited financial statements of the Islands Service Undertakings together with a copy of any remarks made by the Auditor-General.
- 158 The Executive Member responsible for Finance subsequently advised that the audit report on the Island's public accounts for the year ended 30 June 1985 was tabled in the Legislative Assembly on 4 February 1987.
- 159 Parliamentary Papers 78/1987, March 1987, p. 101.
- 160 Parliamentary Papers 78/1987, March 1987, p. 101. Between 1979 and 1988, the following reports that included reference to Norfolk Island were presented to the Federal Parliament by the Commonwealth Auditor-General: *Report of the Auditor-General upon audits, examinations and inspections under the Audit and other Acts*, September 1985, Parliamentary Papers 263/1985, p. 133; *Report on audits to 30 June 1986*, September 1986, Parliamentary Papers 235/1986, p. 147; *Report on audits to 31 December 1986*, March 1987, Parliamentary Papers 78/1987, pp. 100–101; *Report on audits to 30 June 1987*, September 1987, Parliamentary Papers 208/1987, p. 161; *Report on audits to 31 December 1987*, March 1988, Parliamentary Papers 58/1988, p. 21; *Report on audits to 30 June 1988*, September 1988, Parliamentary Papers 152/1988, p. 26.

- 3.110 Notwithstanding the history of serious deficiencies in the Territory Administration's accounting and breaches of public reporting requirements, in 1988 amendments to the *Norfolk Island Act 1979* (Cth) were passed to allow the Territory legislature to appoint its own Auditor.¹⁶¹ The power to appoint was made subject to a number of safeguards to protect the independence of the Auditor and guarantee publication of reports.¹⁶²
- 3.111 Since 1988, private auditors, appointed under the *Norfolk Island Act 1979* (Cth), have had a statutory duty to prepare and submit to the Speaker and the Administrator annual audit reports.¹⁶³ The Speaker has a statutory duty to table the report in the Legislative Assembly within 65 days of receipt.¹⁶⁴ The Administrator is required to forward the report to the Federal Minister as soon as practicable.¹⁶⁵ The auditor is required to draw any significant irregularities to the attention of the Speaker, but the provisions are silent on whether such remarks must be included in the report and tabled in the Assembly.¹⁶⁶ It appears that, in 1988, the *Public Moneys Act 1979* (NI) was also amended and the statutory obligation of the Executive Member to table the audit report, complete with any remarks by the Auditor, was removed at that time.
- 3.112 While financial statements and audit reports of the financial statements are generally tabled in the Legislative Assembly within the statutory period, the Committee is aware that, in recent years, audit reports have not been provided to the Federal Minister in a timely fashion despite the statutory duty to do so. These reports have only been presented after several requests to Norfolk Island Government

161 It is reported that, on 1 July 1986, the Executive Member raised matters concerning the 1984-85 report and the terms of the Agreement with the Audit Office.

162 The *Norfolk Island Act 1979* (Cth) allows the Norfolk Island Government to set auditing standards.

163 Subsection 51C (3), *Norfolk Island Act 1979* (Cth).

164 The tabling record is as follows:

19/11/98 - Audited financial statements and audit report for year ended 30 June 1998.

17/11/99 - Audited financial statements for year ended 30 June 1999.

22/12/99 - Audit report of financial statements for year ended 30 June 1999.

18/10/00 - Audited financial statements for year ended 30 June 2000.

20/12/00 - Audit report of financial statements for year ended 30 June 2000.

21/11/01 - Audited financial statements for year ended 30 June 2001.

18/12/02 - Audited financial statements and audit report of financial statements for year ended 30 June 2002.

165 Subsection 51D (1), *Norfolk Island Act 1979* (Cth).

166 Subsections 51C (1), (2) & (3), *Norfolk Island Act 1979* (Cth).

representatives and officials by the Administrator's Office on behalf of the Federal Minister for the outstanding report to be located and provided.

- 3.113 The Committee is also concerned that a pro forma audit report provides little useful information to the public about the efficiency of the Administration. Previously, audit reports for Norfolk Island identified areas of accounting practice that needed improvement. Performance audits are now standard practice. In the Committee's view, the Norfolk Island Administration would gain considerable benefit from efficiency and performance auditing and the public and the legislature would be better informed about the operations and performance of the Norfolk Island Government.
- 3.114 On 22 January 2003, the Legislative Assembly appointed the Queensland Auditor-General to provide auditing services to the Assembly for the financial years ending June 2003, 2004 and 2005. This signifies recognition by the Legislative Assembly that the audit arrangements have not delivered the quality or range of auditing services needed by a Government with local, State, and Federal type responsibilities. However, in light of the following recommendation that the Federal Parliament's Joint Statutory Committee of Public Accounts and Audit be involved in the audit process for Norfolk Island, it is not appropriate for the Queensland Auditor-General to perform this function on a long term basis.
- 3.115 Norfolk Island is a Territory under the authority of the Commonwealth. The Commonwealth Auditor-General, as an independent officer of the Federal Parliament, is autonomous of the Federal Government and closely linked to the Parliament's Joint Statutory Committee of Public Accounts and Audit. It would be highly appropriate and desirable for the Commonwealth Auditor-General to be reappointed on a permanent basis as the auditor for Norfolk Island. The Australian National Audit Office (ANAO) is a specialist public sector auditor providing a full range of audit services to the Federal Parliament and Commonwealth public sector agencies and statutory bodies. It currently provides auditing services to 300 government bodies, including budget dependent agencies involved in delivery of core services and commercially oriented entities. The ANAO already performs this function for the Administration of the Indian Ocean Territories.
- 3.116 However, unless the office of Auditor-General is enshrined in the foundation law of Norfolk Island, there is no certainty that the public

will obtain the benefit of the comprehensive reporting they are entitled to expect. There is a precedent in Victoria where, after public clashes over the role of the Auditor-General, the office of Auditor-General is now protected in the State constitution.¹⁶⁷

- 3.117 The *Norfolk Island Act 1979* (Cth) must, therefore, be amended to provide that the report of the Commonwealth Auditor-General be tabled, in its entirety, in the Legislative Assembly by the Executive Member responsible for Finance within two sitting days of the Assembly after receipt of the report. The report should be provided directly to the Federal Minister for Territories, who, in turn, must table the report in the Federal Parliament as soon as practicable during the next sitting of Parliament. Subsection 8 (2) of the *Public Accounts and Audit Committee Act 1951* (Cth) must be amended to enable the Joint Statutory Committee of Public Accounts and Audit to examine all financial statements, reports and performance reports on the Administration of Norfolk Island.¹⁶⁸

Recommendation 14

- 3.118 That sections 51-51F of the *Norfolk Island Act 1979* (Cth) be amended to provide for the following:
- the appointment of the Commonwealth Auditor-General as Auditor for the Norfolk Island Administration to provide both finance and performance audit reports;
 - financial and performance audit reports be tabled, in their entirety including any remarks concerning significant irregularities, in the Norfolk Island Legislative Assembly by the Executive Member responsible for Finance within two sitting days of the Assembly after receipt of the report; and
 - provision of the report by the Commonwealth Auditor-General directly to the Federal Minister for Territories to be tabled, in

167 Mulgan, R. 2001, *Auditors-General: Cuckoos in the Managerialist Nest?* in *Australian Journal of Public Administration*, 60 (2), p. 25.

168 Subsection 8 (2) *Public Accounts and Audit Committee Act 1951* (Cth) states that the duties of the Committee do not extend to an examination of the financial affairs; or examination of a report of the Auditor-General that relates to the Administration of an External Territory or the results of an efficiency audit of operations of the Administration of an External Territory. However, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands are not included in the definition of external territory for the purposes of Section 8.

its entirety, in the Federal Parliament as soon as practicable during the next sitting of the Parliament.

Recommendation 15

- 3.119 That subsection 8 (2), *Public Accounts and Audit Committee Act 1951* (Cth) be amended to require the Federal Parliament's Joint Statutory Committee of Public Accounts and Audit to examine the financial affairs of the Administration of Norfolk Island and review all reports of the Commonwealth Auditor-General on the Administration of Norfolk Island.**

Annual Reports

3.120 Between 1914 and 1991, the Norfolk Island Administration tabled an annual report in the Federal Parliament. The practice ceased in 1992 and no annual reports have been tabled in the Federal Parliament since. In recent years, the production and tabling of annual reports in the Norfolk Island Assembly has also fallen behind. The Commonwealth Grants Commission found that, in 1997, “no reports have been produced since 1993-94”, and that the annual reports for 1994-95 and 1995-96 were still in production.¹⁶⁹ The Grants Commission reported:

some concern in the community that it is not adequately informed about Government performance and there was a level of secrecy surrounding many Government decisions.¹⁷⁰

3.121 There has been little progress in producing comprehensive and timely annual reports since these findings were made. The annual report for 1998-1999 was not tabled until 18 October 2000, and the report for the financial year 2000-2001 was not tabled until 19 June 2002.¹⁷¹ The annual report of the Norfolk Island Administration for 2001-2002 was tabled in the Legislative Assembly on 15 October 2003.

3.122 The Norfolk Island Government has acknowledged that this is an area where improvement needs to be made.¹⁷² Section 20 of the relatively new *Public Service Management Act 2000* (NI) requires the Public Service Board to produce an annual report on the state of the public service.¹⁷³ Section 25 of this Act requires the Chief Executive Officer to provide an annual report on the management of the public

169 Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, p. 204.

170 Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, p. 204.

171 The Annual Report for 1999/2000 financial year was tabled on 20 December 2000.

172 Norfolk Island Government, *Submissions*, p. 245.

173 Section 20 of the *Public Service Management Act 2000* (NI) imposes a statutory duty on the Public Service Board to report to the Executive Member on the performance of the Board's functions during the year. The report must include a report on the state of the public service and observance by public service management and employees of the public sector general principles and employment standards; a summary of and results of any reviews conducted under Part 5 of the Act and any other matter required by the Act, the Regulations or any other law. Subsection 20 (3) requires the Executive Member to table a copy of a report in the Legislative Assembly within two sitting days after receiving it.

service.¹⁷⁴ Copies of these reports are to be tabled by the responsible Executive Member within two sitting days after receiving them. The challenge will be to ensure that these statutory duties are met.

- 3.123 Although the practice was to table annual reports in the Federal Parliament, there was no requirement in the *Norfolk Island Act 1979* (Cth) to do so. As explained elsewhere in this report, the Federal Government and the Federal Parliament have an ongoing statutory responsibility for the governance of Norfolk Island. Given the fundamental importance of public reporting to the people of Norfolk Island and the Commonwealth, the Committee believes the requirement to produce and table an annual report should be institutionalised as part of the self-government arrangements. The *Norfolk Island Act 1979* (Cth) must be amended to require an annual report be tabled in the Legislative Assembly within three months of the end of the financial year. Once tabled in the local legislature, the annual report should be forwarded, through the Administrator, to the Federal Minister for Territories for tabling in the Federal Parliament and for periodic review by the Joint Standing Committee on the National Capital and External Territories.

Recommendation 16

- 3.124 **That the *Norfolk Island Act 1979* (Cth) be amended to require the Norfolk Island Government to report annually to the Legislative Assembly within three months of the end of each financial year, and that:**
- **the Annual Report include all information on all Norfolk Island Administration operations including government business enterprises;**
 - **the Executive Member must table the report within two sitting days of receipt;**
 - **the annual report to be forwarded to the Administrator within**

¹⁷⁴ Section 25 of the *Public Service Management Act 2000* (NI) requires the Chief Executive Officer to report to the responsible Executive Member on measures taken to ensure observance by all public service employees of the public sector general principles, of employment standards and measures taken to improve personnel management in the public service; action taken with respect to substantiated complaints under Section 65; any other matter specified in the regulations. Subsection 25(2) requires the Executive Member to table a copy of the report in the Legislative Assembly within two sitting days after receiving it.

two days of being tabled in the Legislative Assembly for transmission to the Federal Minister for Territories for tabling in the Federal Parliament; and

- **the Joint Standing Committee on the National Capital and External Territories to be given, through its Resolution of Appointment, the role of reviewing the annual report of the Norfolk Island Administration.**

