
The Parliament of the Commonwealth of Australia

Quis custodiet ipsos custodes?

Inquiry into Governance on Norfolk Island

Joint Standing Committee on the National Capital and External Territories

December 2003
Canberra

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Who is to guard the guards themselves?
Juvenal AD c. 60 – c. 130: *Satires*

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Foreword

Parliaments of the Commonwealth of Nations vary greatly in size and many other aspects. Their essential functions include legislation, scrutiny of government, representation and legitimation. Parliaments need to reform and to adapt in order to perform these key roles effectively.¹

This is the first of two reports on the governance and financial sustainability of Norfolk Island. It is an attempt to recommend real and meaningful reform for Norfolk Island. The overwhelmingly evidence, from this inquiry and previous inquiries that this Committee and others have conducted, is that Norfolk Island is in deep and growing trouble and needs help. In order to ensure that real and meaningful reform does take place, the Committee has chosen to deliver an unambiguous report that provides the catalyst and framework for reform to begin.

The Committee is in no doubt that the majority of the community are peaceful and law abiding, hardworking, conscientious, possessing a strong sense of civic duty and with an inherent ethic of supporting those in the community who may be less well off. Yet, evidence available to the Committee points to the fact that elements within the community are able to exploit the current governance system, with its lack of effective checks and balances, for their own ends. It has become increasingly clear that beneath the surface, informal mechanisms can and do operate with relative impunity.

There will be a vocal, self-interested minority that will criticise the Committee's efforts and attempt to stifle considered debate on our recommendations. Those opposed to real reform on the Island will, undoubtedly, endeavour to stymie any attempts at reform. The Committee expects that this minority group will organise a petition condemning the report and initiate a referendum to demonstrate popular opposition to Federal Government 'interference' in the affairs of Norfolk Island. The Committee, however, has serious concerns with the practices

1 Donahoe, A. R. 2002, *The Value of Parliament*, in *Australasian Parliamentary Review*, Vol. 17 (1), pp. 109-118.

associated with the conduct of petitions and referendums on Norfolk Island. There will be those who seek to ensure this report joins the long list of other reports by Federal and Norfolk Island inquiries that have never been implemented and which now gather dust. If they succeed, the Committee will have wasted its time and that of the Island community, the cause of genuine reform on Norfolk Island will be set back irrevocably and the future of the Island community seriously undermined.

In this report, the Committee seeks to preserve the principle of self-government for the Island and to make it more effective through the introduction of a similar range of accountability and transparency mechanisms that apply to all levels of government elsewhere in the nation.

The financial and administrative burden of implementing the report's recommendations will fall primarily on the Federal Government - and not the Norfolk Island Government and community. The Commonwealth will bear the cost - as it should and must given the nature of the difficulties facing the Norfolk Island community and the Commonwealth's role and responsibilities for that community. Nor on any dispassionate and impartial examination of the report's recommendations, can there be any serious argument that implementation of those recommendations will have an undue cultural impact. The findings and recommendations of the report are drawn primarily from - and are supported by - the evidence and suggestions of the Norfolk Island community and from previous reports, especially Norfolk Island Legislative Assembly or Norfolk Island Government reports.

The report is entirely consistent with previous reports of this Committee, reports of other bodies, and reports of Norfolk Island committees as well. The report is also entirely consistent with Federal Government policy. Australia's interest in facilitating good governance throughout the Pacific must mean that all appropriate steps be taken to ensure that these same principles of good governance protect those who live in a part of Australia that is located in the Pacific.

All Members of the Committee, therefore, hope that this report will be used by the Norfolk Island community and the Federal Government as the basis for overdue manifest reform on the Island. My Committee colleagues and I will continue to take a keen and active interest in the responses to this report and in ensuring equality and a sustainable future for the Norfolk Island community.

The Committee is grateful to all those who participated in the first stage of this very important inquiry. We are especially grateful to those on the Island who assisted the Committee, in particular to the Members of the Norfolk Island Legislative Assembly for their advice and assistance and in kindly allowing the

use of the Assembly chamber for our hearings, and for the hospitality shown to the Committee by residents of the Island during our many visits.²

Senator Ross Lightfoot
Chairman

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Mr Justin Baker

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Terms of reference

That the Joint Standing Committee on the National Capital and External Territories report on measures to improve the operations and organisation of the Territory Ministry and Legislature on Norfolk Island, with particular emphasis on the need for a financially sustainable and accountable system of representative self-government in the Territory.

The inquiry should consider possible alternative measures, such as:

- a) direct elections for the position of Chief Minister; and*
- b) fixed terms of government.*

These matters should be considered in the context of the financial sustainability of self-government arrangements on Norfolk Island, with particular consideration of -

a) the findings of the Commonwealth Grants Commission documented in its 1997 report on Norfolk Island on the Territory's capacity to administer and fund obligations associated with:

- current and future government functions and responsibilities;*
- the Island's current and foreseeable infrastructure requirements;*
- the provision of government services on Norfolk Island at an appropriate level;*

b) subsequent government and parliamentary reports relevant to the above; and

c) the role of the Commonwealth and its responsibilities for Norfolk Island as part of remote and regional Australia.



List of recommendations

2 The Case for Reform

Recommendation 1

That the continuation of self-government for Norfolk Island, as provided for under the *Norfolk Island Act 1979* (Cth), be conditional on the timely implementation of the specific external mechanisms of accountability and reforms to the political system recommended in this report.

3 Improving the Quality of Governance

Recommendation 2

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 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.

Recommendation 3

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.

Recommendation 4

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.

Recommendation 5

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

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.

Recommendation 7

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).

Recommendation 8

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.

Recommendation 9

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

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.

Recommendation 11

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 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

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.

Recommendation 13

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.

Recommendation 14

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

Recommendation 15

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.

Recommendation 16

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 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.

4 Reforming the Structure of Government**Recommendation 17**

That the *Norfolk Island Act 1979* (Cth) be amended to incorporate:

- the designation of Chief Minister and the role of Chief Minister as leader of the government;
- the election of the Chief Minister, from among the sitting Members of the Legislative Assembly, at the first meeting of the Assembly immediately following a general election;
- the power of the Legislative Assembly to dismiss the Chief Minister through a vote of no confidence passed with a two thirds majority of the Assembly Members, at any time during the life of the Assembly;

-
- the duty of the Chief Minister to appoint up to three Ministers, from among the sitting Members of the Legislative Assembly;
 - the power of the Chief Minister to dismiss a Minister from office at any time;
 - the duty of the Chief Minister to allocate portfolio responsibilities and to table in the Legislative Assembly and publish in the *Norfolk Island Government Gazette* the division of executive responsibilities;
 - the duty of a Minister to administer the matters allocated to him or her by the Chief Minister; and
 - the number of Ministers not to exceed three.

Recommendation 18

That Section 35 of the *Norfolk Island Act 1979* (Cth) be amended to provide that in the event the Legislative Assembly resolves to dismiss the Chief Minister through a vote of no confidence passed with a two thirds majority of the Assembly Members, the Legislative Assembly is dissolved and writs for an election shall be issued by the Administrator.

Recommendation 19

That Sub-section 11 (8) of the *Norfolk Island Act 1979* (Cth) be repealed.

Recommendation 20

That Sections 41 and 42 of the *Norfolk Island Act 1979* (Cth) be amended to provide that:

- the Speaker and Deputy Speaker of the Legislative Assembly be appointed from among suitably qualified persons who are not elected Members of the Legislative Assembly;
- the Speaker and Deputy Speaker of the Legislative Assembly be appointed by the Administrator on the advice of the Federal Minister for Territories;
- the Speaker and Deputy Speaker of the Legislative Assembly be appointed immediately following each general election for the life of the Assembly;
- the role of the Speaker, and in the Speaker's absence, the Deputy Speaker, is to preside over meetings of the Legislative Assembly, and therefore, the Speaker does not have a vote on any matter before the Assembly; and
- the Speaker and Deputy Speaker not hold any executive office or any other public office on Norfolk Island.

Recommendation 21

That Section 40 of the *Norfolk Island Act 1979* (Cth) be amended to provide that:

- all meetings of the Legislative Assembly must be held in public, except during debate on matters relating to the employment conditions of public officers;
- all Members of the Legislative Assembly, unless excluded on the grounds of conflict of interest, are entitled to be present;
- the authority to call meetings of the Legislative Assembly rests with the Speaker, acting on the advice of the Chief Minister;
- notice of the time and place of meetings of the Legislative Assembly be published in the *Norfolk Island Government Gazette*;
- a 12 month forward calendar of Legislative Assembly sittings be issued and published in the *Norfolk Island Government Gazette*;
- the Speaker, on the advice of the Chief Minister, may recall the Legislative Assembly for a special sitting to deal with a matter that requires urgent attention;
- seven days notice of the special meeting must be given in writing to each Member of the Legislative Assembly and include an outline of the business to be considered; and
- the Speaker may extend the period of recall of the Legislative Assembly if the Speaker believes that for any reason insufficient notice has been given.

Recommendation 22

That the *Norfolk Island Act 1979* (Cth) and the *Public Moneys Act 1979* (NI) be amended to establish a Norfolk Island Legislative Assembly Standing Committee to Review Government Expenditure, with the power to examine the financial affairs of the Norfolk Island Administration and all statutory authorities and review the reports of the Commonwealth Auditor-General in relation to Norfolk Island, as outlined in Recommendation 14.

Recommendation 23

That Section 35 of the *Norfolk Island Act 1979* (Cth) be amended to provide that the term of the Legislative Assembly shall be four years from the date of its election, and that after the third anniversary of the declaration of the election results by the Australian Electoral Commission, the

Legislative Assembly may be dissolved by the Administrator at the request of the Legislative Assembly following a resolution to do so, passed by two-thirds majority.

Recommendation 24

That, consistent with other Australian jurisdictions, the *Norfolk Island Act 1979* (Cth) be amended to provide that the Administrator may, at his own discretion or on the advice of the Federal Minister:

- terminate at any time the appointment of an individual Minister or the Executive as a whole, where the Administrator is satisfied that the Minister or the Executive has acted unlawfully or corruptly;
- dissolve the Legislative Assembly and issue writs for a new election, where the Administrator is satisfied that the Legislative Assembly is incapable of effectively performing its functions, or is conducting its affairs in a grossly improper manner;
- that the Administrator publish a statement of reasons in the *Norfolk Island Government Gazette* as soon as practicable after the day of the dissolution;
- that the Federal Minister publish the statement of reasons in the *Commonwealth Gazette* as soon as practicable after the day of the dissolution and table the statement in each House of the Federal Parliament within 15 sitting days of that House after the day of the dissolution; and
- that the general election be held on a day specified by the Administrator by notice published in the *Norfolk Island Government Gazette*, not more than 90 days after the day of dissolution of the Legislative Assembly.

Recommendation 25

That Section 20 of the *Legislative Assembly Act 1979* (NI) be amended to introduce the 'block vote' variation of the first-past-the-post method of voting for elections to the Legislative Assembly, and that the Federal Government support this amendment.

Recommendation 26

That the *Norfolk Island Act 1979* (Cth) and the *Commonwealth Electoral Act 1918* (Cth) be amended to:

- ensure that all elections and referenda on Norfolk Island come under the supervision of the Australian Electoral Commission;
- that the Australian Electoral Commission be responsible for preparing and maintaining the electoral roll for Norfolk Island; and

- that the *Legislative Assembly Act 1979* (NI) be amended to reflect the amendments to the Commonwealth statutes.

Recommendation 27

That the *Norfolk Island Act 1979* (Cth) be amended to provide that Australian citizenship be reinstated as a requirement for eligibility to vote for and be elected to the Norfolk Island Legislative Assembly, with appropriate safeguards for the right to vote of all those currently on the Norfolk Island electoral roll.

Recommendation 28

That the *Norfolk Island Act 1979* (Cth) be amended to provide that the period for which an Australian citizen must reside on Norfolk Island before being eligible to enrol to vote in Territory elections and referenda be a minimum of six months.

Recommendation 29

That the *Electoral Act 1918* (Cth) and other relevant Commonwealth statutes be amended to provide for the inclusion of Norfolk Island in the Federal electorate of Canberra for the purposes of voting in Federal elections and referendums, and that:

- the existing provision, under the *Electoral Act 1918* (Cth), for optional enrolment by Norfolk Island residents be replaced with compulsory enrolment for all Norfolk Island residents who qualify under Section 93 of the *Electoral Act 1918* (Cth);
- those Norfolk Island residents currently enrolled in Federal electorates under the provisions of the *Electoral Act 1918* (Cth) to change their enrolment to the Federal Electoral Division of Canberra; and
- Norfolk Island residents who qualify for enrolment must, following the amendment, do so in the Federal Electoral Division of Canberra.

Recommendation 30

That, with the assistance of the Federal Government, the Norfolk Island Government immediately commence:

- a phased reform of Norfolk Island law, with priority for redrafting of existing laws to be determined by both the Federal and Territory governments, with the Federal Government having the final say in the case of disagreement;

-
- a new and dedicated legislative drafter be funded, supported by and report to the Commonwealth Office of Parliamentary Counsel and Commonwealth Attorney-General's Department to draft the aforementioned reforms; and
 - the new laws, once drafted, be implemented by an Ordinance introduced into the Norfolk Island Legislative Assembly by the Governor-General pursuant to Section 26 of the *Norfolk Island Act 1979* (Cth).

Recommendation 31

That, with the assistance of the Federal Government, the Norfolk Island Government enter into a service delivery agreement with the Commonwealth Office of Parliamentary Counsel and the Commonwealth Attorney-General's Department for the provision of its usual drafting services.

Recommendation 32

That the Federal Government assist the Norfolk Island Government in the immediate reform of the laws of Norfolk Island in relation to the following:

- review the Territory's child welfare law to ensure that it conforms with the *Convention on the Rights of the Child* and best practice in Australia;
- provide assistance to ensure reform of the Territory's child welfare law is complete within 12 months of acceptance of this recommendation;
- provide assistance to ensure reform of the Territory's criminal justice laws is complete within 12 months of acceptance of this recommendation;
- investigate the regulation of companies with a view to applying Federal company, bankruptcy and insolvency laws to the Territory;
- ensure that proposed uniform national legal profession laws apply to legal practitioners who practice in the jurisdiction of Norfolk Island;
- pending promulgation of the proposed national legal profession laws, legal practitioners on Norfolk Island be required to register in some other Australian legal jurisdiction; and
- review the *Employment Act 1988* (NI) to ensure it is consistent with best practice and legislation in other Australian jurisdictions and is in compliance with International Labour Organization Conventions and Australia's other international obligations.

The Way Forward

The Focus of the Inquiry

- 1.1 The Committee had been asked to examine “measures to improve the operations and organisation of the Territory Ministry and Legislature on Norfolk Island, with particular emphasis on the need for a financially sustainable and accountable system of representative self-government in the Territory”.¹ In addition to questions concerning the existing political arrangements, witnesses also raised concerns about the declining financial status of the Island, the inability to meet the Island’s infrastructure needs and barriers to economic growth.
- 1.2 The financial and administrative capacities of the Norfolk Island Government and the system of financial management have been the subject of a number of inquiries and reports.² A body of expert

1 Inquiry Terms of Reference.

2 See, for example, Butland, G. J. 1974, *Report to the Department of the Capital Territory of the Australian Government on a Long Term Population Study of Norfolk Island*; Nimmo, J. 1976, *Report of the Royal Commission into Matters relating to Norfolk Island*, Australian Government Publishing Service, Canberra; 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; Australian Law Reform Commission, 1994, Report No. 69, *Equality before the Law: Women’s Equality* (Chapter 14: *Women in Remote Communities: Norfolk Island – a case study*); Joint Standing Committee on the National Capital and External Territories, 1995, *Delivering the Goods*, Australian Government Publishing Service, Canberra; Australian Law Reform Commission, 1995, Report No. 77, *Open*

analysis and recommendations on the remedial steps necessary to overcome these problems was already available to the Federal Government and the Territory legislature.

- 1.3 The Committee has therefore focused its analysis in this report on the inadequacy of existing political arrangements and legal infrastructure, and on ways to improve and strengthen the governance arrangements for Norfolk Island. The Committee has formed the view that, in the absence of proper accountability mechanisms and stronger political leadership, it is unlikely the administration of the Island will improve. The measures recommended by the Committee are review mechanisms that increase the accountability of the Norfolk Island Government and Legislative Assembly to the people of Norfolk Island. The task of implementing and maintaining these review mechanisms falls singularly on the Commonwealth. The Committee does not intend for the Norfolk Island Government to take on additional, costly functions, nor should a small, isolated community, such as Norfolk Island, have to shoulder the burden of regulating itself alone.
- 1.4 The Terms of Reference directed that the governance arrangements for Norfolk Island “should be considered in the context of the financial sustainability” of the Territory in light of the findings of relevant government and parliamentary reports. In particular, the Committee was directed to consider the findings of the Commonwealth Grants Commission documented in its 1997 report on Norfolk Island on the Territory's capacity to administer and fund obligations associated with:
- current and future government functions and responsibilities;
 - the Island's current and foreseeable infrastructure requirements; and

Government: a review of the federal Freedom of Information Act 1982 (Chapter 11); Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra; Access Economics, 1997, *Norfolk Island: Recent Economic Performance, Present Situation, and Future Economic Viability. Is there a Case for Change?*; John Howard and Associates, 1998, *Norfolk Island Administration, Strategic Review*, Sydney; Human Rights and Equal Opportunity Commission, 1999, *Territorial Limits: Norfolk Island's Immigration Act and Human Rights*, J. S. McMillan Printing Group, Sydney; Joint Standing Committee on the National Capital and External Territories, 1999, *Island to Islands: Communications with Australia's External Territories*; 2001, *In the Pink or in the Red?: Health Services on Norfolk Island*; and 2002, *Norfolk Island Electoral Matters*, Canprint, Canberra; and *Focus 2002 – Sustainable Norfolk Island*, 10th Legislative Assembly, Norfolk Island.

- the provision of government services on Norfolk Island at an appropriate level.

In considering and making recommendations in respect of the above, the Committee was required to have regard to the role of the Commonwealth and its responsibilities for Norfolk Island as part of remote and regional Australia.

- 1.5 While these matters have been raised and touched upon in both this report and the report of the review of the annual reports of the departments of Transport and Regional Services and Environment and Heritage for 2001-02 in relation to Norfolk Island, the Committee is still to consider them in detail and make specific recommendations.³ It will do so and table a second report, specifically on these aspects. Before doing so, the Committee intends to consider the Government's Response to this report as well as the annual report review and the implementation of its recommendations. Any taxation or fiscal reforms implemented by the Norfolk Island Government in the interim, for example, as a result of the Territory Government's Revenue Base Review, will also be examined. Further hearings may be held and witnesses called as part of this process. The Committee will then table its second report for this inquiry, on the financial sustainability of the Territory. In light of the problems the Norfolk Island community is confronting, the Committee expects a rapid and comprehensive response from the Federal Government to these reports.

Structure of the Report

- 1.6 The report is divided into four chapters. Chapter Two outlines the case for reform. Two options for reform – withdrawing self-government or modifying self-government – and the respective merits of each, are discussed, with the Committee favouring the latter,

3 The role of the Commonwealth and its responsibilities for Norfolk Island as part of remote and regional Australia is raised in Chapter Two and Recommendation Two of this report. The provision of Commonwealth services to Norfolk Island is also addressed in the Committee's review of the annual reports of the departments of Transport and Regional Services and Environment and Heritage for 2001-02. Both reports also detail concerns with the Territory's administrative and financial capacity and the Territory Government's ability to raise and secure sufficient revenue to meet its current and future responsibilities to the Norfolk Island community at the appropriate level. The second report of the governance inquiry will also examine such areas as emergency service provision and the Island Hospital. See also reports listed in Footnote 2.

although with conditions. In this chapter, the status of the Territory, the enabling legislation and the role of the Commonwealth are also examined.

- 1.7 Chapter Three examines the quality of governance on Norfolk Island. The chapter begins with the recommendation that the Federal Government's role in relation to Norfolk Island be re-examined in light of the growing problems of sustainability the Territory is grappling with. A range of mechanisms for implementing good governance in the Territory are then examined. These include a code of ethical conduct for Legislative Assembly Members, the disclosure of pecuniary and non-pecuniary interests, access to an independent anti-corruption body, a series of administrative law measures and public reporting.
- 1.8 Chapter Four looks at the structure of government on Norfolk Island. In this chapter, the Committee makes a number of recommendations designed to improve the way in which the Territory Government and the Legislative Assembly work. These include the manner in which the Chief Minister and Ministers are chosen, the appointment of the Speaker and Deputy Speaker, the term of the Legislative Assembly, the electoral system, and the legal infrastructure.

Role of the Committee

- 1.9 The role of the Commonwealth with respect to Norfolk Island is not limited to the responsibilities of the Federal Government but also involves the Federal Parliament. It is the function of the Federal Parliament to participate in developing law and policy, to scrutinise government action and public administration and to inquire into matters of public interest on behalf of all Australians. A system of Federal parliamentary committees facilitates the work of the Parliament.
- 1.10 A Resolution of Appointment, passed by the House of Representatives on 14 February 2002 and by the Senate on 15 February 2002, is the source of authority for the establishment and operations of the Joint Standing Committee on the National Capital and External Territories.⁴ The Committee is appointed to inquire into
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4 By convention, where the Resolution of Appointment is silent joint committees follow Senate committee procedures to the extent that such procedures differ from those of the House.

and report to both Houses of Parliament, in an advisory role, on a range of matters.

- 1.11 The Committee was established in 1993. Prior to 1993, inquiries relating to external territories were dealt with by other committees - for example, the House of Representatives Standing Committee on Legal and Constitutional Affairs reported on legal regimes in the external territories in 1991. A Joint Standing Committee on the Australian Capital Territory has been appointed in each Parliament since 1956. In 1992, the Joint Standing Committee on the Australian Capital Territory changed its name to the Joint Standing Committee on the National Capital, to emphasise the significant change in the focus of the Committee's work which occurred following the introduction of self-government in the ACT in 1989. At the start of the 37th Parliament in 1993, a committee specifically to cover Australia's external territories was established for the first time.
- 1.12 The Committee has produced five reports in relation to the external territories so far, of which only two have exclusively focused on Norfolk Island:
- *Delivering the Goods*, February 1995;
 - *Island to Islands: Communications with Australia's External Territories*, March 1999;
 - *In the Pink or in the Red: Health Services on Norfolk Island*, July 2001;
 - *Risky Business: Inquiry into the tender process followed in the sale of the Christmas Island Casino and Resort*, September 2001; and
 - *Norfolk Island Electoral Matters*, June 2002.⁵

Conduct of the Inquiry

- 1.13 The Inquiry was initiated by a reference from the then Minister for Regional Services, Territories and Local Government, the Hon. Wilson Tuckey MP. The Committee resolved to accept the reference on 28 March 2003. Interest in an inquiry of this type arose from the nature of the evidence given by Island residents to the Committee's review of

5 Mr Geoff Bennett states that there have been "endless Parliamentary Committee Inquiries - around ten inquiries in a decade and a half is a little 'over the top!'", a view expressed by several other residents. Bennett, Submissions, p. 25. See also McCullough, Christian-Bailey, Blucher, Submissions.

the annual reports of the departments of Transport and Regional Services and Environment and Heritage for 2001-02. An advertisement calling for submissions was placed in *The Norfolk Islander* newsletter on 5 April 2003 and letters of invitation were sent to a wide range of people seeking submissions. The closing date for submissions was set at 2 May; however, as with all parliamentary inquiries, the Committee continued to accept submissions up to the finalisation of the draft report. The Committee has received 48 written submissions, taken oral evidence from 28 witnesses, held four days of hearings (two in public and two in-camera), received several private briefings, and held a number of private meetings with individuals and community groups from Norfolk Island.

- 1.14 As part of the Inquiry process, the Committee attempted to visit the Island in May 2003 to conduct on-Island hearings. Unfortunately, extreme weather conditions on the Island meant the visit had to be cancelled. A subsequent visit was arranged for July 2003. Four Committee members, the Inquiry Secretary and research officer visited the Island for four days, holding public and in-camera hearings, and meetings with the Norfolk Island Legislative Assembly Select Committee on Electoral and Constitutional Matters, community leaders and local organisations, the local media, the Administrator and the Official Secretary.

The Case for Reform

Here, the whole system, and everything arising from it is rotten. And unless an immediate stop is put to this kind of thing, the consequences will be most disastrous. It really appears to me wonderful that a small community like this should have succeeded in so completely gulling the whole world into the belief that they are an isle of saints.¹

The 'Isle of Saints'

- 2.1 Norfolk Island is a small community of some 2000 people isolated in the South Pacific more than 1600 kilometres north east of Sydney.² It has a unique history as a former penal settlement and home to the descendants of the mutineers from HMS Bounty and their Tahitian companions who had settled on Pitcairn Island in 1790.³ They were subsequently relocated to Norfolk Island in 1856 by the British Government with the consent of the Pitcairn Island population.⁴ The fact that Norfolk Island is a small and isolated community is a major

1 Magistrate Henry Wilkinson's description of the Norfolk Island community in his 1885 report to the Governor of New South Wales, Lord Augustus Loftus. Quoted in Nimmo, J. 1976, *Report of the Royal Commission into Matters relating to Norfolk Island*, Australian Government Publishing Service, Canberra, p. 30.

2 Norfolk Island Census of Population and Housing, 2001, *Statistical Report on Characteristics of Population and Dwellings*, Norfolk Island Government, p. 6.

3 Recent discovery of early Polynesian settlement on the Island now indicates occupation before its 'discovery' by the British in 1788.

4 See Nobbs, R. 1984, *George Hunn Nobbs 1799-1884: Chaplain on Pitcairn and Norfolk Island*, The Pitcairn Descendants Society, Norfolk Island.

factor affecting the social cohesion and sustainability of the community.

- 2.2 But Norfolk Island is significantly different from other Pacific Island communities in many respects. Most importantly, it is not an independent nation, but an Australian Territory and an integral part of Australia. As such, the responsibility for governance of the Island is shared between the local legislature and the Federal Government and Federal Parliament. In addition, the Island community is a mixture of descendants of the Pitcairn Island inhabitants relocated to Norfolk Island in 1856 and others who are a mixture of Australian and non-Australian citizens. Over the past 30 years, new and often wealthy arrivals have been attracted to the Island for its rural lifestyle and generous taxation arrangements.⁵

The 'Shining Beacon'

- 2.3 Many on Norfolk Island as well as the Norfolk Island Government aspire to belong to the community of Pacific Island nations.⁶ It has been claimed that Norfolk Island is a model for the Pacific.⁷ Having examined all the evidence put to it during this Inquiry, the Committee must disagree with this assessment. However, the Committee does agree that, in the current climate, Australia's long term national interest will be best served by ensuring the same principles of good governance in place in other states and territories of the Commonwealth are adhered to on Norfolk Island. In its efforts to promote good governance in the Pacific region and assist many Pacific Island countries to rebuild and reform their institutions of

5 See Butland, G. 1974, *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, pp. 68-9; Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, pp. 25-6.

6 The Norfolk Island Government has sought involvement, including separate, full membership, in the South Pacific Commission/Pacific Community; Norfolk Island has successfully sought membership of the Pacific Arts Council and Norfolk Island representatives attend the South Pacific Arts Festival; Norfolk Island has separate membership of the South Pacific Games Council and the Asia Pacific and Oceania Sports Assembly and participates in the South Pacific Games, most recently in Fiji in 2003. In December 2001, Norfolk Island hosted the South Pacific Mini Games.

7 Bennett, Submissions, p. 27 – cites Norfolk Island as a “shining beacon in the South Pacific”; Hughes, H. 2003, *Aid Has Failed the Pacific, Issue Analysis*, Centre Independent Studies, No.33, p.4; Hughes, H. “Way out for poor little rich island”, *The Australian*, 8 April 2003, p. 11; Mr Geoff Bennett, Transcript, 15 July 2003, pp. 47-8; Mr Ron Nobbs MLA, Transcript, 15 July 2003, p. 106.

government, Australia cannot afford to allow Norfolk Island – as an integral part of Australia in the Pacific - to languish behind. Australia also has a national interest and responsibility to ensure that citizens and residents of Australia are not disadvantaged by systemic weaknesses in the existing governance arrangements.

- 2.4 The Committee respects the strong desire of many Norfolk Islanders to preserve the traditions of the Pitcairn Island descendants such as their language, burial traditions, mutual self-help, family gatherings, community picnics and special holidays.⁸ The rural lifestyle of the broader Norfolk Island community is also one worth preserving and the source of much of the Island’s attraction to visitors. But none of these are central to the conduct of government, nor the operation of good governance principles. Norfolk Island’s history and cultural heritage are highly valued as part of Australia’s national and multicultural heritage. In this respect, Australia’s national interest and responsibility is also served by ensuring these aspects of Norfolk Island life are maintained.
- 2.5 However, despite claims by some in the community that Norfolk Island is ethnically and culturally distinct from Australia, and that Norfolk Islanders of Pitcairn descent are indigenous and Norfolk Island is their ‘homeland’, this is not borne out by the historical record.⁹ The notion that the descendants of the Bounty mutineers have an international or constitutional right to self-government was dealt with thoroughly by the Nimmo Royal Commission in the mid-1970s and by the High Court of Australia in the Berwick decision.¹⁰ Nor does the Committee accept that the “Norfolk Way” can in any

8 See Nimmo, J. 1976, *Report of the Royal Commission into Matters relating to Norfolk Island*, Australian Government Publishing Service, Canberra, pp. 84-5.

9 Robinson, Submissions, pp. 5-9. See the 1975 findings of the Senate Standing Committee on Foreign Affairs and Defence, which described Norfolk Island’s population as “ethnically and culturally akin to that of the mainland”, and stated that Norfolk Island’s “economic and social links are with Australia.” Senate Standing Committee on Foreign Affairs and Defence, 1975, *Report on United Nations Involvement with Australia’s Territories*, Australian Government Printing Service, Canberra. See also O’Collins, M. 2002, *An Uneasy Relationship: Norfolk Island and the Commonwealth of Australia*, Pandanus Books, Canberra.

10 Nimmo, J. 1976, *Report of the Royal Commission into Matters relating to Norfolk Island*, Australian Government Publishing Service, Canberra; *Berwick Limited v R R Gray, Deputy Commissioner for Taxation* (1976) 133 CLR 603. See also the finding of the Human Rights and Equal Opportunity Commission 1999 Report that “the Pitcairn descendants cannot be described as indigenous people [and]... there is no basis for asserting that there exists any right or claim to self-determination”. Human Rights and Equal Opportunity Commission, 1999, *Territorial Limits: Norfolk Island’s Immigration Act and human rights*, J. S. McMillan Printing Group, Sydney, p. 48.

way justify a lack of effective democratic governance.¹¹ Indeed, many Islanders have objected to the misuse of claims to cultural distinctiveness as an excuse for poor political and administrative practices or as an argument against reform. Used in this sense, the 'Norfolk Way' has an obvious analogy in the 'Pacific Way', a myth perpetuated in the region to justify corrupt practices.¹² If Norfolk Island is to live up to its aspiration of being a model of good governance in the region, it must embrace the best practices of good governance. Transparency and accountability in government is the essential framework for the social and economic development that will ensure the sustainability of future generations of Islanders.

The Perils of Speaking Out

2.6 The United Nations Development Programme (UNDP) defines governance as:

the exercise of economic, political and administrative authority to manage a country's affairs at all levels. Good governance is, among other things, participatory, transparent and accountable. It is also effective and equitable. And it promotes the rule of law. Good governance ensures that political, social and economic priorities are based on broad consensus in society and that the voices of the poorest and most vulnerable are heard in decision-making over the allocation of development resources.¹³

2.7 The capacity of a community to develop and sustain an effective and democratic system of government depends, in large measure, on the freedom to receive and impart information, to express ideas and to participate in public affairs.¹⁴ These freedoms are universally

11 The 1996 Report of the Norfolk Island Legislative Assembly *Select Committee to Define the Roles and Responsibilities of Members of Legislative Assembly of Norfolk Island*, in particular Recommendation 4, claims that "the Norfolk Island political system is evolving in its own special way" and therefore Westminster parliamentary conventions ought not to always apply.

12 Andrews J, *Pacific Islands Forum: Pacific Way the 'wrong way'*, *New Zealand Herald*, 16 August 2003; Levi, N. Secretary General, Pacific Islands Forum Secretariat, *The Forum's Eight Principles of Accountability: Progress to Date*, Press Statement, 27 February 2001.

13 <http://www.undp.org/fj/Gold/governance.htm>

14 See also Chesterman M, 2000, *Freedom of Speech in Australian Law*, Ashgate Dartmouth, United Kingdom, p. 301, in which the author explains the three classic justifications for

accepted as a fundamental human right.¹⁵ The High Court of Australia has also found that a necessary condition of representative democracy is the freedom to discuss and communicate information regarding political and economic matters.¹⁶

The 'Fear of Reprisal'

2.8 The Committee is therefore greatly disturbed by the number of witnesses whose participation was made contingent on written submissions being kept confidential and oral evidence taken in-camera (in almost secrecy). A common theme in these requests was that witnesses feared being ostracised or believed they were at risk of reprisal.¹⁷ Some witnesses have had to give evidence on the mainland in order to protect their identity on the Island.¹⁸ Some who have spoken on the public record expect to be vilified for doing so. This was foreshadowed in a submission from an influential resident, Dr Colleen McCullough, who criticised specific individuals for their likely participation.¹⁹ Other submissions and witnesses attacked the

freedom of speech, including that freedom to communicate on matters of public interest is an integral element of any genuinely democratic society.

- 15 The right to hold opinions and to freedom of expression is enshrined in Article 19 of the *Universal Declaration of Human Rights* and Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR). The right to take part in the conduct of public affairs is protected by Article 25 of the ICCPR. See also *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.
- 16 The implied freedom of political communication is derived from Sections 7 and 24 of the Constitution. The Committee is aware that differing views were expressed amongst the justices of the High Court as to whether residents in a Territory enjoy this implied freedom. See McHugh J, in *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, p. 246, who took the view that the territories power was not restricted by the implied limitation. For a contrary view see Dean and Toohey JJ who said the implication was drawn from the Constitution as a whole and applied to Section 122's power to make laws for the government of any territory. In *Theophanous v Herald & Weekly Times Ltd* Deane J held it was arguable and Brennan J asserted that the Territory legislatures are similarly limited by the constitutional right to free political speech - *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, pp. 164, 156.
- 17 Ms Alice Buffett, Transcript, 16 July 2003, p. 129, pointed out that: "there is the existence of fear and apprehension among quite a few people who would like to submit to the Joint Standing Committee and even to the committee of the Norfolk Island legislature but who ... will not do so ... in fear of reprisal". As explained elsewhere in this report, this is not a new or temporary phenomenon on Norfolk Island – see footnote 22 for example.
- 18 The Committee notes the Chief Minister's statement to the Assembly on 20 August 2003 that there has been no requirement for the Norfolk Island Legislative Assembly *Select Committee Inquiry into Electoral and Governance Issues* to hold in-camera sessions. Norfolk Island Legislative Assembly, *Hansard*, 20 August 2003, p. 1063.
- 19 McCullough, Submissions, pp. 11-14.

Committee for undertaking the Inquiry.²⁰ Mr Michael King pointed out that:

the Norfolk Island community is basically all committed out ... I am here to express concerns which others in the community have about the number of committees that have confronted the Norfolk Island community, committees which have focused on our concerns and our shortcomings and which have produced reams and reams of recommendations and voluminous reports and debates in this parliament here and perhaps in the federal parliament ... They are inquiries which have gobbled up our resources and energies and which, at the end of the day, have produced very few meaningful net outcomes for the Norfolk Island community. So it is little wonder that the community has openly expressed some indifference and scepticism about this committee of inquiry, and indeed about the concurrent local committee of inquiry. That is very sad and unfortunate.²¹

- 2.9 At one level, the reluctance to speak out for fear of reprisal expressed by many witnesses may simply reflect the nature of all small communities where social pressure to conform is greater than in the urban centres of the mainland and ‘demtul’ (they say/gossip) can exaggerate minor incidences. However, allegations of intimidation and reprisals that first arose during the Committee’s review of the annual reports of the departments of Transport and Regional Services and Environment and Heritage for 2001-02 in relation to the external territories have been independently corroborated by witnesses during the present Inquiry.²²
- 2.10 The Committee has no doubt that the majority of the community are peaceful and law abiding, hardworking, conscientious, and with a strong ethic of supporting those less well off. Yet evidence available to

20 A petition, with 81 signatures, declaring that “the governance of Norfolk Island is best left to the people and the elected representatives of the people of Norfolk Island” was submitted by Dr McCullough’s husband, Mr Ric Ion Robinson. See also Griffiths, Nobbs, Bennett, Christian-Bailey, Blucher, Buffett, Submissions; Geoff Bennett, Transcript, 15 July 2003, p. 49.

21 Mr Michael King, Transcript, 15 July 2003, p. 3.

22 The Australian Law Reform Commission reported in its 1994 case study of women on Norfolk Island that: “An atmosphere of fear and secrecy prevailed among those women who were willing to make submissions. The fear and lack of privacy inspired by this culture of violence was asserted as an explanation for the lack of attendance at the Commission’s public hearings”. Australian Law Reform Commission, 1994, Report No. 69, *Equality before the Law: Women’s Equality*, Sydney, p. 265.

the Committee alleges elements within the community exploit the current governance system, with its lack of effective checks and balances, for their own ends. It has become increasingly clear that beneath the surface, informal mechanisms are being allowed to operate with impunity. The Committee is aware of growing community concern over the activities of these elements.²³

2.11 The Committee has experience of other small isolated communities where such phenomena do not exist and the allegations cannot simply be dismissed as the norm in such communities. Based on the evidence presented to it, the Committee now has grave concerns that a culture of fear and intimidation has taken root on the Island to the detriment of the majority of the community. It is alleged, for example, that:

- acts of arson and physical assault have been used to pressure some residents to leave the Island;
- arson has been used to destroy property to gain financial advantage or cover up illegal dealings;
- instances of misuse and abuse of political power are commonplace; and
- interference with mail, e-mail and monitoring of telephones and other more subtle forms of intimidation have allegedly been used against people perceived as questioning the conduct of public affairs or who simply disturb the status quo of Island life.

2.12 Whether these acts are highly organised or not is immaterial. The undercurrent of intimidation and the overt criticism of those who express a different view do not sit well with the image of a participatory consensual style of politics or cohesive community life.²⁴ That said, it is possible for inquiry processes to be used to air frivolous grievances that could and should be dealt with through other means. However, there is no evidence that this has occurred in this Inquiry. Moreover, the evidence of fear of reprisal has been consistent over a number of inquiries and over a number of years.²⁵

23 Concerns and disquiet are being expressed through such avenues as letters to *The Norfolk Islander* and the internet - <http://www.nf/forum/forum.htm>.

24 McCullough, Griffiths, Christian-Bailey, Blucher, Reeves, Norfolk Island Government, Smith, Submissions; The Hon. Ivens Buffet MLA, Transcript, 15 July 2003, pp. 85-6; Norfolk Island Government, Transcript, 25 July 2003, pp. 42-44.

25 The Committee is not the first external body to identify the problem of secrecy and fear of reprisal. In 1994, the Australian Law Reform Commission conducted a case study of issues facing women on Norfolk Island as part of its inquiry into women and the law.

In his 1976 Royal Commission report, Sir John Nimmo noted a description of the Norfolk Island community in 1885:

Everybody is so closely related, and everybody lives in a 'glass house', and is afraid to throw a stone, so that the Chief Magistrate dare not administer even justice, or he would be pounced upon at once, and is in a constant fear of how a decision will be regarded by others, who may, and would retaliate, if they do not approve.²⁶

2.13 There is also a discernable frustration that ingrained views and practices are undermining Norfolk Island's political and economic development. Complacency, apathy and lack of professional and policy skills on the part of some within the Island government is also said to contribute to a lack of adequate competency in administration.²⁷

2.14 The evidence suggests a greater degree of division and factionalism in the community than is generally acknowledged and this is reflected in Legislative Assembly debate. This also appears to be an enduring phenomenon. Sir John Nimmo highlighted the factionalism existing within the community, noting that:

Pitcairn descendants, traders, operators of tax avoidance schemes, retired people and new farmers all constitute divergent groups. A superficial friendliness and conviviality masks a deal of resentment and dislike among some of the groups.²⁸

Nimmo concluded that it would be:

exceedingly difficult for this small faction-riddled and confined community to evolve for the Island policies that are

The Commission was alarmed by the culture of fear and secrecy operating on the Island compounded by the isolation which exposes women to greater risk of reprisals for speaking out about domestic violence and sexual assault. Australian Law Reform Commission, 1994, Report No. 69, *Equality before the Law: Women's Equality*, Sydney.

26 Nimmo, J. 1976, *Report of the Royal Commission into Matters relating to Norfolk Island*, Australian Government Publishing Service, Canberra, p. 30.

27 The Commonwealth Grants Commission found that "administrative capacity is the major factor limiting the Norfolk Island Government's ability to deliver services." - Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, pp. 205-8. See also Lozzi-Cuthbertson, Submissions, p. 3.

28 Nimmo, J. 1976, *Report of the Royal Commission into Matters relating to Norfolk Island*, Australian Government Publishing Service, Canberra, p. 62.

likely to receive general acceptance in respect of major matters.²⁹

- 2.15 More importantly, it appears that the values of accountability and transparency, respect for the rule of law, and inclusiveness are not widely understood nor accepted and that standards of conduct in public office often fall below acceptable standards. The seriousness of the problem should not be underestimated.³⁰ These values and standards are the essential foundation of good governance and go to the heart of this Inquiry.
- 2.16 Any attempt to suppress the expression of ideas or to participate freely and safely in the commercial, political and community life of the Island undermines the capacity of Norfolk Island to be a self-governing territory. Any informal alliance of interests in maintaining the status quo can only damage the viability of self-government. The Committee must conclude that had successive Norfolk Island governments put in place the necessary laws and policies, as well as ensuring that any such laws and policies were implemented effectively and appropriately, the community would not be bringing these concerns to a Federal Parliamentary Committee.

The Need for Reform

- 2.17 The Norfolk Island community has experience of a number of governance arrangements including direct rule, advisory councils and self-government. Naturally, the history and characteristics of Norfolk Island have a bearing on prevailing attitudes and expectations of self-government and the role of the Federal Government. Witnesses have given thoughtful evidence taking account of this experience and history which has, in turn, informed the Committee's deliberations.

29 Nimmo, J. 1976, *Report of the Royal Commission into Matters relating to Norfolk Island*, Australian Government Publishing Service, Canberra, p. 64.

30 The most graphic example is the recent and as yet unsolved brutal murder of Janelle Patton, a Temporary Permit Holder resident on the Island. In a community where 'everyone knows everyone else's business', it is difficult to accept that a code of silence can be so strong as to permit the ultimate violation – the taking of life. Mr Tom Lloyd, proprietor of *The Norfolk Islander* newspaper noted that: "I think that there are people who know who did it, but they're not going to talk. They're not going to open up." Quoted in Elder, J. *The evil eating at an island's dark soul*, *The Age*, 14 April 2002; See also ABC Radio National Background Briefing, 30 March 2003, *Murder on Norfolk Island: One year later, who killed Janelle Patton?*

Financial & Administrative Incapacity

2.18 The breadth of the issues canvassed during the inquiry gives an indication of the extent of the challenges now confronting the community. A litany of problems was identified by a wide range of witnesses, most importantly, the general lack of administrative and financial capacity of the Territory Government to manage the broad range of responsibilities it has been given and, the increasing, but unacknowledged reliance on the Federal Government for advice and support.³¹ The efforts of those in the Territory Government seeking to address these problems were undermined by out of date practices within the Administration and entrenched resistance to reform.³² Witnesses pointed out the inadequacy of the legal infrastructure and questionable and changing legislative priorities, the lack of legislative drafting resources and in-house legal services, and an excessive reliance on legal staff for everyday administrative matters.³³ A high

31 Mr Michael King, Transcripts 15 July 2003, p. 5. Griffiths, Submissions, p. 17. These problems have been confirmed by a plethora of independent and ultimately ignored reports, including Butland, G. J. 1974, *Report to the Department of the Capital Territory of the Australian Government on a Long Term Population Study of Norfolk Island*; Nimmo, J. 1976, *Report of the Royal Commission into Matters relating to Norfolk Island*, Australian Government Publishing Service, Canberra; 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; Australian Law Reform Commission, 1994, Report No. 69, *Equality before the Law: Women's Equality* (Chapter 14: *Women in Remote Communities: Norfolk Island – a case study*); Joint Standing Committee on the National Capital and External Territories, 1995, *Delivering the Goods*, Australian Government Publishing Service, Canberra; Australian Law Reform Commission, 1995, Report No. 77, *Open Government: a review of the federal Freedom of Information Act 1982* (Chapter 11); Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra; Access Economics, 1997, *Norfolk Island: Recent Economic Performance, Present Situation, and Future Economic Viability. Is there a Case for Change?*; John Howard and Associates, 1998, *Norfolk Island Administration, Strategic Review*, Sydney; Human Rights and Equal Opportunity Commission, 1999, *Territorial Limits: Norfolk Island's Immigration Act and Human Rights*, J. S. McMillan Printing Group, Sydney; Joint Standing Committee on the National Capital and External Territories, 1999, *Island to Islands: Communications with Australia's External Territories*; 2001, *In the Pink or in the Red?: Health Services on Norfolk Island*; and 2002, *Norfolk Island Electoral Matters*, Canprint, Canberra; and *Focus 2002 – Sustainable Norfolk Island*, 10th Legislative Assembly, Norfolk Island.

32 Mr Ron Nobbs MLA, Transcript, 15 July 2003, pp. 101-4.

33 See comments by the Chief Minister, the Hon. Geoff Gardner MLA, to the Legislative Assembly on 21 May 2003: "The under resourcing of the Legal Unit was another criticism that Chloe had and I think we would all, certainly me in particular as being the Minister responsible for the Legal Unit, very much like a bottomless pit of money to be able to resource the Legal Unit. It is a concern, the level of advice and the access to the advice being provided by the Legal Unit. That is not a fault of personalities that are in the Legal Unit, it is a matter that we have discussed with the CEO to try and draw some attention

turnover of professional staff, especially those not from the Island, has been a persistent problem over many years.

- 2.19 The Norfolk Island taxation system is criticised for being regressive, disadvantaging low income families and falling disproportionately on tourists.³⁴ Inadequate collection of tax by the Norfolk Island Government and tax avoidance within the community which, in turn, reduces available revenue was also raised. A lack of adequate financial planning by successive Norfolk Island governments and their failure to account for depreciating capital stock and inability to fund new major works was highlighted and is a matter of serious concern.³⁵ Inadequate auditing and public reporting falling short of even the most very basic of parliamentary and corporate governance standards was also raised as emblematic of the deeper problem. The situation was best described by the Hon. David Buffett MLA, during debate on the *Appropriation Bill 2002* (NI):

This is an unsatisfactory budget. It does make inadequate provisions for the island's need and Members around the table have given a number of examples and I'll just add a couple more. Insufficient waste management funding for example. No money for essential immigration review processes. No justice package funding and Court costs are really not realistically addressed. These are just a few more examples to others that have been mentioned to date. It's not a full catalogue but it's some additions. This budget puts us on a maintenance diet. We'll stay alive but there is no growth, and it's been explained already why we're in this position, why we've got this budget, because our commitments and our costs are overtaking our revenue stream, and we have

to the senior management positions within the Public Service to rely on their own expertise in the preparation of documents and the provision of advice and rather than to shift a lot of the requests for advice directly to Legal and have Legal prepare the papers that they themselves as the officers are charged to prepare." Norfolk Island Legislative Assembly, *Hansard*, 21 May 2003, pp. 943.

34 In his submission, Mr Bruce Griffiths calls for "a broader based tax system" - Griffiths, Submissions, p. 17.

35 In its report *Focus 2002 – Sustainable Norfolk Island*, 10th Legislative Assembly, Norfolk Island, the Norfolk Island Government acknowledges the extent of the financial and administrative problems confronting the Island. The Focus 2002 report is the outcome of a review of "the way we currently do things", initiated by the 10th Legislative Assembly in May 2002. The report notes that "quite obviously, a trend has become evident over past years, namely that expenditure is rising at a rate far greater than income. This situation is not sustainable." (p. 3). See also the Hon. David Buffett MLA, Transcript, 25 July 2003, pp. 45-6; Bennett, Submissions, p. 32; Lozzi-Cuthbertson, Submissions, p. 3.

delayed, we've neglectfully delayed finding the long term solutions. In last years budget and in previous years budgets the Assembly allocated funds to address this very problem but it wasn't done and the problem hasn't gone away and it's now very much knocking on the door, it's right there. What was done last year when this situation was apparent, of course and the year before that and the year before that. Firstly look at the expenditure, we cut expenditure. Now of course some expenditure needed curtailment, it always needs curtailment but the regularity which we addressed it meant that it lead to a reduction and in may cases elimination of capital programmes and maintenance programmes and so whilst a reasonably balanced budget for that particular year was achieved, we've progressively run down, we have not maintained our assets and provided little capital investment for long term future arrangements in the island. In some years we have made withdrawals from our reserves and we've in other years siphoned money off from the Government Business Enterprises. That is money over and above the dividend that they normally pay to the Revenue Fund and the monies that we siphoned off were monies that the GBE's needed for their own capital programmes and equipment replacement needs. Examples there are the electricity generators, the telephone exchange and of course coming up the Airport resurfacing upgrade. That's just some things in terms of expenditure. What have we done on the revenue side. In most cases we have merely increased the take from the traditional taxing facilities without adequate thought and effort on what our present revenue raising methods are in their relevance in terms of how the economy of the island is presently structured, measured against for example how it might have been structured 20, 30, 50 years ago when some of those present taxing measures were instituted. Some of the results of those increases have been these, to drive public income sources offshore, for example the FIL. Another example is that it is brought Customs Duty to a level where prices are forced to a non competitive level in the marketplace and in other instances, being unfairly burdensome for some personal income levels. They are just a couple of examples that I mention ... it does deserve explanation so that we see it in a sense so that we don't go on repeating it and we find a remedy ... Now if our annual

budget doesn't do this and I've tried to demonstrate to you that it doesn't, then the financial review must remedy this ... The real test is as to whether we can really measure up to adequate management of it. That's the real test and we are the ones who are on the line.³⁶

2.20 The report of the financial review that Mr Buffett referred to was tabled in the Legislative Assembly on 19 March 2003. At the direction of the Legislative Assembly, the *Focus 2002* Report only investigated areas for possible expenditure reductions, with revenue options not being examined "until all expenditure savings had been identified".³⁷ This is an admission of the serious obstacles facing any unilateral effort at fiscal and budgetary reform by the Norfolk Island Government alone.³⁸ The Minister for Finance, the Hon. Graeme Donaldson MLA, announced to the Assembly, on 19 March 2003, a two-stage proposal to increase revenue:

Stage 1 is an increase to existing revenue sources to provide additional funds in the short term. Stage 2 is a longer term approach where the revenue base would be broadened, made more equitable, more robust and able to meet the needs of the Norfolk Island community for the foreseeable future.³⁹

The history of previous attempts at financial reform by the Norfolk Island Government, the independent findings as to the Government's lack of administrative capacity and the fact that political opposition and criticism to this proposal is already evident on Norfolk Island, make it unlikely the proposal will move 'from rhetoric to reality' without considerable local political courage and significant Federal Government involvement and assistance.⁴⁰

36 Norfolk Island Legislative Assembly, *Hansard*, 5 June 2002, pp. 381-83.

37 *Focus 2002 – Sustainable Norfolk Island*, 10th Legislative Assembly, Norfolk Island, pp. 4, 25.

38 See Department of Transport and Regional Services, Submissions, pp. 57-8.

39 Norfolk Island Legislative Assembly, *Hansard*, 19 March 2003, p. 26.

40 The Chief Minister, the Hon. Geoff Gardner MLA, reported to the Legislative Assembly on 21 May 2003 that in relation to the recommendations of the *Focus 2002* Report: "the Assembly as a whole haven't addressed those recommendations as yet, they haven't been brought to the Assembly for consideration and adoption. However there are a number of recommendations within there that are reflected within the budget or within current initiatives that are in place, that have been put in place by the Government and the Public Service and a significant number of those recommendations believe it or not are either embraced by the budget or currently underway. ... those are matters that really need to be brought back to this forum to have further discussion on and a position taken on that as to whether something like that is going to be adopted and progressed and there are a number of matters within those recommendations that need that type of

Failures within the Political System

- 2.21 In relation to the political system, witnesses drew the Committee's attention to an insufficient separation between the Legislative Assembly and the Executive Council, lack of cohesion in the Executive Council and a general inability to address long-term issues that affect the whole community. There was widespread agreement that the existing 'Illinois' voting system led to bloc voting entrenching power in some minority groups which had undermined representative democracy. While citizens' initiated referenda have become an accepted part of the political system, unquestioned adherence to the result of poorly constructed petitions, questionnaires and referenda reflects a lack of local leadership and objectivity. It was also reported that intimidation and use of the 'ring around' were not uncommon and have distorted referenda results.⁴¹
- 2.22 Witnesses persuasively argued that the prevalence of pecuniary and non-pecuniary conflicts of interest by Members of the Legislative Assembly affecting government decision making and the excessive involvement of Assembly Members in daily operations of the

attention." Norfolk Island Legislative Assembly, *Hansard*, 21 May 2003, pp. 943. However, a number of Assembly Members have stated their opposition to the *Focus 2002* Report recommendations and the Territory Government's two stage revenue raising proposal – see, for example, Norfolk Island Legislative Assembly, *Hansard*, 19 March 2003, p. 27, and 18 June 2003, pp. 978, 999, 1000.

- 41 See, for example, a statement by Mrs Vicky Jack MLA in the Legislative Assembly that during the gathering of signatures in November 2002 for a petition against proposed electoral reform, "people were harassed ... they did not appreciate their names being read out of an electoral roll and being contacted by phone while at work or at home, wanting to know why they hadn't signed it. I disagree with the way that that petition was carried out. A petition to me means that the people come along, they feel free to sign their name. They do not get followed". Norfolk Island Legislative Assembly, *Hansard*, 5 March 2003, p. 11. Other witnesses have stated that for this petition, a stall was set up outside the entrance to the Island's main shopping centre and all entering were "invited" to sign. The stall was manned by at least one MLA and members of the Pitcairn Descendants Society among others. The petition organisers then worked their way through the Island's electoral roll to identify those voters who had not signed and those people were contacted in an attempt to secure their signatures. Some signed the petition because of concerns about being stigmatised in the community. By way of example of the tactics employed, it is alleged the organisers of the petition sent a representative and a copy of the petition to the lightering crew working a ship to obtain their signatures. Two men who refused to sign the petition allegedly came in for abuse and pressure from the rest of their workmates. See also Letter to the Editor, *The Norfolk Islander*, 8 March 2003, from one of the petition organisers, Mr Rick Kleiner, disputing Mrs Jack's view of the November 2002 petition. In his letter, Mr Kleiner states that it was not the intention of the petition organisers to pressure people into signing "and I hope (and believe) it didn't occur often".

Administration seriously undermined the quality of governance.⁴² A lack of transparency and accountability in government decision making and insufficient avenues for arms-length redress of administrative decisions was raised. The operation of the immigration, social security and health assistance systems were singled out for particular grievance. Inadequate protection of occupational health and safety standards for workers was widely acknowledged.⁴³ The Commonwealth has also been criticised for imposing an ‘unworkable voting system’,⁴⁴ the withdrawal of Medicare in 1989 and the exclusion of Norfolk Island from Commonwealth social security, family assistance and supplementary payments.

2.23 In view of all the above, the vast majority of witnesses have called for reform of the political system and governance arrangements although opinion is divided over the detail. These are not the concerns of a small minority, but are issues raised by those of Pitcairn descent and other long-term residents with the interests of the Island community at heart. Some current and former Members of the Legislative Assembly have also expressed their personal frustration with the difficulty they experience in making unpopular decisions and resistance to change.⁴⁵ The Committee takes all of their concerns most seriously.

42 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.

43 In 1997, the Commonwealth Grants Commission identified a number of serious shortcomings with the workers compensation scheme and occupational health and safety provisions established by the *Employment Act 1988* (NI). See Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, p. 104. In an example of this problem, Mr Tom Meyer, a worker employed by Island Industries, a company owned by Mr John Brown, a Member of the Legislative Assembly lost both legs and was blinded (according to the Committee’s understanding) in an accident at the Mt Pitt road construction site on 29 January 2003, but had no immediate remedy under partially enacted and inadequate Territory employment laws. See *The Norfolk Islander*, 1 February 2003, Vol. 38, No. 10; and Norfolk Island Legislative Assembly, *Hansard*, 12 February 2003, pp. 4-5.

44 In his evidence, Mr Geoff Bennett states that the Illinois voting system was “dumped on us; we did not want it” – Transcript, 15 July 2003, p. 54. In 1982, a Federal Government inquiry was held into an alternative voting system for Norfolk Island – see Abbott, L. J. & Snider, G. A. 1982, *Report of an Inquiry into the type of Electoral System most appropriate to elections of the Norfolk Island Legislative Assembly*, Canberra. A referendum on voting systems was held in December 1982 with the majority favouring the Illinois system.

45 Mr Michael King, Transcript, 15 July 2003, p. 5.

History Repeating

2.24 Most, if not all the issues raised, have been dealt with in numerous inquiries and reports over the past 10 to 15 years but, to a large extent, have remained unaddressed.⁴⁶ Not surprisingly, there is an understandable frustration and cynicism about whether this Inquiry will result in any significant concrete change. There should be no illusion but that the quality of governance goes directly to the viability of the community. The Committee strongly believes that the current form of self-government for Norfolk Island is not sustainable unless there is fundamental change in the political, financial and administrative arrangements of the Island.

Options for Reform

2.25 Witnesses have raised a wide range of issues with the Committee and taken the opportunity for constructive dialogue about options for reform. The broad spectrum of ideas falls largely into two main approaches:

- Option A - withdrawal of internal self-government and replacement with an appropriate local government model; or
- Option B - strengthening the framework for self-government by imposing structural reform of the existing political system.

Option A – Withdrawing Self-Government

2.26 It has been forcefully argued that self-government is simply not achievable because of the inherent limitations of any small community. The *Norfolk Island Act 1979* (Cth) gave a mere 2000 residents the right to elect and fund their own government to exercise many of the responsibilities of State and Federal governments including education, health, taxation, immigration, law and order and social welfare. On this view, the existing model is too complex and onerous for such a small pool of people to deliver services and programmes at the level required to secure good government for the Island community. The existing model of self-government, therefore, should be abolished and replaced with a more limited governance arrangement similar to the local government models in New South

46 See Footnote 31 for the list of reports.

Wales or Queensland. Witnesses envisage an extensive resumption of powers by the Federal Government. The heritage of the Pitcairn Island descendants and the Islanders as a whole would, of course, continue to be recognised and preserved where practicable.⁴⁷

- 2.27 This approach would open the way for greater cooperation with the Federal Government, investment in basic infrastructure leading to greater economic opportunities and job creation for Islander youth, improved health and aged care services, and the end to an immigration system that has created a distinct underclass of Temporary Entry Permit holders. Specifically, the need for aged care accommodation, replacement of major capital items such as the hospital, repair of the severely degraded roads and construction of a harbour were some of the examples of major development projects beyond the financial capacity of the current government.⁴⁸ The need to diversify the tourism industry and exploit opportunities for agricultural and energy projects were also cited as neglected areas of opportunity. Advocates do not believe that this will be possible under the existing system of government and with current revenue raising arrangements.
- 2.28 Such fundamental reform would effectively mean an end to the ‘great experiment’, which has been described as “a wonderful, visionary model ... having great worth in the region”.⁴⁹ From this perspective, the “experimental government for Norfolk Island” has failed and a smaller system of government will be less of a financial burden and would be to the ultimate benefit of all Islanders and for the common good.⁵⁰
- 2.29 The Commonwealth has the unambiguous power to both endow and withdraw self-government from Norfolk Island.⁵¹ To withdraw self-government in its present form, it would be necessary to abolish the existing political institutions by amending or repealing the *Norfolk*

47 Friend, Woolley, Submissions.

48 See *Focus 2002 – Sustainable Norfolk Island*, 10th Legislative Assembly, Norfolk Island. See also statement by the Hon. David Buffett MLA, Transcript, 25 July 2003, p. 45. Department of Transport and Regional Services, Submissions, p. 56.

49 Mr Geoff Bennett, Transcript, 15 July 2003, p. 47. See also comment by the Hon. Ivens Buffett MLA – “this experiment we call self-government” – in King, Submissions, p. 315.

50 Mr Geoff Bennett, Transcript, 15 July 2003, p. 47. See also references to the ‘experiment’ in Nobbs, R. 1984 *George Hunn Nobbs 1799-1884: Chaplain on Pitcairn and Norfolk Island*, The Pitcairn Descendants Society, Norfolk Island, pp. 65-66, 68, 81, 88.

51 Section 122 of the Constitution is the source of the Commonwealth’s power to make laws for the government of a territory.

Island Act 1979 (Cth). The creation of a new representative body with limited powers, closer to that of a local/shire council, requires new or amending Federal legislation. Under Section 122 of the Constitution, the Commonwealth could legislate to provide a model of localised government with whatever revenue raising powers are considered appropriate to local circumstances and requirements.⁵²

- 2.30 The above model implies a significant resumption of powers traditionally carried out by the Commonwealth and many of those usually performed by State governments. In practical terms, governance would be delivered through a combination of direct local and Federal administration and service delivery arrangements between the Commonwealth and a State(s) for health, social welfare, education and infrastructure. This would remove the need for costly administrative arrangements and legislative programmes that inevitably lag behind. The model the Committee has in mind is one which would be similar to the service delivery arrangements agreed to between the Federal and Western Australian Governments for the Indian Ocean Territories.
- 2.31 The Federal Government would need to take account of the financial implications of the abolition or significant amendment of the current model of self-government but this need not be prohibitive. The issue of income tax would need to be addressed. Administratively, legislatively and in terms of cost effectiveness, the simplest solution would be to remove the exemption that income from Norfolk Island sources currently enjoys under the *Income Taxation Assessment Act 1936* (Cth), which already applies to the Territory. There is no fundamental legal or policy reason why a system of income tax could not be designed specifically for Norfolk Island.⁵³ As happened with Christmas Island, any taxation regime could be introduced over several years to allow local businesses and individuals to adjust gradually to the new revenue raising measures. The Committee

52 Under Section 481 of the *Local Government Act 1993* (NSW), local councils in NSW may obtain income from rates, charges, fees, grants, borrowing and investments.

53 See the statement of the Norfolk Island Minister for Land and the Environment, the Hon. Ivens Buffett MLA, to the Legislative Assembly on 18 June 2003: "perhaps its been said in a number of occasions that Norfolk Island is at the crossroads. Well perhaps we've been at the cross roads for three or four years in terms of what we are doing with the budget and the aspirations of this community and perhaps we have considered all the easy options in terms of revenue raising and have avoided the question of equity in the levies and revenue that we raise but perhaps we are at the point where part of the new revenue raising options that have been provided for in this budget we will look at the question of equity." Norfolk Island Legislative Assembly, *Hansard*, 18 June 2003, p. 1005.

believes there is considerable support for the urgent, fundamental change of this nature on the Island.

Option B – Modifying Self-Government

2.32 Some witnesses were adamant that the fundamental problem is a lack of representation caused by the prevalence of bloc voting, an inequitable taxation system, inadequate accountability measures, poor financial planning and the lack of an adequate social safety net. Reform in these areas, then, would be a significant positive readjustment to the present system. On this view, the best approach would be to retain the existing institutions of government, but with the following essential reforms:

- modification to improve accountability and financial management;
- the resumption of Commonwealth responsibility for delivery of key services and programmes on-Island such as social welfare, health and immigration;⁵⁴
- rectify the distortions in the electoral system to open the political and administrative systems to change; and
- impose an equitable tax regime, including on income, to provide financial sustainability.⁵⁵

2.33 The inability of successive Island governments to address these fundamental issues, poor coordination in the relationship between the Commonwealth and Norfolk Island, and the inherent limitations of a small and isolated community to manage a broad range of complex matters, are the context in which the Committee must consider its recommendations.⁵⁶ Having considered the evidence, the Committee is in no doubt that Norfolk Island is at a crossroads and the case for reform is clear. In the Committee's view, systemic problems in the political system and deficiencies in the legal infrastructure, combined with the smallness and isolation of the community, make delivery of effective government inherently difficult.

54 The delivery of these services has proved onerous to the Norfolk Island Government and recipients of these services. The Commonwealth Grants Commission recommended that some services should be resumed by the Commonwealth, which is better placed to deliver them. Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra.

55 See Chapter 9, Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra.

56 Buffett, Bennett, Submissions.

The Committee's Preference – Option B

- 2.34 Nonetheless, the Committee believes that significant reform can be achieved without withdrawing self-government from Norfolk Island at this stage. But the Committee is strongly of the view that self-government should only be retained on the condition that specific external mechanisms of accountability and reforms to the political system are put in place. The retention of self-government must ultimately be conditional on the ability of the Norfolk Island Government to demonstrate a capacity to ensure the long term sustainability of the Island community.

Recommendation 1

- 2.35 **That the continuation of self-government for Norfolk Island, as provided for under the *Norfolk Island Act 1979 (Cth)*, be conditional on the timely implementation of the specific external mechanisms of accountability and reforms to the political system recommended in this report.**
- 2.36 Administrative and anti-corruption laws must be applied, the system of government must be modified to increase Territory ministerial responsibility and deal with conflicts of interest. There should be a system of financial and performance audits put in place. Legal policy advice and drafting assistance to the Norfolk Island Government's in-house lawyers must be provided by the Commonwealth or by arrangement with, for example, the Australian Capital Territory. The legal profession must be properly regulated. Circuit magistrates from the ACT and provision for off-Island trials in serious criminal and civil matters must be introduced.
- 2.37 The Committee believes the Commonwealth must resume responsibility for a range of matters such as immigration, provision of aged care facilities, and child protection. A system of taxation tailored to the conditions and requirements of Norfolk Island must be designed to ensure equity and ongoing financial sustainability. Access to Medicare and the Pharmaceutical Benefits Scheme and reciprocal arrangements for social welfare assistance to ensure equality of access to income support should be put in place. Many of these matters have been the subject of previous inquiries by the Committee and other bodies such as the Commonwealth Grants Commission. The

Federal Government should examine these recommendations and implement those still outstanding.

Implementing Reform

- 2.38 Individual members of the Legislative Assembly and Executive Council have acknowledged there are systemic weaknesses in the current system of government and administration that impede their ability to discharge their responsibilities.⁵⁷ The current Norfolk Island Government has represented well the achievements of self-government over the past 25 years, but also acknowledges that it lacks the administrative and financial capacity to discharge many of its functions and that there are flaws in the existing political system.⁵⁸
- 2.39 Yet, at the same time, the Norfolk Island Government continues to seek greater transfer of power from the Commonwealth, to remove the Commonwealth from the Territory's affairs to the maximum extent possible and allow the most important reform in governance arrangements to 'mature' over time, whilst simultaneously arguing for assistance from the Commonwealth, but only when requested and then only on the terms acceptable to the Norfolk Island Government.⁵⁹ These contradictory propositions are symptomatic of the entrenched denial of fundamental flaws in the present arrangements and the lack of manifest capacity for self-government. Such views have attracted criticism from many Island witnesses.⁶⁰ The suggestion that 'cultural difference' or the 'Norfolk Way' is a legitimate justification for avoiding democratic accountability has found little support.
- 2.40 Therefore, the reforms recommended in this report must not be left to the Territory Assembly. The Committee is firmly of the view that left to the Territory Assembly, reforms capable of implementation through local laws are unlikely to ever eventuate or be of sufficient standard. These reforms must be implemented by the Federal Parliament through amendments to relevant Commonwealth legislation such as the *Norfolk Island Act 1979* (Cth).
- 2.41 Before turning to a discussion of the details of these proposals, it is necessary to provide a brief outline of the constitutional status of

57 Mr George Smith MLA, Transcript, 15 July 2003, p. 23; Mr Ron Nobbs MLA, Transcript, 15 July 2003, p. 105.

58 Norfolk Island Government, Submissions, p. 244-46.

59 Norfolk Island Government, Submissions, p. 233; Mr George Smith MLA, Transcript, 15 July 2003, p. 28.

60 Woolley, Submissions, p. 1; Mr Michael King, Transcript, 15 July 2003, p. 5.

Norfolk Island, the current system of government, the Commonwealth's responsibilities and the role of the Committee.

The Territory's Status

- 2.42 The constitutional status of Norfolk Island clearly remains a subject of 'live' debate only within the Island community and has a significant impact on the political life of the Island. It shapes residents' views on the nature of government and the relationship with mainland Australia. For example, one witness proposed a special Constitutional Convention and others questioned the legitimacy of the Committee, arguing against 'Federal interference', in evidence and in the media.⁶¹
- 2.43 An oft repeated claim is that Norfolk Island is a 'dependent territory', rather than a part of the Australian Federation, on the basis that Norfolk Island was 'given' to the inhabitants of Pitcairn Island by the British Crown.⁶² The implication being that the descendants of these Pitcairn Island inhabitants have an ultimate right to independence from Australia as a separate nation and the purpose of self-government is to work toward that future goal or a type of free association, although views differ on that point.⁶³ Some have argued that recognition as a 'dependency' would provide a basis for limiting Commonwealth powers, but, at the same time, retain access to Commonwealth financial assistance, advice and support. This view was expressed by the Hon. David Buffett MLA on behalf of the Norfolk Island Government, and is an underlying theme of the Norfolk Island Government's submission.⁶⁴

61 Robinson, McCullough, Bennett, Submissions; See also the petition in Robinson, Submissions, pp. 19-24; Mr Bruce Griffiths, Transcript, pp. 15-16; Mr Geoff Bennett, Transcript, 15 July 2003, p. 49; McIlveen, L. 5 July 2003, *Author battles plan to make islanders pay tax*, The Australian; Chipperfield, M. 20 July 2003, *Paradise isle vows mutiny at Australian tax threat*, UK Telegraph.

62 Robinson, Submissions, p. 7- 8.

63 Mr Geoff Bennett, however, acknowledges that the 'independence movement' on Norfolk Island, "has always been in the minority view and unlikely to ever dominate or sway public opinion in this direction in sufficient numbers to ever be a threat." - Bennett, Submissions, p. 32.

64 Norfolk Island Minister for Tourism and Community Services and Speaker of the Legislative Assembly. Mr Buffett stated that the Norfolk Island and Commonwealth governments should "cement into place the parameters of activity and authority of both governments to elaborate further responsibilities and to guard against unnecessary excursions by one upon the other". The Hon. David Buffet MLA, Transcript, 25 July 2003, p. 62.

- 2.44 Whilst the Committee acknowledges the heritage of the Pitcairn descendants, the notion that Norfolk Island was ceded to the Pitcairn Island inhabitants who were relocated there in 1856, the Island later becoming a dependency of Australia, is not supported by the legal or historical record.⁶⁵ The Committee believes this aspect of claimed Norfolk Island history is a myth perpetuated by a minority of Pitcairn descendants and other more recent, often wealthy, arrivals motivated by self-interest to resist the imposition of income tax. This is not a new phenomenon and was also identified during the Nimmo Royal Commission as damaging to the development and interests of the Island community as a whole.⁶⁶
- 2.45 The Committee is not persuaded that, even if the option was legally or constitutionally available, independence or free association reflects the beliefs or aspirations of the majority of Pitcairn descendants or other residents of the Island. On the contrary, the evidence suggests that most witnesses regard the continued advocacy of this issue as a costly and confusing diversion from the primary responsibility of self-government – the development of a just, equitable and secure community life in which all Island residents can participate.⁶⁷
- 2.46 Detailed histories of Norfolk Island can be found elsewhere.⁶⁸ For the purpose of this Inquiry, it is sufficient to recall that Norfolk Island was not ‘ceded’ to the Pitcairn Island inhabitants. In 1854, in response to requests from the Pitcairn Island inhabitants, the British Government agreed to make specific grants of land on Norfolk Island available to them. Permission to reside on Norfolk Island was granted to ensure the long-term survival of the community which subsequently moved there in 1856 from Pitcairn Island. In a letter dated 5 July 1854, Toup Nicolas, British Consul for the Society Islands, confirmed the arrangement for the relocation of the Pitcairn Island inhabitants to Norfolk Island:

65 See Nobbs, R. 1984 *George Hunn Nobbs 1799-1884: Chaplain on Pitcairn and Norfolk Island*, The Pitcairn Descendants Society, Norfolk Island, p. 47, and chapters 6 and 7.

66 Nimmo, J. 1976 *Report of the Royal Commission into Matters relating to Norfolk Island*, Australian Government Publishing Service, Canberra, p. 335.

67 It has also been suggested that many in the community do not fully understand the implications of the term ‘dependency’ and that, as Australian citizens, they believe that it implies a closer relationship to the rest of Australia.

68 Nobbs, R. 1984 *George Hunn Nobbs 1799-1884*, Pitcairn Descendants Society of Norfolk Island, Norfolk Island; Hoare, M. 1999, *Norfolk Island: A Revised and Enlarged History 1774-1998* (5th Ed), Central Queensland University Press, St. Lucia, Queensland; O’Collins, M 2002 *An Uneasy Relationship: Norfolk Island and the Commonwealth of Australia*, Pandanus Books, Canberra.

I am at the same time to acquaint you that you will be pleased to understand that Norfolk Island cannot be ‘ceded’ to the Pitcairn Islanders, but that grants of land will be made for allotments of land to the different families; and I am desired further to make known to you that it is not at present intended to allow any other class of settlers to reside or occupy land on the island.

- 2.47 At that time, Norfolk Island was annexed to the Colony of Van Diemen’s Land (later Tasmania).⁶⁹ On 24 June 1856, Norfolk Island was transferred from the jurisdiction of Van Diemen’s Land and made a distinct and separate settlement under the control and administration of the Governor of the Colony of New South Wales.⁷⁰ The situation remained essentially unchanged until Norfolk Island was accepted by the Commonwealth as a Territory under its authority by Order in Council of 30 March 1914, pursuant to Section 122 of the Constitution.
- 2.48 The status of the Island was considered in *Newbery v The Queen*.⁷¹ In that case, Justice Eggleston found the *Norfolk Island Act 1957* (Cth) to be constitutionally valid, and that the history of, and historical documents relating to, Norfolk Island, showed that it became, in 1914, a Territory placed by the Crown under the authority of the Commonwealth within the meaning of Section 122 of the Constitution. Justice Eggleston ruled that the words “placed under the authority of the Commonwealth” had no special meaning or conferred no special status on Norfolk Island.⁷² Any remaining doubts about the status of the Island were removed by the High Court of Australia in 1976 in *Berwick’s Case* in which Justice Mason – with whom the other judges agreed – stated that, the history of the Island made it “abundantly clear that Norfolk Island forms part of the Commonwealth of Australia”.⁷³ The Hon. Robert Ellicott, QC, widely

69 In 1844, Norfolk Island was removed from the control of the Colony of New South Wales and annexed to the Colony of Van Diemen’s Land.

70 By Order in Council under the *Australian Waste Lands Act 1855* of the Imperial Parliament.

71 *Newbery v The Queen*, 1965, Supreme Court of Norfolk Island, Federal Law Reports, No. 7, pp. 34-42.

72 *Newbery v The Queen*, 1965, Supreme Court of Norfolk Island, Federal Law Reports, No. 7, p. 41.

73 In *Berwick’s Case*, the High Court specifically stated that by virtue of Section 122 the Commonwealth can pass laws for the direct administration of Norfolk Island by the Commonwealth Government or endow the Island with ‘separate political, representative and administrative institutions’. *Berwick Limited v RR Gray, Deputy Commissioner for*

respected on-Island as the architect of self-government for Norfolk Island, concurred with this position in evidence before the Committee on 25 July 2003.⁷⁴

2.49 The issue of Norfolk Island's constitutional status was also exhaustively examined in detail as part of the 1976 Nimmo Royal Commission into the status of Norfolk Island and its relationship with the Commonwealth.⁷⁵ The Royal Commission heard witnesses and examined documentary evidence from Britain and New Zealand as well as Australia and concluded there was no evidence to support the proposition that Norfolk Island was ceded to the Pitcairn Island inhabitants.⁷⁶

2.50 The issue was subject to further inquiry in 1987 by a Constitutional Commission, an independent body established to review the Australian Constitution. An Advisory Committee to the Constitutional Commission was charged with reporting on the distribution of power and Territorial self-government. The Advisory Committee rejected a proposal by the then Norfolk Island Government that, while acknowledging "the close and friendly relations that have existed between Norfolk Island and Australia over a long period", argued for the Constitution to be amended:

to put it beyond doubt that Norfolk Island is, from a political, social and legal point of view, more appropriately to be regarded as a dependency of the Commonwealth of Australia rather than an integral part of the Commonwealth.⁷⁷

2.51 The Advisory Committee noted that no problems resulted from Norfolk Island's status as part of the Commonwealth and there were sharp differences of opinion within the Island community about the Island's relationship with the rest of Australia.⁷⁸ The Advisory Committee further noted that:

Taxation (1976) 133 CLR 603; See also *Newbery v The Queen* (1965) 7 FLR 34; *Brown v The Administration of Norfolk Island and Others* [1991] 101 ALR 201, p. 30.

74 The Hon. Robert Ellicott, QC, Transcript, 25 July 2003, p. 33.

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

76 See Nimmo, J. 1976 *Report of the Royal Commission into Matters relating to Norfolk Island*, Australian Government Publishing Service, Canberra, Chapter 17, pp. 327-342.

77 Constitutional Commission, 1987, *Advisory Committee on the Distribution of Powers Report*, p. 145.

78 Constitutional Commission, 1987, *Advisory Committee on the Distribution of Powers Report*, p. 145.

The Norfolk Island Government also argued that the Commonwealth's power should be curtailed by requiring local consultation and approval to be obtained with respect to the application of any federal legislation to the Island. On the other hand, the argument put by several residents was that the Commonwealth should retain its residual power to intervene in the affairs of the island.⁷⁹

The Advisory Committee concluded that creating a new status of 'dependency' would not alter the constitutional right of the Commonwealth to routinely apply Federal laws to the Territory and rejected the proposal to limit Section 122 to prevent it from doing so.⁸⁰

- 2.52 In light of the evidence put to the current Inquiry, and the previous examination of this issue by independent expert bodies including the High Court of Australia, the Committee sees no reason to recommend that the question of Norfolk Island's constitutional status be subject to further inquiry. Further, the Island's capacity for self-government and performance of the existing political and administrative systems are of fundamental importance. Distraction from these urgent matters is unlikely to attract the support of the majority of Islanders.

The Legal Position

- 2.53 In summary, Norfolk Island is a self-governing Australian Territory and part of the Commonwealth of Australia, vested with legislative and executive capacity by the Federal Parliament under Section 122 of the Australian Constitution. The Island was governed initially under the *Norfolk Island Act 1913* (Cth), subsequently the *Norfolk Island Act 1957* (Cth) and now under the *Norfolk Island Act 1979* (Cth). As a self-governing Territory, Norfolk Island is a jurisdictional unit within a Federal system, but under Section 122 of the Australian Constitution the Commonwealth has exclusive power to pass laws in respect of Norfolk Island.⁸¹

79 Constitutional Commission, 1987, *Advisory Committee on the Distribution of Powers Report*, p. 148.

80 Constitutional Commission, 1987, *Advisory Committee on the Distribution of Powers Report*, p. 148. Rather the Advisory Committee regarded application of Federal laws as an administrative matter that was adequately catered for by Section 18 of the *Norfolk Island Act 1979* (Cth) which provides that Federal laws will not apply unless expressly provided.

81 In *Berwick's Case*, the High Court held that the *Income Tax Assessment Act (No. 4) 1973* (Cth) was validly applied to Norfolk Island. The Act was held to be a law within the meaning of Section 51 (ii) (taxation power) and a law within the meaning of Section 122.

- 2.54 The Commonwealth does not share power with the Territories in the same way that it does with the six States. The relationship between the States and the Commonwealth is reflected in Chapter One, Section 51 and Chapters Four and Five of the Constitution.⁸² Chapter Five expressly guarantees the continued existence of the States, and preserves the State constitutions which enable the States to pass laws on any subject matter.⁸³ The subject matter upon which the Commonwealth can legislate is set out in Section 51, subject to the guarantees and limitations found elsewhere in the Constitution. Importantly, a valid Commonwealth law will override an inconsistent State law to the extent of the inconsistency by virtue of Section 109.
- 2.55 By contrast, the Territories are dealt with separately in Chapter Six of the Constitution and Section 122, the Territories power, is often referred to as the ‘non-federal’ part of the Constitution.⁸⁴ Section 122 states:
- The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.
- 2.56 Section 122 is interpreted by the High Court to be a plenary power – that is, a power equivalent to the “peace, order and good government” powers assigned to the States under their own

82 Section 51 sets out the Commonwealth’s heads of legislative power by listing the subject matter upon which the Commonwealth can legislate, Chapter 4 deals with matters of trade and finance and Chapter 5, which is devoted entirely to the States, expressly guarantees the continuing existence of States and preserves each of the State constitutions. Section 109 is the mechanism by which valid Commonwealth legislation may override the law of a State, to the extent of any inconsistency.

83 Sections 106 and 107 of the Constitution. Note that in Chapter 5 of the Constitution, the States are prevented from raising and maintaining military forces (Section 114), from coining money (Section 115), and from discriminating against residents of other States (Section 117).

84 The question of whether and to what extent the power to make laws for the government of a territory is subject to the rest of the Constitution is fraught with inconsistency and uncertainty. However, for the purpose of this Inquiry those issues are of limited relevance. The key issue is whether the Commonwealth retains its power to make laws for the government of a territory despite having devolved powers of self-government to a community. Legal advice is that the Commonwealth’s power to endow and withdraw self-government remains unchanged by the exercise of Section 122 to pass laws for self-government.

Constitution Acts.⁸⁵ Section 122 is “capable of exercise in relation to Territories of varying size and importance which are at different stages of political and economic development”.⁸⁶

- 2.57 It is not relevant for the purpose of the Inquiry to examine the emerging case-law on Section 122, its relationship to Section 51 and other express and implied guarantees and limitation in the rest of the Constitution.⁸⁷ However, it is worth noting that the implied limitation on Commonwealth legislative powers which protects the continued existence of the States as constituent parts of the Federal system and their capacity to function as governments does not apply to the territories “nor to any institution of government created for the territories by the Commonwealth Parliament”.⁸⁸ There is also:

nothing to prevent the Commonwealth Parliament from enacting a law under Section 122 which ‘singled out’ or discriminated against a territory or territories in some way, or which restricted or burdened the functions of government in a territory.⁸⁹

- 2.58 In *Berwick’s case*, the High Court discussed the scope of Section 122 with particular reference to Norfolk Island. In that case, the Court determined that the Commonwealth can:

... on the one hand pass laws providing for the direct administration of Norfolk Island by the Commonwealth Government ‘without separate territorial administrative institutions or a separate fiscus’ and on the other hand endow the Island with ‘separate political, representative and administrative institutions, having control of the fiscus’. It is therefore open to the Commonwealth to lay down any form

85 *Tau v The Commonwealth* (1969) 119 CLR 564.

86 *Berwick Limited v RR Gray, Deputy Commissioner for Taxation* (1976) 133 CLR 603, Barwick C.J., McTiernan and Murphy JJ, p. 607.

87 See Aitken G. & Orr R. 2002, *Sawer’s The Australian Constitution, 3rd Edition*, Australian Government Solicitor, Canberra, pp. 127-130; and Nygh P. E. 1963-4, *Federal and Territorial Aspects of Federal Legislative Power over Territories A Comparative Study*, ALJ, Vol. 37, pp. 72-81.

88 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31; *Re Australian Education Union: ex parte Victoria (“State Public Servants”)* (1995) 184 CLR 188, p. 231; see also Horan, C. 1997, *Section 122 of the Constitution: A “Disparate and Non-Federal” Power?* in Federal Law Review, Vol. 25, No. 1, p. 20.

89 Horan, C. 1997, *Section 122 of the Constitution: A “Disparate and Non-Federal” Power?* in Federal Law Review, Vol. 25, No. 1, p. 20.

of government and administration for the Island under Australia that it chooses.⁹⁰

- 2.59 Thus, although the endowment of self-government depends for its support upon the enactment of legislation by the Federal Parliament, it could also be withdrawn by the Federal Parliament.⁹¹ Alternatively, the Commonwealth can validly make significant modifications to the system of government created under the *Norfolk Island Act 1979* (Cth).

The *Norfolk Island Act 1979* (Cth)

- 2.60 Norfolk Island was endowed with its current model of self-government by the Federal Parliament in 1979. Under the *Norfolk Island Act 1979* (Cth), Norfolk Island is constituted as a separate body politic with its own institutions of government. The Act established a nine member local legislature with the power, subject to certain restrictions, to make laws for the peace, order and good government of the Territory; an executive council; a Supreme Court, and the power to create other courts of inferior jurisdiction. An Administrator administers the government of the Territory, on advice from the Island's Executive Council.⁹²
- 2.61 The *Norfolk Island Act 1979* (Cth) was the product of lengthy consultations following the 1976 Nimmo Royal Commission, although the final statute departed in significant ways from many of the Commission's recommendations.⁹³ It recognises the unique history and cultural heritage of the Pitcairn descendants, the

90 Nimmo, J. 1976, *Report of the Royal Commission into Matters relating to Norfolk Island*, Australian Government Publishing Service, Canberra, p. 329.

91 See, for example, the discussion on the status of the Northern Territory in Nicholson G.R. 1985, *The Constitutional Status of the Self-Governing Northern Territory*, 59 A.L.J. p. 701.

92 See Chapter 9: *The Territories*, in Aitken G. & Orr R. 2002, *Sawer's The Australian Constitution*, 3rd Edition, Australian Government Solicitors, Canberra, pp. 127 -130.

93 Nimmo, J. 1976, *Report of the Royal Commission into Matters relating to Norfolk Island*, Australian Government Publishing Service, Canberra. For example, see recommendation 3 which proposed that "the residents of Norfolk Island be included in the electorate of Canberra for the purpose of giving them representation in the Commonwealth Parliament"; recommendation 9 proposed that the Norfolk Island Assembly "not be given the right to borrow money but be given the right to apply to the Commonwealth Grants Commission for financial assistance"; recommendation 33 proposed that "all social security, pensions and medical, hospital and other health benefits dispensed by the Commonwealth be extended to the residents of Norfolk Island"; recommendation 39 proposed that "citizens in Norfolk Island be made liable to the same levels of taxation and other imposts as apply in the Australian Capital Territory"; and recommendation 71 proposed that Federal legislation be applied to Norfolk Island unless the contrary was expressly stated.

geographical isolation of the Norfolk Island community and the express desires of the residents of Norfolk Island at that time.⁹⁴ The Act has absolutely nothing to do with the conferral of sovereignty on the Island community or with its secession from Australia. The stated rationale for the Act and the conferral of self-government was and is the “special relationship” of the Pitcairn Island descendants with Norfolk Island and “their desire to preserve their traditions and culture”.⁹⁵

- 2.62 The model of self-government enshrined in the *Norfolk Island Act 1979* (Cth) was an experiment subject to review. The basic aim was to equip the Territory “with responsible legislative and executive machinery to enable it to run its own affairs to the greatest practicable extent”.⁹⁶ In his second reading speech, the Hon. Robert Ellicott, then Minister for Home Affairs and the Capital Territory, said that:

...the Government believes that it should try to develop for Norfolk Island an appropriate form of government involving the Island’s own elected representatives, under which the revenue necessary to sustain that government will be raised internally by its own system of law. This Bill provides a framework within which that object can be achieved...

Under the Bill, wide powers will be exercised by an elected Legislative Assembly and an Executive Council of Norfolk Island comprising the executive members of the Legislative Assembly who will have ministerial type responsibilities. The Bill also contains provisions that will ensure the preservation of the Commonwealth’s responsibility for Norfolk Island as a Territory of the Commonwealth.⁹⁷

- 2.63 The Act devolved legislative and executive power over a wide range of local, State and Commonwealth type responsibilities to the Territory Assembly and Executive Council. The Island’s Legislative Assembly has the power to legislate for all things except coinage, the raising of defence forces, the acquisition of property on other than just

94 See Preamble, *Norfolk Island Act 1979* (Cth).

95 Preamble, *Norfolk Island Act 1979* (Cth), p. 3.

96 House of Representatives Hansard, 23 November 1978, pp. 3311. In its 1987 *Issues Paper*, the Advisory Committee to the Constitutional Commission pointed out that the relationships of the Northern Territory, Australian Capital Territory and Norfolk Island with the Commonwealth are quite different from each other. Given the small size of the Norfolk Island community it was expected that the Commonwealth would need to provide financial assistance.

97 House of Representatives Hansard, 23 November 1978, pp. 3311.

terms, and euthanasia. This means that the Assembly can enact laws on virtually any topic that it chooses, including on matters that are the preserve of the Federal Government elsewhere (such as customs and immigration). Once the Assembly enacts a law, the Norfolk Island Government is equipped with broad executive powers and responsibilities to administer, fund and enforce that law. The Act also recognises the fact that the Norfolk Island Government was, and is, primarily responsible for the delivery of government services on the Island.

- 2.64 Under the Act, the Administrator is the nominal head of the Norfolk Island Government.⁹⁸ The Administrator must rely on the advice of the Norfolk Island Government Ministers when exercising powers and functions under the *Norfolk Island Act 1979* (Cth) or under any other Act, in relation to matters set out in Schedule 2.⁹⁹ Federal oversight was retained by the requirement that Norfolk Island legislation and Executive action by the Administrator in relation to Schedule 3 matters remained subject to any possible contrary instruction of the Federal Minister.¹⁰⁰ The Governor-General retains a residual legislative power in respect of matters that are not dealt with in either Schedule 2 or Schedule 3.¹⁰¹ Federal oversight, through the mechanisms of Schedules 2 and 3 of the Act, the requirement for referral by the Administrator to the Federal Minister or Governor-General in specific instances and the subsequent inter-governmental consultation, is a means of ensuring that Federal Government laws, policies or programmes applicable to Norfolk Island do not conflict with Territory laws and that proposed Norfolk Island laws do not conflict with national obligations under international law.

98 Section 5 (1), *Norfolk Island Act 1979* (Cth).

99 Section 7, *Norfolk Island Act 1979* (Cth). Schedule 2 lists 93 subject matters including, among other things: raising revenues for the purpose of matters specified in the schedule; other public monies; public works; Public Service of the Territory; public utilities; community and cultural affairs; child, family and social welfare; prices and rent control; housing; finance credit and assistance; lotteries; betting and gaming; maintenance of law and order and the administration of justice; regulation of business and professions; industry; tourism; telecommunications and postal services; building controls; transportation; health and safety; and maintaining public registers.

100 Schedule 3 of the *Norfolk Island Act 1979* (Cth) lists ten matters where an exercise of legislative or executive authority of the Norfolk Island Administrator is subject to overriding instruction of the Commonwealth: fishing; customs (including the imposition of duties); immigration; education; human, animal and plant quarantine; labour and industrial relations, workers compensation and occupational health and safety; moveable cultural heritage; and social security.

101 Sections 27-28A, *Norfolk Island Act 1979* (Cth).

- 2.65 The Administrator has the power, at any time, to terminate the appointment of a Member of the Legislative Assembly to the Executive Council if, in his or her opinion, there are exceptional circumstances that justify his or her doing so.¹⁰² This power has never been exercised. The convention would be that such power would only ever be exercised on ministerial advice.
- 2.66 Since 1979, the policy of successive Federal Governments has been:
- To reaffirm the undertaking given by the Federal Government in 1976 that it would retain responsibility for maintaining Norfolk Island as a viable community;
 - To reaffirm the commitment made in 1979 to internal self-government for Norfolk Island as enshrined in the Act; and
 - That the funds necessary to sustain self-government will be raised primarily by the Norfolk Island Government itself under legislative and executive powers provided to it by Federal Parliament for that purpose.¹⁰³
- 2.67 It is within this framework that a range of matters - some very broad in scope - have been added to the list of legislative topics on which prior consultation between the Federal and Norfolk Island Governments is not required under the *Norfolk Island Act 1979 (Cth)*, namely by amendment to Schedule 2 of the Act.¹⁰⁴ In 1979, there were some forty-two subject matters listed in Schedule 2. Another six items were added to Schedule 2 on 12 July 1985, including the public service of the Territory, public works, lotteries, betting and gaming, civil defence and emergencies and territory archives. On 28 September 1989, another 30 items were added extending Schedule 2 to 74 subject matters.¹⁰⁵ Again on 18 June 1992, another suite of powers were transferred bringing Schedule 2 matters up to 93 items.¹⁰⁶ The effect

102 Section 13 (2), *Norfolk Island Act 1979 (Cth)*.

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

104 Schedule 2, *Norfolk Island Act 1979 (Cth)*.

105 Among those matters transferred were, for example, water resources; energy planning and regulation; business names; price and cost indexes; administration of estates and trusts; registration of medical practitioners and dentists; public health; navigation, including boating; inquiries and administrative review; fees or taxes imposed by certain Norfolk Island enactments such as the *Absentee Landowners Levy Ordinance 1976*; *Public Works Levy Ordinance 1976*; *Departure Fee Act 1980*; *Cheques (Duty) Act 1983*; *Financial Institutions Levy Act 1985*; and *Fuel Levy Act 1987*.

106 The transfer included matters such as pricing and rent control; public utilities; housing; community and cultural affairs; industry (including forestry and timber, pastoral, agricultural, building and manufacturing); mining and minerals within all the land of the Territory above the low water mark; legal aid; corporate affairs; child, family and social

of these transfers was to remove direct Federal oversight of the Assembly's legislative and executive power in respect of those matters. However, despite this periodic expansion of the range of matters over which prior consultation between the Federal and Norfolk Island governments is not required under the Act, it was neither the intention nor the effect of these arrangements to displace the responsibility of the Commonwealth to protect individual rights, to ensure that the Territory government is accountable and to encourage the economic and social development of the Island.¹⁰⁷

The Commonwealth's Responsibility

- 2.68 Ultimate responsibility for the governance of Norfolk Island rests with the Federal Minister responsible for Territories and the Federal Parliament. This is not just because Section 122 of the Constitution gives the Commonwealth the power to make laws for the Territory. The Federal Government also has certain obligations towards Australian citizens and non-Australian residents wherever they live within the Federation.
- 2.69 In a recent policy statement, the then Federal Minister for Territories, the Hon. Wilson Tuckey MP, explained that these obligations were not limited to matters of national significance, such as defence and security or immigration. These obligations also extend to the welfare of the community, ensuring equitable access to basic services; access to justice, an environment where people were free from criminal elements; open, transparent and accountable political administration and the use of public resources; the protection of cultural heritage and sustainable use and protection of the natural environment for future generations.¹⁰⁸
- 2.70 Additionally, international law obligations apply to all the constituent units of a federation. The Commonwealth has the responsibility to ensure that Australia's international treaty and customary law

welfare; regulation of businesses and professions; the legal profession; maintenance of law and order and the administration of justice, correctional services and private law.

107 The Hon. Wilson Tuckey MP, Minister for Regional Services, Territories and Local Government, 'The Federal Government's Interests in, and Obligations to, Norfolk Island', *The Norfolk Islander*, 28 September 2002. See also Department of Transport and Regional Services, Submissions, p. 48. See Appendix A for the Minister's Statement in full.

108 The Hon. Wilson Tuckey MP, Minister for Regional Services, Territories and Local Government, *The Federal Government's Interests in, and Obligations to, Norfolk Island*, tabled in the Legislative Assembly on 25 September 2002 and published in *The Norfolk Islander*, 28 September 2002.

obligations are met.¹⁰⁹ There is an obligation to ensure the consistency of local law with Australia's treaty and customary law obligations that applies to Norfolk Island to the same extent that it does to other State and Territory Governments.¹¹⁰

- 2.71 The impact of international law on domestic law and policy should not be underestimated. Australia is party to over 2000 treaties which cover a broad range of subject matter, including, for example, trade, commerce, intellectual property, industrial relations, environment, human rights and criminal laws essential to the governance of matters of regional and global concern. Although domestic legislation is required to give effect to rights and obligations created under international law, in certain circumstances, the courts may have recourse to Australia's international obligations to interpret statutes and develop the common law.

109 For example, the *Universal Declaration of Human Rights* (UDHR) and the *International Covenant on Civil and Political Rights* (ICCPR) protects fundamental rights to freedom of expression and the right to vote. Since the acceptance by Australia in 1991 of the first Optional Protocol to the ICCPR, individuals have had the right to lodge a complaint with the UN Human Rights Committee if they believe that their rights under the treaty have been violated.

110 Article 27 of the *Vienna Convention on the Law of Treaties* provides that a State party to a treaty may not invoke a deficiency in its internal law as a justification for a failure to perform its treaty obligations, ATS 1974 No. 0002; see also, for example, Article 2, ICCPR which requires that a State (Australia) to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant.

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,

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.**

Reforming the Structure of Government

If ever there's been anything that has made me fear that we are totally incapable of handling self government, it has been this issue.¹

Change should not be feared but seen as a necessary part of maturation and development. However one would hope that change would be 'rational and directed, a genuine reformation and not a mere parrying of external thrusts and threats'.²

The Existing System

- 4.1 The *Norfolk Island Act 1979* (Cth) provides for an Administrator, an Executive Council and Executive Offices, a Legislative Assembly, and a judiciary comprised of a Supreme Court and courts of inferior jurisdiction created under Norfolk Island laws. As explained earlier in the report, the intention underlying the Act is that the Territory Government is primarily responsible for the delivery of government services and programmes on Norfolk Island and the funding of such services and programmes. To this end, the Act confers plenary legislative powers on the Territory Legislature and confers executive

1 Comment by Mr John Brown MLA during debate in the Assembly on the management of the Norfolk Island hospital – Norfolk Island Legislative Assembly, *Hansard*, 18 December 2002, p. 410.

2 Nobbs, R. 1984, *George Hunn Nobbs 1799-1884: Chaplain on Pitcairn and Norfolk Island*, The Pitcairn Descendants Society, Norfolk Island, p. 109.

authority on Territory Ministers in respect of all laws passed by that Legislature.³

- 4.2 Consultation between the Territory and Federal Governments is required in respect of proposed laws on certain subjects. For instance, the Act requires the Administrator to seek and abide by Federal ministerial instructions in respect of decisions on certain subjects.⁴ The *Norfolk Island Act 1979* (Cth) enables the Legislative Assembly to pass laws on any subject matter, but the Federal Government's "endorsement is required for some matters of particular sensitivity or national importance".⁵ Schedules 2 and 3 of the Act provide for this through the assent process outlined in Section 21 of the Act. Schedule 2 lists those matters for which the Norfolk Island Government "has full executive authority".⁶ Any laws on matters listed in Schedule 3 must be referred by the Administrator to the Federal Minister.⁷ Matters not listed on either schedule are referred by the Administrator for the Governor-General's pleasure.⁸ These requirements of the Act "ensure that Territory laws are not in conflict with national policies, programmes and agreements, or with Australia's international obligations".⁹ As an Australian Territory and part of the Australian Federation, Norfolk Island remains subject to the legislative power of the Federal Parliament and the Federal Government retains its constitutional powers to enact Federal laws in respect of the Island.¹⁰

3 Item 42, Schedule 2, *Norfolk Island Act 1979* (Cth).

4 It is important to note that this requirement has limited impact due to the breadth of subjects listed in Schedule 2 of the Act, and the fact that the requirement only affects the Administrator – successive Norfolk Island Governments have been progressively removing the Administrator's powers under Territory laws so that Administrator has a relatively minor statutory decision making role.

5 Department of Transport and Regional Services, Submissions, p. 50.

6 Department of Transport and Regional Services, Submissions, p. 50. There are currently 93 items listed under Schedule 2.

7 There are currently 10 items listed under Schedule 3.

8 Section 21 (2) (b), *Norfolk Island Act 1979* (Cth).

9 Department of Transport and Regional Services, Submissions, p. 50. However, the enrolment qualification provisions of the *Legislative Assembly Act 1979* (NI) infringes Article 25 of the *International Covenant on Civil and Political Rights* that enshrines the right of all citizens to vote and stand for election.

10 Under Section 18, *Norfolk Island Act 1979* (Cth) Federal laws must be expressly applied to the Territory if they are intended to do so.

The Administrator

- 4.3 An Administrator, appointed by the Governor-General, is nominally responsible for the administration of the government of Norfolk Island. The Administrator performs three primary roles. Firstly, the Administrator exercises functions similar to that of a State Governor, as the representative of the Crown. As such, the Administrator is part of the executive arm of the Norfolk Island Government.¹¹ The Administrator performs similar ceremonial and social duties to those of the Crown's representatives in other parts of Australia.
- 4.4 The Administrator's second role is as the Federal Government's representative on the Island. The Office of the Administrator provides advice and information on Federal Government policy, programmes and laws. The Administrator also serves as a channel of communication between the Federal and Territory governments and between Island residents and Commonwealth agencies.
- 4.5 Thirdly, the Administrator exercises the duties of the office under the *Norfolk Island Act 1979* (Cth), other Commonwealth legislation and those conferred by local statutes, in a manner that is consistent with the tenor of his or her commission.¹² The Administrator is required to act on the advice of the Norfolk Island Executive Council in relation to matters specified in Schedule 2 of the Act.¹³ In relation to Schedule 3 matters, the Administrator must act on the advice of the Executive Council unless the advice is inconsistent with instructions given by the Federal Minister.¹⁴
- 4.6 The Administrator is assisted by an Official Secretary. Until recently, it has been the practice to appoint a legally qualified person to the position of Official Secretary given his or her important role as advisor to the Administrator and the nature of the Administrator's functions and powers. The Official Secretary acts as the Deputy

11 Department of Transport and Regional Services, Submissions, p. 75.

12 Section 7, *Norfolk Island Act 1979* (Cth).

13 The exercise of the Administrator's powers are governed by section 7 of the Act. In relation to Schedule 2 matters the Administrator must act on the advice of the Executive Council. Subsection 7 (1) (a), *Norfolk Island Act 1979* (Cth).

14 Subsections 7 (1) (b) and 7 (2) and (3), *Norfolk Island Act 1979* (Cth). See also the general requirement that the Administrator act on the advice of the Executive Council where the statutes require him or her to do so; where the statute requires him or her to form an opinion he or her must act on his or her own discretion and in all other cases in accordance with such instructions, if any, as are given by the Federal Minister - Subsection 7 (1) (c) - (e), *Norfolk Island Act 1979* (Cth).

Administrator in the Administrator's absence.¹⁵ The Department of Transport and Regional Services meets the costs associated with the Office of the Administrator.¹⁶

The Legislative Assembly

- 4.7 The *Norfolk Island Act 1979* (Cth) confers plenary power, subject to the Act, on the Legislative Assembly to "make laws for the peace, order and good governance of the Territory". This power does not extend to the making of laws:
- authorizing the acquisition of property otherwise than on just terms;
 - authorizing the raising or maintaining of any naval, military or air force;
 - authorizing the coining of money;
 - which permit or have the effect of permitting ... the form of intentional killing of another called euthanasia ... or the assisting of a person to terminate his or her life.¹⁷
- 4.8 The Legislative Assembly consists of nine members, who are elected for a maximum term of three years.¹⁸ The Assembly must meet at least once every two months.¹⁹ In practice, the Assembly meets informally and in private every week and formally each month where more controversial matters are voted on. The average life of an Assembly is 2.5 years.²⁰ Although there are "large changes" in the membership of the Executive Council after each election, there is not a high turnover of Members of the Legislative Assembly at each election.²¹ There are, however, relatively frequent changes of Norfolk Island Ministers during the life of any Assembly. Five of the current sitting Members have served in previous Assemblies.²² Five

15 Section 9, *Norfolk Island Act 1979* (Cth).

16 The cost for the 2002-03 financial year was \$625,000 (figure provided by the Department of Transport and Regional Services). Most of this outlay, to maintain the Office of the Administrator and preserve Government House, is spent on salaries, local suppliers and contractors, and on civic and vice-regal functions related to Norfolk Island. All is spent on-Island and is a largely hidden Federal subsidy to the local economy.

17 Section 19 (2), *Norfolk Island Act 1979* (Cth).

18 Sections 31 and 35, *Norfolk Island Act 1979* (Cth).

19 Section 40, *Norfolk Island Act 1979* (Cth).

20 Norfolk Island Government, Submissions, pp. 250, 253.

21 Norfolk Island Government, Submissions, pp. 253.

22 Department of Transport and Regional Services, Submissions, p. 54. Hon. Geoff Gardner MLA, Hon. David Buffett MLA, Mr George Smith MLA, Mr John Brown MLA and Mr

Members, including the Speaker, constitute a quorum and matters are decided by a majority vote of Members present and voting.²³

The Speaker and Deputy Speaker

4.9 Section 41 of the *Norfolk Island Act 1979* (Cth) provides for the election of a Speaker and Deputy Speaker of the Legislative Assembly. Prior to any other business at the first meeting of the Assembly after a general election, the Members elect, from among those Members present, a Speaker and Deputy Speaker to preside over meetings of the Assembly.²⁴ The Speaker or Member presiding at a meeting of the Assembly does not have a casting vote. A vote is defeated if it is split equally.²⁵ The convention that has emerged is that the Speaker can vote whilst remaining in the Chair, but must vacate the Chair if he or she wishes to participate in debate.²⁶ There are no provisions in the Act preventing the Speaker and Deputy Speaker from also holding executive office and sitting on the Executive Council. In practice, the Speaker is usually also an Executive Member with ministerial responsibilities.²⁷

The Executive Council and Executive Offices

4.10 Section 11 of the *Norfolk Island Act 1979* (Cth) provides for an Executive Council “to advise the Administrator on all matters relating to the government of the Territory”.²⁸ The Executive Council is comprised of those Members of the Legislative Assembly holding executive office.²⁹ Executive Members exercise executive authority with respect to the matters specified in Schedules 2 and 3 of the Act.³⁰ It is important to appreciate that Schedule 2 provides that once a law is passed by the Assembly, the Executive Members exercise full executive authority in respect of the administration and enforcement

Ron Nobbs MLA were re-elected at the last general election on 29 November 2001; the Hon. David Buffett MLA has been a member of all 10 Assemblies since 1979.

23 Sections 42 (4) and (5), *Norfolk Island Act 1979* (Cth).

24 Section 41, *Norfolk Island Act 1979* (Cth).

25 Section 42 (6), *Norfolk Island Act 1979* (Cth).

26 Department of Transport and Regional Services, Submissions, p. 73.

27 The current Speaker, the Hon. David Buffett MLA, is also Minister for Community Services and Tourism.

28 Section 11 (1), *Norfolk Island Act 1979* (Cth).

29 Section 13 (1), *Norfolk Island Act 1979* (Cth).

30 See Section 12 (2), *Norfolk Island Act 1979* (Cth).

of that law – irrespective of whether that law concerns a matter specified in Schedule 2, Schedule 3 or neither schedule.³¹

- 4.11 The authority to determine the number of executive offices and their designation rests with the Legislative Assembly, which also has implied power to allocate portfolios.³² Since 1979, the number of Executive Members has varied from two in the First Assembly to six during the Third Assembly.³³ The appointment of four Executive Members is now regarded as settled practice, effectively guaranteeing ‘minority government’.³⁴ There is no statutory requirement to allocate portfolios or that portfolios reflect actual or proposed executive functions or responsibilities.³⁵ Nor does the statute contain a duty to discharge the responsibilities allocated the Executive Member or require gazettal of the administrative arrangements. Technically, the allocation of portfolios to individual Executive Members “is purely conventional and have no legal significance” in determining the scope of the authority of any particular Executive Member.³⁶ As the Executive Council is designed to be a collegiate structure, one Executive Member may exercise the duties of another Executive Member without any preliminary formality.³⁷
- 4.12 However, it would be incorrect to suggest that the designations have no significance in the system of government. In practice, the designations do reflect allocations of executive function and responsibilities to individuals.³⁸ By convention, the specific portfolios allocated to each Executive Member are detailed in an Administrative Arrangement Order which is amended after each general election as well as when the need arises during the life of an Assembly.³⁹

31 Item 42, Schedule 2, *Norfolk Island Act 1979* (Cth). The range of items currently listed in Schedule 2 is extremely broad for a Territory of roughly 2000 people.

32 Section 12, *Norfolk Island Act 1979* (Cth); and *Brown v The Administration of Norfolk Island and Others* [1991] 101 ALR 201, p. 32. It is theoretically possible to appoint each member of the Assembly to an executive office.

33 The term of the First Legislative Assembly of Norfolk Island was from August 1979 to January 1982, the Third Legislative Assembly was from May 1983 to May 1986.

34 The Hon. David Buffett MLA, Transcript, 25 July 2003, p. 44. Department of Transport and Regional Services, Submissions, p. 52.

35 See *Brown v The Administration of Norfolk Island and Others* [1991] 101 ALR 201, p. 26.

36 Norfolk Island Government, Submissions p. 250.

37 Norfolk Island Government, Submissions p. 250.

38 As a matter of law the scope of executive authority and responsibilities depends on the law and administrative arrangements.

39 Norfolk Island Legislative Assembly, November 1996, *Report of the Committee Established by the Legislative Assembly on Norfolk Island to Define the Roles and Responsibilities of the Legislative Assembly of Norfolk Island*, p. 41.

- 4.13 The system of government established by the *Norfolk Island Act 1979* (Cth) was designed to be “broadly consistent with the Westminster system”, but without the adversarial aspects of government versus opposition commonly associated with the system.⁴⁰ The political framework introduced by the Act was intended to engender a more consensual approach to government.⁴¹ Although Assembly Members holding executive office, referred to as ‘Ministers’, have responsibility for specific portfolios, all nine Members of the Assembly are actively involved in policy formulation. All Assembly Members “are appointed to some office of authority”.⁴² For example, at the beginning of the Fifth Legislative Assembly in May 1989, every Member of the Assembly “was given responsibilities” of a ministerial nature.⁴³ The collegiate approach encouraged by the Act also entitles Assembly Members, who are not part of the Executive Council, to attend all meetings of the Executive Council.⁴⁴
- 4.14 The convention that has emerged is that the Assembly Member who received the highest number of votes in the general election is appointed Chief Minister by the Administrator on the recommendation of the Assembly.⁴⁵ Appointments of ministers are also made according to the number of votes each candidate received in the general election. This approach appears to have had its origins in the procedures of the previous Advisory Council which operated prior to self-government.⁴⁶
- 4.15 The designation of ‘Chief Minister’ is a development from the Sixth Assembly, intended to identify a person clearly as the head of government, as distinct from the Speaker who represents the Assembly.⁴⁷ The Chief Minister has no power to appoint or dismiss

40 Ellicott, Submissions, p. 38.

41 Ellicott, Submissions, p. 37.

42 *Brown v The Administration of Norfolk Island and Others* [1991] 101 ALR 201, p. 13.

43 *Brown v The Administration of Norfolk Island and Others* [1991] 101 ALR 201, p. 13.

44 Section 11 (8), *Norfolk Island Act 1979* (Cth).

45 At the last general election on 29 November 2001, the Hon. Geoff Gardner MLA received the highest number of votes cast, 930 votes from 442 voters, and was consequently appointed Chief Minister.

46 Norfolk Island Legislative Assembly, November 1996, *Report of the Committee Established by the Legislative Assembly on Norfolk Island to Define the Roles and Responsibilities of the Legislative Assembly of Norfolk Island*, p. 41.

47 Historically, there was a tendency to regard the President of the Assembly (Speaker) as the head of government. Sections 41 and 42 of the *Norfolk Island Act 1979* (Cth) were amended in 1995 to replace the terms ‘President’ and ‘Deputy President’ with ‘Speaker’ and ‘Deputy Speaker’, so as to remove doubt about the proper role of the Speaker. See the *Report of the Committee Established by the Legislative Assembly on Norfolk Island to Define*

fellow Executive Members.⁴⁸ He or she receives the same remuneration as other Ministers, but is expected to represent the Norfolk Island Government as a whole.

Politics without Parties

- 4.16 An important feature of politics on Norfolk Island is the absence of political parties. Individual candidates issue policy statements during an election campaign, but there has been no clearly identifiable grouping elected with a mandate to implement a party platform. Mr Don Morris noted that “on occasions when individuals have attempted to stand for election as any sort of ‘bloc’, the electors of Norfolk Island have indicated that they prefer to return MLAs as individual independents”.⁴⁹ The Assembly has, thus, been described as “a chamber of independents”.⁵⁰
- 4.17 The Legislative Assembly nominates Members for executive office according to the number of votes received by each candidate. The Administrator, acting on the advice of the Assembly, then appoints these Members to the executive office determined by the Assembly.⁵¹ As noted above, the designation of Chief Minister is by practice rather than law and is awarded to the Member polling the highest number of votes at each general election. He or she has no specific powers, but is expected to represent the Norfolk Island Government and take responsibility for inter-governmental relations.
- 4.18 Consequently, the Executive Council does not function as a cabinet and there is no concept of ‘cabinet solidarity’.⁵² In its 1997 report, the Commonwealth Grants Commission noted the absence of a cabinet, but suggested that the regular informal meetings of Assembly Members prior to formal Assembly sessions serve to function as a

the Roles and Responsibilities of the Legislative Assembly of Norfolk Island, November 1996, p. 52. The term of the Sixth Assembly was from May 1992 to April 1994.

48 The discretion to withdraw an appointment to the Executive Council is vested exclusively in the Administrator and may be exercised only in exceptional circumstances: Sub-section 13 (2), *Norfolk Island Act 1979* (Cth).

49 Morris, Submissions, p. 202. See also Mr Bruce Griffiths, Transcript, 15 July 2003, p. 15.

50 Morris, Submissions, p. 202. See also statement by the Chief Minister, the Hon. Geoff Gardner MLA, to the Legislative Assembly, on 17 July 2002, that: “there are no party politics, we are supposedly all independent thinkers, and we all have independent thoughts”. Norfolk Island Legislative Assembly, *Hansard*, 17 July 2002, p. 466.

51 Section 13 (1a), *Norfolk Island Act 1979* (Cth).

52 Mr Bill Sanders, Transcript, 15 July 2003, p.41.

“cabinet of the whole”.⁵³ The Grants Commission found that “as a result, combined with the absence of political parties, there is often no clear distinction between the Assembly and the executive government”.⁵⁴ Mr Morris believes that self government for Norfolk Island has been ‘hamstrung’ by a:

lack of cohesion between elected Ministers which has hampered their ability to formulate a united programme for the Assembly’s consideration ... On many occasions the Ministers would fail to agree on matters and on a number of occasions Ministers would vote against proposals of other Ministers on the floor of the Assembly. This ... made progress difficult in certain areas.⁵⁵

- 4.19 The Committee is not persuaded that the absence of political parties or the desire for a more consensual approach is a justification for maintaining the existing structure. There is a danger that the collegiate aspects of the system are overplayed with insufficient attention paid to the responsibility to govern. In his submission, Mr Peter Woodward, an Island resident, pointed out that:⁵⁶

The creation of opportunity however often entails making difficult decisions from which we cannot escape running into people who are adversely affected by these decisions in the Supermarket ... Norfolk is a difficult place to govern locally ... [this is] why the Norfolk Island Government has failed in many infrastructure areas, such as not been able to secure a continuing supply of crushed rock for the last five years. A basic infrastructure requirement for which the only lacking resource is the determination to govern and make a decision.

Although the *Norfolk Island Act 1979* (Cth) created an opportunity for consensus politics within the framework of responsible government, a distinct role for an Executive Council and majority voting in the Assembly was also clearly envisaged.⁵⁷

53 Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, p. 188.

54 Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, p. 188.

55 Morris, Submissions, p. 202.

56 Woodward, Submissions, p. 537.

57 See the Second Reading speech by the then Minister for Home Affairs and the Capital Territory, the Hon. Robert Ellicott, for the *Norfolk Island Bill 1978* - House of Representatives Hansard, 23 November 1978, pp. 3311.

A Corporate Board?

- 4.20 There are a number of practices derived from the traditional model of responsible government that suggest a local preference for Westminster style government rather than a more corporate styled board or local government. The Norfolk Island Government, in particular, argued that the “Legislative Assembly of Norfolk Island is in every sense a Parliament, and not akin to a ‘shire council’ “. ⁵⁸ The Legislative Assembly exhibits many features of a Westminster style parliament such as debate on Bills preceding passage of legislation, question time and occasional appointment of a parliamentary committee. In addition, the designation of Chief Minister and Ministers is settled practice, Administrative Arrangement Orders are gazetted, and there is an expectation that ‘Ministers’ will take responsibility for their portfolios.
- 4.21 The Seventh Legislative Assembly Select Committee inquiring into the roles and responsibilities of Members of the Legislative Assembly examined the Westminster system and its applicability to Norfolk Island. ⁵⁹ The Select Committee outlined a Norfolk Island model of the Westminster system which differed in some respects from what it described as the “Australian model of the Westminster system”. ⁶⁰ Although most of these ‘differences’ are primarily procedural, the Committee noted several key characteristics of the Westminster system that have been modified on Norfolk Island – there is no formal cabinet nor, consequently, cabinet solidarity; the legislature is not divided between government and opposition, and:
- instead of the government using the legislature to achieve the government’s ends, as in the Westminster system, our system is that the Assembly uses the government to achieve the Assembly’s ends. ⁶¹
- 4.22 The Select Committee made six recommendations to strengthen the Norfolk Island version of the Westminster system. In particular, the
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58 Norfolk Island Government, Submissions, p. 252.

59 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*, pp. 23-39.

60 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*, p. 31.

61 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*, p. 33.

Select Committee recommended that there needs to be formal recognition that “the Norfolk Island political system is evolving in its own special way”.⁶²

4.23 However, a strategic management review of the Norfolk Island Administration, commissioned by the Norfolk Island Government, in 1998 concluded that, despite its pretensions otherwise, the operations of the Legislative Assembly resemble those of a corporate board rather than a Westminster-style parliament.⁶³ The Review noted that the Westminster system, with its core principles of ministerial responsibility and accountability, does not, “and cannot, work effectively” on Norfolk Island.⁶⁴ The Review found five principal reasons for this:

- The Executive, consisting of the four Executive Members, does not have a majority in the Assembly – policy directions and strategic directions are easily over-turned;
- The Executive does not constitute a ‘Cabinet’ – it does not conform to the conventions of collective responsibility;
- Non Executive Members act to hold the Executive to account – but at the same time wish to be involved in policy making;
- Non Executive Members can, and do, initiate policies and propose expenditure which, by implication, bind the ‘Government’ (under a Westminster system, only the ‘Crown’ can initiate a spending proposal – in the form of a message from the Governor/Governor-General); and
- Non Executive Members establish and maintain lines of communication into the public service.⁶⁵

4.24 Executive Members or ‘ministers’ have primary responsibility for their portfolios, but they are expected to consult with non-executive Members and can and do vote against existing ‘Government’ policy.

62 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*, p. 37.

63 John Howard & Associates, 1998, *Norfolk Island Administration - Strategic Review*, Sydney, p. 42. See also the finding of the Commonwealth Grants Commission that “in the absence of political parties, and in such a small assembly, much of the apparatus normally associated with a Westminster style parliament is absent. There are no Government and Opposition benches, whips or leaders of business.” Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, p. 188.

64 John Howard & Associates, 1998, *Norfolk Island Administration - Strategic Review*, Sydney, p. 42.

65 John Howard & Associates, 1998, *Norfolk Island Administration - Strategic Review*, Sydney, p. 42.

Ministers are also frequently involved in the detail of operational matters which would normally be the responsibility of the Administration. Non-executive Members expect to and are involved in the development of policy. They occupy positions on statutory and non-statutory boards and are involved in operational matters.

4.25 The division of authority between Ministers and non-executive Members and the lines of communication between the Assembly and the Administration are not clearly established.⁶⁶ The blurring of roles and responsibilities undermines the ability of the Assembly to hold 'Government' accountable for its performance.⁶⁷ The Howard Review recommended that "the principle of accountability of the Administration to the Assembly, through Executive Members, for the implementation of Assembly decisions be clearly established".⁶⁸ In addition, the Review recommended that the Assembly introduce a committee system in order to maximise the contribution of non-executive Members to the governance process.⁶⁹

4.26 The Howard Review found that:

the present arrangements guiding the formation and operation of the Government rely too heavily on borrowing precedent and tradition from the Westminster system and too little on the practicalities of governing a small Island community. In particular, the distinction that is drawn between Government and Opposition is inappropriate, wasteful of Members' talents and costly.⁷⁰

The Review argued that principles of corporate governance are more "appropriate for a small community", and recommended that the "corporate basis on which [the Legislative Assembly] operates be legitimized and strengthened".⁷¹

66 This assessment is consistent with the views expressed by the Howard Review.

67 John Howard & Associates, 1998, *Norfolk Island Administration - Strategic Review*, Sydney, pp. 42 -51.

68 John Howard & Associates, 1998, *Norfolk Island Administration - Strategic Review*, Sydney, p. 43.

69 John Howard & Associates, 1998, *Norfolk Island Administration - Strategic Review*, Sydney, p. 42.

70 John Howard & Associates, 1998, *Norfolk Island Administration - Strategic Review*, Sydney, p. 46.

71 John Howard & Associates, 1998, *Norfolk Island Administration - Strategic Review*, Sydney, p. 43.

A Culture of Direct Democracy

4.27 One of the unique features of the Norfolk Island political system is the “steady recourse to referenda to either inform or influence government decision-making, especially in respect of controversial matters”, by both the community and Government.⁷² The use of referenda is highly valued on Norfolk Island.⁷³ Since 1979, there have been fifteen referenda – eleven initiated by the Territory Government/Legislative Assembly and four by residents.⁷⁴ Some witnesses have suggested that this culture of direct democracy “reflects the community’s traditional consensual and inclusive approach to decision-making”.⁷⁵ Mr George Smith MLA, pointed out that Norfolk Island:

is possibly the closest example you can get of a real democracy, where people can control their destiny by using their collective influence over the legislators, for example – and they do. That can manifest itself at elections, at referenda, by petition or simply through talking directly to Members of the Legislative Assembly.⁷⁶

Other witnesses, however, see this reliance on referenda to determine Territory Government policy as indicative of a “lack of leadership and authority within Government and an abdication of responsibility on difficult issues”.⁷⁷

4.28 Under the *Referendum Act 1964* (NI), there are three mechanisms by which a referendum can be initiated:

- the Federal Minister is entitled to direct, through the Administrator, a referendum in relation to an issue which is the subject of proposed legislation in the Federal Parliament;⁷⁸

72 Department of Transport and Regional Services, Submissions, p. 54.

73 Ms Philippa Reeves described the referenda system on Norfolk Island as “one of the most pure forms of democracy and has served the people of Norfolk Island well in keeping our Government transparent and committed to good governance”. Reeves, Submissions, p. 226.

74 Department of Transport and Regional Services, Submissions, pp. 92-4.

75 Department of Transport and Regional Services, Submissions, p. 54. See also Mr Bruce Griffiths, Transcript, 15 July 2003, p. 15.

76 Mr George Smith MLA, Transcript, 15 July 2003, p. 23.

77 Department of Transport and Regional Services, Submissions, p. 54. See also Mr Michael King, Transcript, 15 July 2003, p. 5.

78 Section 4, *Referendum Act 1964* (NI). Section 4 has not, to date, been used.

- the Assembly may resolve to conduct a referendum on a specific question relating to the “peace, order and good government” of the Territory;⁷⁹ and
- one third of residents on the electoral roll can request a referendum on any question, except the constitution of the Assembly.⁸⁰

4.29 The number of votes in favour of a question submitted in a referendum must exceed the number of votes against the question by at least 10% of the total votes cast.⁸¹ A referendum on the same question, or a question which is substantially the same, cannot be put to the electorate more than once in any two year period.⁸² But there are no limits on the number of referenda that can be held in one year. There are no specifications on the wording of a question or numbers of questions on an issue submitted to a referendum. Consequently, referendum questions may be very broad, constructed with multiple parts and without specific draft laws or detailed information behind them.⁸³

4.30 Voting in referenda is compulsory for qualified voters.⁸⁴ The qualification to vote is the same as that for general elections.⁸⁵ As a result, at any time approximately 500 residents, including Australian citizens, are not entitled to vote in referenda although the issue may be one of significance to them. The Committee regards this as inconsistent with the fundamental right to participation in political affairs, the very principle referenda is said to promote and protect.⁸⁶

4.31 The results of referenda are not legally binding. Therefore, as it does not provide a veto over proposed laws, referenda under Norfolk Island law may be more accurately described as a form of compulsory opinion polling. However, the practice of the Legislative Assembly is to accept a referendum verdict and act accordingly. This has created a

79 Section 5, *Referendum Act 1964* (NI).

80 Section 6, *Referendum Act 1964* (NI).

81 Section 24, *Referendum Act 1964* (NI).

82 Section 7, *Referendum Act 1964* (NI).

83 Section 11, *Referendum Act 1964* (NI), compels the Returning Officer to provide, three weeks in advance of the referendum, the ballot paper, a statement to assist voters in their consideration of the question, and any approved statements setting out the case for or against the question by a group of voters.

84 Section 25, *Referendum Act 1964* (NI), applies Section 47 of the *Legislative Assembly Act 1979* (NI), as if voting in relation to referenda were an election for the Legislative Assembly under the latter Act.

85 Section 6, *Legislative Assembly Act 1979* (NI).

86 See Article 25 (a), *International Covenant on Civil and Political Rights*.

popular expectation that the Assembly will always act in accordance with a referendum result, thereby giving referenda an effect not intended by the legislation.

4.32 A number of witnesses also referred to the right of the community to dissolve the Assembly by referenda.⁸⁷ Mr Bruce Griffiths, referring to this, made it clear to the Committee that, “as a practising democrat, I would not wish to remove from the people the right to dismiss a government they were dissatisfied with”.⁸⁸ However, there is no such right conferred by the law nor is dissolution of a legislature a common feature of other citizen initiated referenda systems elsewhere in the world. Section 6 of the *Referendum Act 1964* (NI) expressly excludes resident initiated referenda on the constitution of the Assembly. Legal advice provided by the Department of Transport and Regional Services confirms that this prevents a resident initiated referendum being held on whether a by-election or a general election should be held or in relation to the laws, rules or practices regulating the Legislative Assembly.⁸⁹ Nevertheless, in 1983 and 2001, the Assembly responded to petitions calling for new elections by passing resolutions to formally ask, through referendums, whether a majority of residents wanted an election, and dissolved the Assembly in response to the referendum outcomes.⁹⁰

4.33 The value of citizen initiated referenda attracts widely divergent views. Proponents argue that the mechanisms of direct democracy, such as citizens’ initiated referendums, return the polity to the halcyon days when the entire body of citizens voted directly on public policy issues and legislation. Referenda play a role “in motivating and energizing a sense of civic engagement and participation”.⁹¹ Critics, however, point to a number of disadvantages with citizens’ initiated referendums, including:

- direct voter participation in law-making is inconsistent with the principles of representative democracy;
- law-making by the people by-passes the constitutional safeguard of debate and consent within a legislative assembly;

87 See, for example, Snell, Submissions, p. 41; Reeves, Submissions, p. 226, Smith, Submissions, p. 328.

88 Mr Bruce Griffiths, Transcript, 15 July 2003, p. 14.

89 Department of Transport and Regional Services, Submissions, p. 84.

90 Department of Transport and Regional Services, Submissions, pp. 84, 92-94.

91 Bowler, S. & Donovan, T. 2002, *Democracy, institutions and attitudes towards citizen influence on government*, in *British Journal of Political Science*, Vol. 32, p. 374.

- referendums allow tyranny by the majority – that is, legislative assemblies are charged with governing in the interests of both the majority and the minority, meaning that they may reject laws seen as adversely affecting minorities;
 - interest groups with money and influence may be able to influence the outcome of referendums; and
 - the cost of referendums is considerable.⁹²
- 4.34 The value of referenda results on Norfolk Island has been questioned before the Committee. It has been alleged that intimidation and use of the ‘ring around’ were not uncommon and can distort referenda results.⁹³ Poorly constructed questions and a lack of information and debate on topics is also said to downgrade their usefulness. A recent example of this is the referendum held, on 21 August 2002, on the proposed installation of a mobile phone system on Norfolk Island.⁹⁴ The referendum resulted in a ‘No’ vote with 356 for, 607 against and 6 informal. The Committee has received complaints about the lack of information or debate about other approaches to deal with poor mobile phone etiquette which appears to have been a principal concern.⁹⁵ The value of a mobile phone service for emergency services and to increase personal safety was, therefore, overlooked.⁹⁶
- 4.35 The Committee has previously expressed its view that a referendum on a question of fundamental rights, such as the right of citizens to vote or freedom of movement, is not an appropriate use of the mechanism.⁹⁷ Two referendums, held in 1998 and 1999, were instigated by the Legislative Assembly on proposed amendments by

92 See, for example, Major, S. 1994, *The Citizens Initiated Referendum: Direct Democracy or Irresponsible Mass Government*, Western Australian Electoral Commission; Williams, G. & Chin, G. 2000, *The Failure of Citizens’ Initiated Referenda Proposals in Australia: New Directions for Popular Participation?* in *Australian Journal of Political Science*, Vol. 35, No. 1, pp. 27-48; and Parkinson, J. 2001, *Who Knows Best? The Creation of Citizen-initiated Referendum in New Zealand*, in *Government and Opposition*, Vol. 36 (3), pp. 403-21.

93 See Footnote 41, Chapter Two.

94 The Federal Government proposed to provide a grant of \$1.9 million to upgrade the Island’s telecommunication system and was tied to installation of a mobile phone system. The Norfolk Island Administration had applied for the grant under the Federal Government’s *Networking the Nation* programme.

95 See *The Norfolk Islander*, 24 August 2002.

96 See comments made during debate in the Legislative Assembly on the mobile phone referendum – Norfolk Island Legislative Assembly, *Hansard*, 25 September 2002, pp. 567-72, and 16 October 2002, pp. 53-9.

97 Joint Standing Committee on the National Capital and External Territories, June 2002, *Norfolk Island Electoral Matters*, Canberra, Canprint, p. 30.

the Federal Government to the *Norfolk Island Act 1979* (Cth) designed to extend the franchise. On both occasions, the ‘No’ case was successful.⁹⁸ There have been no changes to the system that would alter the Committee’s view.

- 4.36 A relatively high use of petitions is also reported.⁹⁹ A petition on any subject can be addressed to the Assembly signed by one or more electors. A petition with a high number of signatures can be decisive or may prompt an Assembly initiated referenda.¹⁰⁰ Concerns have been expressed in the Assembly about the manner in which some petitions are collected, including claims that petitions are sometimes signed because of the need to conform in a small community.¹⁰¹
- 4.37 The Committee is concerned that the non-binding opinion polling provided for by the *Referenda Act 1964* (NI) has been allowed to function as a veto over government decision making. Opinion polls are not a substitute for informed policy development nor are they a means of achieving accountability in government. It is the view of the Committee that the practice of unquestioned adherence to poll results is symptomatic of a wider problem of abrogation of responsibility, rather than exemplary of direct democracy.

Proposals for Reform

- 4.38 The Committee has taken considerable evidence, from former and serving Assembly Members, business people and members of the community, pointing to systemic weaknesses in the existing governance arrangements that are an underlying contributing factor to the serious problems identified in the Norfolk Island Government’s *Focus 2002 Report*.¹⁰² The evidence received by the Committee and from other inquiries suggests that successive governments have been unable to address long term strategic needs or to carry through unpopular decisions. Norfolk Island Government Ministers face “real

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

99 Department of Transport and Regional Services, Submissions, p. 54.

100 Department of Transport and Regional Services, Submissions, p. 54.

101 Department of Transport and Regional Services, Submissions, p. 54. See also Footnote 41, Chapter Two.

102 *Focus 2002 – Sustainable Norfolk Island*, 10th Legislative Assembly, Norfolk Island. See also Reeves, Submissions, p. 225; and, especially, the statement by the Hon. David Buffett MLA during debate on the *Appropriation Bill 2002* (NI), Norfolk Island Legislative Assembly, *Hansard*, 5 June 2002, pp. 381-83 (repeated at paragraph 2.19 in Chapter Two).

political difficulties” in first agreeing among themselves on any significant reform, then in gaining the support of other Assembly Members, and finally in dealing with the reaction of the community to unpopular reforms.¹⁰³ Mr Ron Nobbs MLA, a former Chief Minister and Finance Minister, described holding the finance portfolio as “a kiss of death position ... you really get assassinated”.¹⁰⁴ The lack of policy development is reflected in a budgetary process that focuses on cost cutting and balancing the budget. Over time this has had an adverse impact on the financial sustainability of the Island.¹⁰⁵

- 4.39 The Committee was asked to specifically examine the option of a directly elected Chief Minister and a fixed term of government as a means of strengthening the governance of the Island. These proposals were canvassed widely in submissions and during hearings. Proposals for reform of the Territory’s electoral system and the size of the Legislative Assembly were also brought to the Committee’s attention. In particular, there was widespread agreement among witnesses that the existing Illinois voting system should be replaced with a more simplified system such as first-past-the-post. During the hearings, the Committee also canvassed the option of Federal parliamentary representation for Norfolk Island.
- 4.40 The Committee notes that the size of the Legislative Assembly has been examined by previous Territory inquiries. In 1995, the Legislative Assembly *Select Committee on Electoral and Constitutional Matters* recommended a reduction in Assembly Members from nine to seven.¹⁰⁶ The *Focus 2002* Report also recommended that consideration be given to reducing the number of Assembly Members to seven.¹⁰⁷ However, there appears to be little benefit in reducing the size of the Assembly. Members of the Legislative Assembly are not career politicians, receive limited remuneration for their service and must

103 Department of Transport and Regional Services, Submissions, p. 59.

104 Mr Ron Nobbs MLA, Transcript, 15 July 2003, p. 101. See also the comments of Mr Michael King on his experience as Chief Minister - Mr Michael King, Transcript, 15 July 2003, p. 5.

105 For a more detailed examination of these problems, see *Focus 2002 – Sustainable Norfolk Island*, 10th Legislative Assembly, Norfolk Island.

106 Recommendation 17, Norfolk Island Seventh Legislative Assembly, October 1995, *Report of the Select Committee on Electoral and Constitutional Matters*, p. 25.

107 Recommendation 1 (b), *Focus 2002 – Sustainable Norfolk Island*, 10th Legislative Assembly, Norfolk Island, p. 6.

take responsibility for a complex range of government business.¹⁰⁸ Unless there is a significant reduction in the scope of responsibilities, the Committee believes there is no basis for reducing the number of Assembly Members.

- 4.41 As noted above, for a small, essentially rural, community there is a relatively high use of referenda and petitions. The value of this form of participation was counter balanced by concerns that referenda, petitions and questionnaires are vulnerable to manipulation.¹⁰⁹ There are also numerous Committees and Boards that provide an opportunity for Assembly Member and community participation, although whether this is appropriate and effective was questioned.¹¹⁰ Despite these mechanisms, a lack of understanding of the processes of government in the general community and a sense of not being informed about Government activities was raised. Inexperience of the political process amongst Assembly Members, and a lack of policy depth and insufficient professional and managerial skill in the Administration were also cited as serious weaknesses. However, despite the serious concerns brought to the Committee's attention, the Norfolk Island Government stated that it does not "believe that the current organisational arrangements of the executive government lead to instability, or give rise to institutional impediments to effective decision-making".¹¹¹

The Cook Model

- 4.42 One of the more interesting and significant proposals for reform was provided by a former Legislative Assembly Member and Territory Government Minister, the Hon. Adrian Cook, QC, who advocated "a change in the form and structure of the Legislative Assembly".¹¹² Mr Cook referred to the political system on the Isle of Man as providing a

108 See comments on the workload of Members of the Legislative Assembly reported in Norfolk Island Seventh Legislative Assembly, October 1995, *Report of the Select Committee on Electoral and Constitutional Matters*, p. 23.

109 Department of Transport and Regional Services, Submissions, p. 54. There is frequent use of petitions which may, in turn, prompt an Assembly initiated referendum.

110 Department of Transport and Regional Services, Submissions, p. 99. The full list of statutory boards and committees are: Employment Conciliation Board, Immigration Committee, Legal Aid Advisory Committee, Liquor Licensing Board, Museum Trust, Norfolk Island Broadcasting Authority, Norfolk Island Cultural Heritage Committee, Norfolk Island Government Tourist Bureau, Norfolk Island Hospital Board, Norfolk Island Planning Board, Public Service Board, and Norfolk Island Social Services Board.

111 Norfolk Island Government, Submissions, p. 250.

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

suitable model. He noted that the “virtual absence of party politics” on the Isle of Man, “encourages a high degree of consensus” and has “contributed to the remarkable stability of the Manx system”.¹¹³

Drawing on the Manx model, Mr Cook suggested that the current size of the Assembly, nine members, should remain. However, he recommended that the Assembly be divided into two, directly elected bodies that would sit as a single body on a monthly basis. The first body would be:

a council of ministers - akin to that which operates in the Isle of Man - of four members, of which the Chief Minister would be the head. These members would be akin to the executive directors of a large corporation and would be involved in preparing and bringing forward legislation or changes in policy - matters of that kind - which are significant and important in Norfolk Island.

The Members of the Council of Ministers would be directly elected by the Island electorate to the Council as full-time ministers.¹¹⁴ As is currently the case, the Chief Minister would be the candidate who polled the highest in the election for the Council of Ministers.¹¹⁵

4.43 The other five Assembly Members would constitute a “council of review”, with the power to initiate “its own ideas that will assist in the governance of the island”, but primarily to function as a house of review.¹¹⁶ The Council of Review would be responsible for considering the legislative proposals of the Council of Ministers. The head of the Council of Review would be the Speaker of the Legislative Assembly, who would be elected at a joint meeting of both councils.¹¹⁷

4.44 Mr Cook recommended that a joint sitting of the council of ministers and the council of review take place once every month. During this sitting, question time would take place to call ministers:

to account for their actions or inactions and to deal with various other matters which would be able to be dealt with to the satisfaction of the public listening to such broadcasts,

113 The Hon. Adrian Cook, QC, Transcript, 15 July 2003, p. 66.

114 The Hon. Adrian Cook, QC, Transcript, 15 July 2003, p. 69.

115 The Hon. Adrian Cook, QC, Transcript, 15 July 2003, p. 69.

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

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

enabling them to be fully acquainted with what is happening in the government.¹¹⁸

He suggested that this structure would provide, as occurs in the Isle of Man “opportunities for a consensus form of government”.¹¹⁹

Choosing a Government

4.45 With the exception of a small number of witnesses, the introduction of a directly elected Chief Minister was strongly opposed. The main arguments against the proposal were that a directly elected Chief Minister:

- would not be consistent with government by consensus or the Westminster model;
- would have a divisive impact on the community;
- few with appropriate skills and qualification would put themselves forward for election thereby limiting the field of possible candidates;
- there is the risk of entrenching a candidate without the requisite leadership or policy skills; and
- would be unlikely to produce a workable team and may further destabilise the government.¹²⁰

4.46 Mr John Brown MLA was one of the few witnesses to advocate a directly elected Chief Minister. Mr Brown argued that:

the appointment of the Chief Minister is not handled correctly at present. It is one thing for a person to have substantial local popularity; it is a very different thing for him to have the ability to gather around him a team of ministers who are able and prepared to work together and who are able to achieve results. In my view, the Chief Minister should be far more accountable than he is at present ... However, in my view the Chief Minister should be popularly elected.¹²¹

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

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

120 See Norfolk Island Government, Submissions, p. 250; Mr Michael King, Transcript, 15 July 2003, p. 5; Mr Bruce Griffiths, Transcript, 15 July 2003, p. 19; Mr George Smith MLA, Transcript, 15 July 2003, p. 23.

121 Mr John Brown MLA, Transcript, 15 July 2003, p. 89.

- 4.47 Mr Brown suggested that the popularly elected Chief Minister should have the authority to “choose his own ministry and to dismiss persons from among his own ministry”.¹²² In his model, the Legislative Assembly would also be given the power to pass a vote of no-confidence in the Chief Minister, terminating that particular government and allowing a new government to be formed. This model would, Mr Brown suggested, inject accountability “into our system”.¹²³

The Committee’s View

- 4.48 Having considered the evidence, the Committee is not convinced that a directly elected Chief Minister is appropriate or necessary to improve governance on Norfolk Island. Nevertheless, there is a strong case for amending the *Norfolk Island Act 1979* (Cth) to clarify the roles and responsibilities of the Island’s elected representatives.¹²⁴ An obviously identifiable head of government with a clearly defined role and powers, clearer lines of ministerial responsibility and clarification of the role of non-executive Members will strengthen responsible government. The *Australian Capital Territory (Self-Government) Act 1988* (Cth) provides a useful model to follow. The Committee accepts the point made by the Hon. Ivens Buffett MLA that Executive Members “do not have the luxury of dealing with the one issue”.¹²⁵ The proposed reforms, therefore, build on existing practice and create a greater imperative for Executive Members to cooperate. This, in turn, should produce more coherent policy direction and strengthen accountability. Moreover, the proposed reforms are consistent with the Westminster system, but do not impede the widely expressed desire for a consensual approach to government.
- 4.49 The *Norfolk Island Act 1979* (Cth) must, therefore, be amended to include the following provisions. The designation of Chief Minister and the role of the Chief Minister, as leader of the government, must be clearly expressed in the Act.¹²⁶ Immediately following a general election, the Legislative Assembly, at its first meeting and before proceeding with any other business, should elect the Chief Minister

122 Mr John Brown MLA, Transcript, 15 July 2003, p. 89.

123 Mr John Brown MLA, Transcript, 15 July 2003, p. 89.

124 See, for example, Norfolk Island Legislative Assembly, *Hansard*, 24 July 1996, pp. 1180-1195. This has been the subject of discussion by the Assembly without substantial result.

125 The Hon. Ivens Buffett MLA, Transcript, 15 July 2003, p. 78.

126 Section 40, *Australian Capital Territory (Self-Government) Act 1988* (Cth) provides a suitable model for these amendments.

for the Territory.¹²⁷ The Chief Minister may only be removed by a resolution of two thirds of the Assembly that expresses a vote of no confidence in the Chief Minister, at any time during the life of the Assembly.¹²⁸ To avoid the potential for instability generated by repeated votes of no confidence, in the event of a successful vote of no confidence the Assembly would be dissolved and writs issued for an election.

- 4.50 The Chief Minister must appoint up to three ‘Ministers’ from among the Members of the Assembly and allocate portfolios to each.¹²⁹ The Committee agrees with Mr Don Morris that the phrase ‘Executive Member’ is “patronising and archaic”, and should be replaced with ‘Minister’.¹³⁰ The number of Ministers must be established by enactment. It follows that the Act should also confer on the Chief Minister the power to dismiss a Minister at any time.¹³¹ Having allocated portfolios, the Chief Minister must table in the Assembly and publish in the *Norfolk Island Government Gazette* the division of executive responsibilities.¹³² Providing the Chief Minister with the authority to choose his or her fellow Ministers and determine their portfolios would provide “some cohesion to the government” and enable the Government to determine its own structure.¹³³
- 4.51 The *Norfolk Island Act 1979* (Cth) must also contain an express duty that Members appointed to the Executive Council shall administer the portfolios allocated to them by the Chief Minister.¹³⁴ Section 11 (8) of the Act - the right of non-executive Assembly Members to attend Executive Council meetings - must be repealed.¹³⁵ This will clarify the distinction between the function and responsibilities of Executive and non-executive Assembly Members and is more consistent with the Westminster model. The Standing Orders of the Legislative Assembly must, where applicable, be amended to reflect these changes to the enabling Act.

127 See Section 40, *Australian Capital Territory (Self-Government) Act 1988* (Cth).

128 See Sections 19 and 40 (3), *Australian Capital Territory (Self-Government) Act 1988* (Cth).

129 The *Focus 2002* Report recommends that consideration be given to limiting the number of Executive Members appointed by the Legislative Assembly to “no more than three”. Recommendation 1 (c), *Focus 2002 – Sustainable Norfolk Island*, 10th Legislative Assembly, Norfolk Island, p. 6.

130 Morris, Submissions, p. 205.

131 See Sections 41 (1) and 41 (3), *Australian Capital Territory (Self-Government) Act 1988* (Cth).

132 See Sections 43 (1) and (3), *Australian Capital Territory (Self-Government) Act 1988* (Cth).

133 Morris, Submissions, p. 203.

134 See Section 43 (1), *Australian Capital Territory (Self-Government) Act 1988* (Cth).

135 Section 11 (8), *Norfolk Island Act 1979* (Cth).

Recommendation 17

4.52 That the *Norfolk Island Act 1979* (Cth) be amended to incorporate:

- the designation of Chief Minister and the role of Chief Minister as leader of the government;
- the election of the Chief Minister, from among the sitting Members of the Legislative Assembly, at the first meeting of the Assembly immediately following a general election;
- the power of the Legislative Assembly to dismiss the Chief Minister through a vote of no confidence passed with a two thirds majority of the Assembly Members, at any time during the life of the Assembly;
- the duty of the Chief Minister to appoint up to three Ministers, from among the sitting Members of the Legislative Assembly;
- the power of the Chief Minister to dismiss a Minister from office at any time;
- the duty of the Chief Minister to allocate portfolio responsibilities and to table in the Legislative Assembly and publish in the *Norfolk Island Government Gazette* the division of executive responsibilities;
- the duty of a Minister to administer the matters allocated to him or her by the Chief Minister; and
- the number of Ministers not to exceed three.

Recommendation 18

4.53 That Section 35 of the *Norfolk Island Act 1979* (Cth) be amended to provide that in the event the Legislative Assembly resolves to dismiss the Chief Minister through a vote of no confidence passed with a two thirds majority of the Assembly Members, the Legislative Assembly is dissolved and writs for an election shall be issued by the Administrator.

Recommendation 19

4.54 That Sub-section 11 (8) of the *Norfolk Island Act 1979* (Cth) be repealed.

The Presiding Officer

- 4.55 The office of Speaker “is an essential feature of the parliamentary system”.¹³⁶ The Speaker is the “representative of the House itself in its powers, proceedings and dignity”.¹³⁷ In addition, the Speaker presides over meetings of the Legislative Assembly and ensures the procedures of the Assembly, as outlined in the Standing Orders, are adhered to. The Speaker, thus, plays a vital role in ensuring debate can take place and that the Government’s actions are properly examined. As such, the role of the Speaker provides a key mechanism of accountability in the governance process. In all jurisdictions, except Norfolk Island, by convention the Speaker is not a member of executive. This avoids confusing the role of the legislature with executive responsibilities as well as the practical difficulty of presiding over the legislature and participating in debate. The Tenth Norfolk Island Legislative Assembly undertook not to continue the practice of previous Assemblies whereby a Member appointed as a Minister is also appointed Speaker.¹³⁸ The Assembly, however, agreed that the current Speaker, the Hon. David Buffett MLA, who is also Minister for Community Services and Tourism, could perform both functions until his term as regional representative for the Commonwealth Parliamentary Association (CPA) had expired.¹³⁹ Although Mr Buffett is no longer a regional CPA representative, he continues to hold the dual responsibilities of Speaker and Minister.
- 4.56 Given the small size of the Assembly and the need for the Member who is Speaker to also be involved in debate, there is a strong case for an independent non-voting Speaker of the Legislative Assembly to be appointed. The practice of the Speaker being appointed or elected from outside the parliament is well established in a number of Pacific Island legislatures.¹⁴⁰ Adopting this practice for the Norfolk Island legislature would ensure that all nine members are available to participate fully in Assembly business and to vote.
- 4.57 In its report tabled in October 1995, the Legislative Assembly *Select Committee on Electoral and Constitutional Matters* examined the

136 Harris, I. C, Fowler, P. E. & Wright, B. C. (eds) 2001, *House of Representatives Practice*, 4th Edition, Department of the House of Representatives, Canberra, p. 161.

137 Harris, I. C, Fowler, P. E. & Wright, B. C. (eds) 2001, *House of Representatives Practice*, 4th Edition, Department of the House of Representatives, Canberra, p. 162.

138 Norfolk Island Legislative Assembly, *Hansard*, 18 December 2002, p. 423.

139 Norfolk Island Legislative Assembly, *Hansard*, 18 December 2002, p. 423.

140 For example, the Presiding Officers or Speakers of the parliaments of Solomon Islands, Kiribati and Tuvalu are appointed or elected from outside the parliament.

possibility of both the Speaker and Deputy Speaker being independent of the Government.¹⁴¹ Several submissions to the Select Committee's inquiry suggested that the Speaker be elected separately from the other Assembly positions during a general election.¹⁴² The role of the Speaker would be to chair Assembly meetings and not take part in debate, thereby avoiding the "game of 'musical chairs' which is currently played whenever the current Speaker wishes to express an opinion on matters before the House".¹⁴³ The Select Committee noted one suggestion that the Administrator should serve as Speaker, a view that "has support within the community".¹⁴⁴ However, the Select Committee decided against these suggestions, and recommended that the Speaker continue to be "chosen from amongst Elected Members".¹⁴⁵ A review of the Legislative Assembly commenced by the Ninth Legislative Assembly also suggested that "it is perhaps timely to review the role/election/independence of the Speaker in the Norfolk Island context".¹⁴⁶ The *Focus 2002* Report recommended that consideration be given to amending the *Norfolk Island Act 1979* (Cth) to:

- allow the Clerk to act as chairperson at Legislative Assembly meetings; and
- the role of the Deputy Speaker be discontinued and the Deputy Clerk undertake the role of chairperson if necessary.¹⁴⁷

4.58 To ensure the impartiality of the office and enable all Assembly Members to fully participate in the business of the House, the Committee agrees that an independent Speaker and Deputy Speaker,

141 Norfolk Island Seventh Legislative Assembly, October 1995, *Report of the Select Committee on Electoral and Constitutional Matters*, p. 28.

142 Norfolk Island Seventh Legislative Assembly, October 1995, *Report of the Select Committee on Electoral and Constitutional Matters*, p. 28.

143 Norfolk Island Seventh Legislative Assembly, October 1995, *Report of the Select Committee on Electoral and Constitutional Matters*, p. 28.

144 Norfolk Island Seventh Legislative Assembly, October 1995, *Report of the Select Committee on Electoral and Constitutional Matters*, p. 24.

145 Recommendation 21, Norfolk Island Seventh Legislative Assembly, October 1995, *Report of the Select Committee on Electoral and Constitutional Matters*, p. 28.

146 The Hon. Ron Nobbs MLA, *Is the current parliamentary system appropriate for Norfolk Island?* Working Group Report tabled in the Norfolk Island Legislative Assembly on 21 November 2001. See also comments by Mr Michael King, former Chief Minister, to the Legislative Assembly *Select Committee to consider certain issues including Electoral and Governance Issues* regarding the need to "clarify the role of the Speaker" – King, Submissions, p. 316.

147 Recommendation 1 (d) and (e), *Focus 2002 – Sustainable Norfolk Island*, 10th Legislative Assembly, Norfolk Island, p. 6.

who are not elected Members of the Legislative Assembly, need to be appointed. The Speaker and Deputy Speaker should be appointed by the Administrator on the advice of the Federal Minister for Territories. They should be appointed immediately following each general election for the life of the Assembly. The role of the Speaker is to preside over meetings of the Legislative Assembly. Therefore, the Speaker should not have a vote on any matter before the Assembly. As they are not elected Members of the Legislative Assembly, the Speaker and Deputy Speaker could not hold any executive office nor should they hold any other public office on Norfolk Island. In the absence of the Speaker, the Deputy Speaker would fulfil the functions of the office. As the Federal Minister would advise the Administrator on the appointment, an appropriate level of remuneration should be determined by the Federal Minister and, together with the associated costs of the office, funded by the Federal Government.

- 4.59 It is important that a dedicated, senior and experienced person is appointed to the office. A retired judge, retired clerk of another Australian parliament or a person of similar qualifications and standing would be appropriate. The appointees could be from the Island or the mainland, but must be sufficiently independent of local politics to discharge the function in an impartial manner. Accordingly, the Committee recommends the following amendments to the *Norfolk Island Act 1979* (Cth). The Standing Orders of the Legislative Assembly must also be amended to reflect these changes to the enabling Act.

Recommendation 20

- 4.60 That Sections 41 and 42 of the *Norfolk Island Act 1979* (Cth) be amended to provide that:
- the Speaker and Deputy Speaker of the Legislative Assembly be appointed from among suitably qualified persons who are not elected Members of the Legislative Assembly;
 - the Speaker and Deputy Speaker of the Legislative Assembly be appointed by the Administrator on the advice of the Federal Minister for Territories;
 - the Speaker and Deputy Speaker of the Legislative Assembly be appointed immediately following each general election for the life of the Assembly;

- **the role of the Speaker, and in the Speaker’s absence, the Deputy Speaker, is to preside over meetings of the Legislative Assembly, and therefore, the Speaker does not have a vote on any matter before the Assembly; and**
- **the Speaker and Deputy Speaker not hold any executive office or any other public office on Norfolk Island.**

The Legislative Assembly

Meetings of the Assembly

- 4.61 Currently, the *Norfolk Island Act 1979* (Cth) provides that the Legislative Assembly “shall meet at least once every 2 months”.¹⁴⁸ Although the Assembly Standing Orders provide that the public may not be present during debate on matters relating to the employment conditions of public officers, Assembly meetings are generally open to the public and broadcast on the local radio service.¹⁴⁹ The practice, prior to the adjournment of each Assembly meeting, is for Members to set a date for the next meeting.¹⁵⁰ A minimum of three Assembly Members may also request the Administrator convene a meeting of the Assembly.¹⁵¹ However, there is no statutory requirement for Assembly meetings to be held in public. Some witnesses were critical of the practice of holding private, informal meetings of Assembly Members prior to formal sessions of the Legislative Assembly.¹⁵²
- 4.62 The Committee believes that Section 40 of the *Norfolk Island Act 1979* (Cth) must be amended to ensure that, except in relation to matters covered under Standing Order 72A, all meetings of the Legislative Assembly be held in public. All Members of the Assembly, unless excluded on the grounds of conflict of interest, are entitled to be present. The authority to call meetings should be given to the Speaker, acting on the advice of the Chief Minister. Furthermore, there should be a specific statutory requirement to give notice to the

148 Section 40, *Norfolk Island Act 1979* (Cth).

149 Order 72A, *Norfolk Island Legislative Assembly Standing Orders*.

150 Department of Transport and Regional Services, Submissions, p. 71.

151 Section 40 (2), *Norfolk Island Act 1979* (Cth).

152 See, for example, King, Submissions, p. 316. The practice is for Assembly members to meet informally and in private each week to make decisions, which are then ratified at the monthly, formal Legislative Assembly meetings.

public of the times and place of Assembly meetings and Legislative Assembly committee meetings.¹⁵³

- 4.63 The Assembly should also publish a twelve month forward calendar of its sittings. The amendment to the Act should provide that the forward calendar of Assembly sittings be subject to variation on one month's notice, and special meetings of the Assembly may be called by the Speaker on the advice of the Chief Minister on not less than seven days notice in writing to all Assembly Members. The notice should be published in the *Norfolk Island Government Gazette* and provide detail of the business to be dealt with at the special sitting. If for any reason the Speaker believes that insufficient notice has been provided, he or she may extend the period for the recall of the Assembly by a period not exceeding seven days.

Recommendation 21

- 4.64 That Section 40 of the *Norfolk Island Act 1979* (Cth) be amended to provide that:
- all meetings of the Legislative Assembly must be held in public, except during debate on matters relating to the employment conditions of public officers;
 - all Members of the Legislative Assembly, unless excluded on the grounds of conflict of interest, are entitled to be present;
 - the authority to call meetings of the Legislative Assembly rests with the Speaker, acting on the advice of the Chief Minister;
 - notice of the time and place of meetings of the Legislative Assembly be published in the *Norfolk Island Government Gazette*;
 - a 12 month forward calendar of Legislative Assembly sittings be issued and published in the *Norfolk Island Government Gazette*;
 - the Speaker, on the advice of the Chief Minister, may recall the Legislative Assembly for a special sitting to deal with a matter that requires urgent attention;
 - seven days notice of the special meeting must be given in

¹⁵³ See for example, Sections 9 (1) and (2), *Local Government Act 1993* (NSW).

writing to each Member of the Legislative Assembly and include an outline of the business to be considered; and

- **the Speaker may extend the period of recall of the Legislative Assembly if the Speaker believes that for any reason insufficient notice has been given.**

Committees of the Assembly

4.65 Parliamentary committees have come to play an important role in responsible government where the volume of business and expectation of community participation have increased. They provide a scrutiny function and enable more detailed inquiry to take place drawing upon the expertise and experience of the community and recognised experts.¹⁵⁴ The Legislative Assembly has investigated and agreed with the principle that parliamentary committees are an appropriate and effective means of increasing accountability and opportunities for public participation on Norfolk Island.¹⁵⁵ In 1995, the Legislative Assembly *Select Committee on Electoral and Constitutional Matters* recommended that more use be made of committees.¹⁵⁶ The Select Committee noted that a greater use of committees by the Assembly would “spread the workload amongst members” and allow for community participation in consideration of matters of public importance.¹⁵⁷ In 1996, the Legislative Assembly *Select Committee to Define the Roles and Responsibilities of Members of the Legislative Assembly* recommended that “further investigation be

154 See Harris, I. C, Fowler, P. E. & Wright, B. C. (eds) 2001, *House of Representatives Practice*, 4th Edition, Department of the House of Representatives, Canberra, p. 605.

155 See Norfolk Island Seventh Legislative Assembly, October 1995, *Report of the Select Committee on Electoral and Constitutional Matters*; 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*; and The Hon. Ron Nobbs MLA, *Is the current parliamentary system appropriate for Norfolk Island?* Working Group Report tabled in the Norfolk Island Legislative Assembly on 21 November 2001.

156 Recommendation 19, Norfolk Island Legislative Assembly, October 1995, *Report of the Select Committee on Electoral and Constitutional Matters*, p. 25.

157 Recommendation 19, Norfolk Island Legislative Assembly, October 1995, *Report of the Select Committee on Electoral and Constitutional Matters*, p. 25.

undertaken to determine the most appropriate committee system for a small legislature like the Norfolk Island Legislative Assembly”.¹⁵⁸

- 4.66 These findings have been supported by other inquiries and reports. In 1997, the Commonwealth Grants Commission noted Island community concerns in relation to the “lack of a formal committee structure” which does not “always give sufficient transparency of government”.¹⁵⁹ In 1998, the Howard Review recommended the establishment of a committee system “as a way to maximise the contribution of non-executive members to the governance process”.¹⁶⁰
- 4.67 The Committee endorses the value of parliamentary committees as a means of increasing the active participation of Members of the Assembly and the public in the conduct of parliamentary business. The Assembly should prioritise areas of public interest that require more detailed and regular scrutiny and establish standing committees to inquire into and report on these matters. In particular, the Committee recommends that the *Norfolk Island Act 1979* (Cth) and the *Public Moneys Act 1979* (NI) be amended to require the Legislative Assembly establish a Standing Committee to Review Government Expenditure. The purpose of this committee would be to examine the financial affairs of the Norfolk Island Administration and all statutory authorities and review the reports of the Commonwealth Auditor-General in relation to Norfolk Island, as outlined in Recommendation 14. In addition to taking evidence from the senior officers of the Administration, this committee should also accept submissions and hear evidence from interested members of the Island community.
- 4.68 The recommendation that the Federal Parliament’s Joint Statutory Committee of Public Accounts and Audit perform a similar role, however, still very much applies.¹⁶¹ The Committee believes that an estimates process, similar to that used by the Senate, for Norfolk Island must be established. This involves both the development of a Legislative Assembly committee process to examine Territory Government budgets and expenditure, and Federal parliamentary oversight via the Commonwealth Auditor-General, the Joint Statutory

158 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*, p. 50.

159 Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, p. 189.

160 John Howard & Associates, 1998, *Norfolk Island Administration - Strategic Review*, Sydney, p. 46

161 Recommendation 15.

Committee of Public Accounts and Audit, and the Joint Standing Committee on the National Capital and External Territories. This is essential given the Commonwealth's contingent liabilities for Norfolk Island.¹⁶² Any suggestion that the Norfolk Island Legislative Assembly committee process would be sufficient and Commonwealth scrutiny, therefore, not required, would, in light of the serious problems facing the Territory, be totally unacceptable.

Recommendation 22

- 4.69 **That the *Norfolk Island Act 1979 (Cth)* and the *Public Moneys Act 1979 (NI)* be amended to establish a Norfolk Island Legislative Assembly Standing Committee to Review Government Expenditure, with the power to examine the financial affairs of the Norfolk Island Administration and all statutory authorities and review the reports of the Commonwealth Auditor-General in relation to Norfolk Island, as outlined in Recommendation 14.**

The Term of the Legislative Assembly

- 4.70 The maximum term for each Legislative Assembly is three years and, as noted above, the average life of an Assembly is 2.5 years.¹⁶³ Opinion on the value of a longer fixed term for the Assembly and, therefore, the Territory Government varied. The Hon. Adrian Cook QC described the issue as a:

two-edged sword ... because there is a question of either stability of government – the government getting on with its job and functioning in the best possible way it can when it has been given a mandate – or, from time to time, if there is a crisis, whether government could be thrown out.¹⁶⁴

- 4.71 Mr George Smith MLA, for instance, argued that “the question of introducing fixed terms for the assembly would prevent the

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

163 “The period from the first meeting of the Legislative Assembly after a general election of members of that Assembly to the date of the next succeeding general election shall not be more than 3 years”. Section 35 (2), *Norfolk Island Act 1979 (Cth)*.

164 The Hon. Adrian Cook, QC, Transcript, 15 July 2003, p. 71.

democratic process from taking place if and when the people decide it is time for a change”.¹⁶⁵ The Norfolk Island Government argued that the average life of an Assembly of 2.5 years is not a significant departure from the three years maximum allowed by the statute.¹⁶⁶ The Hon. David Buffett MLA pointed out that “there have been only three early elections out of 10”.¹⁶⁷ Mr Buffett noted that, in relation to the last early general election in 2001:

A number of electors were really hesitant about forcing an early election ... They were apprehensive about creating instability in the whole governmental process ... I get the impression they would be hesitant to do this with regularity, and certainly not without just cause.¹⁶⁸

- 4.72 The Norfolk Island Government also pointed out that the Administrator is not bound to act on the advice of the Executive Council and therefore it is open to the Administrator to refuse to issue writs for a general election if there was concern about instability.¹⁶⁹ The Committee, however, regards this argument as a gross oversimplification of the role of the Administrator that fails to address the fundamental issue of political leadership. The Administrator is bound to act in accordance with the tenor of his or her commission.¹⁷⁰ In practice, successive Administrators have acted on the advice of the Executive Council. To do otherwise would no doubt have attracted considerable criticism and possible legal challenge.
- 4.73 The term of the Legislative Assembly was also examined by the Seventh Legislative Assembly *Select Committee on Electoral and Constitutional Matters*. Although the Select Committee received some submissions advocating extending the term of the Assembly, the Select Committee recommended that the maximum term continue to be three years.¹⁷¹

165 Mr George Smith MLA, Transcript, 15 July 2003, p. 24.

166 Norfolk Island Government, Submissions, p. 253.

167 The Hon. David Buffett MLA, Transcript, 25 July 2003, p. 44.

168 The Hon. David Buffett MLA, Transcript, 25 July 2003, p. 44.

169 Norfolk Island Government, Submissions, p. 253. Section 33, *Norfolk Island Act 1979* (Cth) provides that “Writs for the election of members of the Legislative Assembly shall be issued by the Administrator”; and Section 35 (1) provides that “A general election of the members of the Legislative Assembly shall be held on a date determined by the Administrator”.

170 Subsection 7 (1), *Norfolk Island Act 1979* (Cth).

171 Recommendation 15, Norfolk Island Legislative Assembly, October 1995, *Report of the Select Committee on Electoral and Constitutional Matters*, p. 17.

- 4.74 Some other witnesses for this inquiry have expressed concern that fixed terms, especially of four years, will prevent the dissolution of unworkable Assemblies.¹⁷² The Hon. Robert Ellicott, QC, suggested that the diversity of the Island population means that greater flexibility is required.¹⁷³ However, the national and ethnic diversity of Norfolk Island is by no means any greater than elsewhere in Australia. Nor has evidence been offered to justify why a micro community with such wide governmental responsibilities should require greater flexibility than other jurisdictions.
- 4.75 Mr Don Morris argues that the cost of the flexibility in the present system is a lack of continuity and disruption to the Administration and the community, especially the business community.¹⁷⁴ It has long been claimed that short parliamentary terms do not encourage governments to work in a sustained way on longer term problems.¹⁷⁵ The hidden cost in the time taken to learn the skills and responsibilities of public office must also be taken into account. Some witnesses suggested that short terms have not instilled a greater sense of urgency or responsibility and that any changes to the term of the Legislative Assembly must be undertaken in conjunction with reform of the Territory's electoral system.¹⁷⁶
- 4.76 The Committee agrees with those witnesses that have suggested a four year term would be more suitable for the Norfolk Island Legislative Assembly.¹⁷⁷ Four year terms are regarded as working satisfactorily in the five States that have them.¹⁷⁸ The question is whether a fixed four year term would be more appropriate for Norfolk Island or a mixed system of a four year term with a minimum of three years would provide the appropriate balance. A longer period in office would provide a measure of stability and assist the

172 Snell, Reeves, King, Smith, Sanders, Submissions.

173 The Hon. Robert Ellicott, QC, Transcripts 25 July 2003, p. 30. By diversity, Mr Ellicott is referring to the Island population which is made up of people from Australia, New Zealand, United Kingdom and Canada, together with the descendants of the Pitcairn Islanders.

174 Morris, Submissions, p. 202.

175 See Bennett, S. September 2003, *Four Year Terms for the House of Representatives?* Research Paper No. 2, 2003-04, Department of the Parliamentary Library, p. 11.

176 See Mr Michael King, Transcript, 15 July 2003, p. 7; and Mr Ron Hobbs MLA, Transcript, 15 July 2003, p. 110.

177 Buffett, Morris, Submissions.

178 Bennett, S. September 2003, *Four Year Terms for the House of Representatives?* Research Paper No. 2, 2003-04, Department of the Parliamentary Library, p. 16. A three year fixed term in the ACT is provided for by Section 100 (2), *Electoral Act 1992* (ACT).

Territory Government in implementing its programme. It would certainly discourage the Government from what Mr Ron Nobbs MLA described as the tendency to ‘coast’:

they get to two years and they are coasting to make sure they survive the third year ... I am in the assembly now and I believe that our government, with all due respect, is coasting right now, and they are only halfway through. This is to make sure that they get to this magic three-year figure.¹⁷⁹

- 4.77 However, an excessively long fixed term may be counterproductive. Therefore, in the Committee’s view, a four year term with a minimum of three years is a viable alternative that provides a balance between stability and flexibility. The Committee recommends that Section 35 of the *Norfolk Island Act 1979* (Cth) be amended to provide that after the third anniversary of the general election, the Legislative Assembly may be dissolved by the Administrator at the request of the Assembly following a resolution to do so, passed by a two-thirds majority.¹⁸⁰ This ensures a substantial majority must agree on the need for a general election before the four year term expires. The Administrator should not otherwise be empowered to issue writs for an election, except where there has been a successful vote of no confidence in the Chief Minister.¹⁸¹

Recommendation 23

- 4.78 **That Section 35 of the *Norfolk Island Act 1979* (Cth) be amended to provide that the term of the Legislative Assembly shall be four years from the date of its election, and that after the third anniversary of the declaration of the election results by the Australian Electoral Commission, the Legislative Assembly may be dissolved by the Administrator at the request of the Legislative Assembly following a resolution to do so, passed by two-thirds majority.**

179 Mr Ron Nobbs MLA, Transcript, 15 July 2003, p. 110.

180 Morris, Submissions p. 202; Buffett, Submissions, p. 170.

181 See paragraph 4.49 and Recommendations 17 and 18.

The Powers and Functions of the Administrator

- 4.79 The appointment, powers and functions of the Administrator provided for by the *Norfolk Island Act 1979* (Cth) would remain essentially the same under the reforms recommended by the Committee.¹⁸² However, the Committee believes some of the Administrator's powers and functions need to be clarified and strengthened. In particular, the Administrator's power under Section 13 (2) of the Act to dismiss, at his discretion, the Chief Minister and Ministers needs to be expanded. In its present form the discretion may only be exercised in respect of individual appointment(s) where, in the Administrator's opinion, exceptional circumstances justify such action.¹⁸³ The *Australian Capital Territory (Self-Government) Act 1988* (Cth) provides a useful model. Section 16 of this Act provides for the dissolution, in exceptional circumstances, of the ACT Legislative Assembly by the Governor-General.
- 4.80 The Committee, therefore, recommends that the *Norfolk Island Act 1979* (Cth) be amended to provide that the Administrator may, at his own discretion or on the advice of the Federal Minister, terminate at any time:
- the appointment of an individual Minister or the Executive as a whole, where the Administrator is satisfied that the Minister or the Executive has acted unlawfully or corruptly;¹⁸⁴ and
 - dissolve the Legislative Assembly and issue writs for a new election, where the Administrator is satisfied that the Assembly is incapable of effectively performing its functions, or is conducting its affairs in a grossly improper manner.¹⁸⁵
- 4.81 The Administrator must publish a statement of reasons in the *Norfolk Island Government Gazette* as soon as practicable after the day of the dissolution. The Federal Minister should also publish the statement of reasons in the *Commonwealth Gazette* as soon as practicable after the day of the dissolution and table the statement in each House of the

182 For example, the Administrator would continue to appoint the Executive, but under the recommended reforms the Administrator would appoint the Chief Minister on the advice of the Assembly and the remaining three Ministers on the advice of the Chief Minister.

183 Section 13 (2), *Norfolk Island Act 1979* (Cth).

184 See, for example, the powers of the Queensland Governor in Council under Section 164, *Local Government Act 1993* (Qld).

185 See, for example, Section 16 (1), *Australian Capital Territory (Self-Government) Act 1988* (Cth).

Federal Parliament within 15 sitting days of that House after the day of the dissolution.¹⁸⁶

- 4.82 During any period that the Territory Government as a whole has been dissolved in accordance with the above procedures, the Administrator should exercise the powers of the Executive in accordance with any directions given by the Federal Minister. The Administrator shall continue to exercise these functions until immediately before the first meeting of the Assembly held after the elections. There should be a statutory limitation on the transitional period to avoid effective withdrawal of self-government. In the Australian Capital Territory, the period of 90 days is provided for and the same period for Norfolk Island would ensure consistency in both jurisdictions.¹⁸⁷

Recommendation 24

- 4.83 **That, consistent with other Australian jurisdictions, the *Norfolk Island Act 1979* (Cth) be amended to provide that the Administrator may, at his own discretion or on the advice of the Federal Minister:**
- **terminate at any time the appointment of an individual Minister or the Executive as a whole, where the Administrator is satisfied that the Minister or the Executive has acted unlawfully or corruptly;**
 - **dissolve the Legislative Assembly and issue writs for a new election, where the Administrator is satisfied that the Legislative Assembly is incapable of effectively performing its functions, or is conducting its affairs in a grossly improper manner;**
 - **that the Administrator publish a statement of reasons in the *Norfolk Island Government Gazette* as soon as practicable after the day of the dissolution;**
 - **that the Federal Minister publish the statement of reasons in the *Commonwealth Gazette* as soon as practicable after the day of the dissolution and table the statement in each House of the Federal Parliament within 15 sitting days of that House after**

186 See, for example, Section 16 (8), *Australian Capital Territory (Self-Government) Act 1988* (Cth).

187 See, for example, Section 16 (2b), *Australian Capital Territory (Self-Government) Act 1988* (Cth).

the day of the dissolution; and

- **that the general election be held on a day specified by the Administrator by notice published in the *Norfolk Island Government Gazette*, not more than 90 days after the day of dissolution of the Legislative Assembly.**

The Electoral System

- 4.84 In 1979, prior to the elections for the first Legislative Assembly, the Federal Government replaced the first-past-the-post voting system, which then existed for election of members of the Norfolk Island Advisory Council, on the grounds that it could not guarantee that significant minority groups could secure representation.¹⁸⁸ A modified version of the Hare-Clark system of proportional representation was introduced, but was subsequently rejected, as too complex, in a referendum in July 1979.¹⁸⁹ In 1982, a Federal Government inquiry was held into an alternative voting system for Norfolk Island and recommended a cumulative voting system.¹⁹⁰ The cumulative or 'Illinois' voting system was endorsed by the majority of the Island community in a Territory Government/Assembly initiated referendum on 1 December 1982.¹⁹¹ Since 1983, elections for the Legislative Assembly have been conducted using the Illinois voting system.¹⁹²
- 4.85 The Illinois voting system, otherwise known as 'cumulative voting', allows voters to 'cumulate' or combine their votes instead of having to cast one vote for one candidate. On Norfolk Island, each elector is

188 As a multi-member electorate, Norfolk Island used the 'block vote' variation of the first-past-the-post voting system, in which each elector has as many votes as there are candidates to be elected. See Norfolk Island Legislative Assembly, October 1995, *Report of the Select Committee on Electoral and Constitutional Matters*, p. 30; and also Hoare, M. 1999, *Norfolk Island: A Revised and Enlarged History 1774-1998*, St Lucia, Central Queensland University Press, pp. 155-6.

189 Department of Transport and Regional Services, Submissions, p. 92.

190 Abbott, L. J. & Snider, G. A. 1982, *Report of an Inquiry into the type of Electoral System most appropriate to elections of the Norfolk Island Legislative Assembly*, Canberra.

191 Department of Transport and Regional Services, Submissions, p. 93. See also Hoare, M. 1999, *Norfolk Island: A Revised and Enlarged History 1774-1998*, St Lucia, Central Queensland University Press, pp. 155-6.

192 A number of witnesses claimed that the Illinois voting system was imposed on Norfolk Island by the Federal Government. See, for example, Griffiths, Submissions, pp. 17, 210; Bennett, Submissions, p. 29; and Mr Geoff Bennett, Transcript, 15 July 2003, p. 54.

entitled to nine votes (equivalent to the number of Assembly Members to be elected) and must allocate all nine votes. The elector may allocate as many votes as they wish, up to a maximum of four votes, to any one candidate.¹⁹³ The cumulative voting system is often characterised as a system of ‘semi-proportional’ representation because it:

enhances the ability of a minority of voters to elect a candidate or some candidates of choice, but it is not designed to translate votes into seats in a proportional manner.¹⁹⁴

- 4.86 The system is designed to make it more likely that minorities, women and independents will be elected because supporters of such candidates may cast all their votes for their preferred candidate. In this way, candidates can win support from fewer voters than in an election using the first-past-the-post system. There is, however, no research on the impact of this system in a small electorate without party politics or significant minority groups.
- 4.87 There was widespread agreement among witnesses that the Illinois voting system has not worked as originally intended, and that it should be replaced. Mr Geoff Bennett described the Illinois system as a ‘monster’ that has provided the “ability to ‘stack’ the outcome”.¹⁹⁵ The Illinois system, it is claimed, gives those with connections to large family groups or sectional interests such as the public service or commercial sector “a disproportionate say in who is elected ... [and is] open to abuse and having the potential for fraud”.¹⁹⁶ The original rationale, to ensure the Pitcairn descendants were assured representation, is of little relevance in an electorate where they comprise approximately 46% of the Island population. In the absence of party politics, where each candidate stands as an independent, the rationale for additional minority protection is also less persuasive. In practice, cumulative voting has entrenched the power of minority sectional interests and, in the view of many witnesses, undermined representative democracy.
- 4.88 In 1994, the Seventh Legislative Assembly appointed a *Select Committee on Electoral and Constitutional Matters*. The Select Committee

193 Subsections 20 (3) (a) (b) and (4), *Legislative Assembly Act 1979* (NI).

194 Brischetto, R. & Engstrom, R. 1997, *Cumulative voting and Latino representation: exit surveys in fifteen Texas communities*, *Social Science Quarterly*, Vol. 78, No. 4, pp. 973-91.

195 Bennett, Submissions, p. 29.

196 Norfolk Island Legislative Assembly, October 1995, *Report of the Select Committee on Electoral and Constitutional Matters*, p. 31.

examined the electoral system and, in its report tabled in October 1995, recommended that a new voting system, a modified version of the first-past-the-post system, be introduced.¹⁹⁷ In the event that Federal Government did not support this proposed system, the Select Committee recommended that the Illinois system be modified to reduce the maximum number of votes for one candidate from four to three.¹⁹⁸ In 2001, the Ninth Legislative Assembly Working Group reviewing Norfolk Island's parliamentary system also concluded that the "present voting system is not perhaps in the best interests of a small community like Norfolk Island".¹⁹⁹

- 4.89 Witnesses to this inquiry were reasonably evenly divided between their support for a first-past-the-post system, a modified version of the first-past-the-post system or modifications to the existing Illinois system. There appears to have been a consistent community desire over a long period of time to return to the first-past-the-post system, as one which is relatively easy to understand and to operate. In light of this evidence and the widespread community dissatisfaction with the existing voting system, the Committee recommends that Section 20 of the *Legislative Assembly Act 1979* (NI) be amended to introduce the 'block vote' variation of the first-past-the-post method of voting for elections to the Legislative Assembly, and that the Federal Government support this amendment.²⁰⁰
- 4.90 Under the first-past-the-post system, voters place a tick (or cross) against the name of the candidate they support. The candidate attracting the highest number of votes wins, whether or not he or she has more than 50 per cent of the vote. What counts is that the candidate wins a simple majority (more votes than any other candidate), not that he or she wins an absolute majority or a particular percentage of the vote. Although the first-past-the-post system is most commonly used in single-member electorates, it can be used in multi-member electorates such as Norfolk Island. In this case, it is known as

197 Recommendation 22, Norfolk Island Legislative Assembly, October 1995, *Report of the Select Committee on Electoral and Constitutional Matters*, p. 33.

198 Recommendation 23, Norfolk Island Legislative Assembly, October 1995, *Report of the Select Committee on Electoral and Constitutional Matters*, p. 33.

199 The Hon. Ron Nobbs MLA, *Is the current parliamentary system appropriate for Norfolk Island?* Working Group Report tabled in the Norfolk Island Legislative Assembly on 21 November 2001, p. 6.

200 Although her preferred position is for the proportional representation system of voting with compulsory preferences, Senator Stott Despoja respects the preferred view of the local community and the majority of the Committee with respect to the 'block vote' variation of the first-past-the-post method of voting.

the 'block vote'. Under the 'block vote', electors have as many votes as there are candidates to be elected and may use as many or as few votes as they wish (that is, they do not have to cast all their votes). The 'block vote' variation of the first-past-the-post system is simple to use and enables the elector to vote for individual candidates.

- 4.91 Furthermore, the Committee reiterates the recommendation of its 2002 report, *Norfolk Island Electoral Matters*, that the *Norfolk Island Act 1979* (Cth) and the *Commonwealth Electoral Act 1918* (Cth) be amended to ensure that all elections and referenda on Norfolk Island come under the supervision of the Australian Electoral Commission.²⁰¹ In addition, the Australian Electoral Commission must assume responsibility for preparing and maintaining the electoral roll for Norfolk Island.²⁰² Consequently, the *Legislative Assembly Act 1979* (NI), in particular sections 5 and 11, will need to be amended to reflect the amendments to the enabling Act and other Commonwealth statutes.

Recommendation 25

- 4.92 **That Section 20 of the *Legislative Assembly Act 1979* (NI) be amended to introduce the 'block vote' variation of the first-past-the-post method of voting for elections to the Legislative Assembly, and that the Federal Government support this amendment.**

Recommendation 26

- 4.93 **That the *Norfolk Island Act 1979* (Cth) and the *Commonwealth Electoral Act 1918* (Cth) be amended to:**
- **ensure that all elections and referenda on Norfolk Island come under the supervision of the Australian Electoral Commission;**
 - **that the Australian Electoral Commission be responsible for preparing and maintaining the electoral roll for Norfolk Island;**

201 Recommendation 2, Joint Standing Committee on the National Capital and External Territories, 2002, *Norfolk Island Electoral Matters*, Canprint, Canberra, p. 31.

202 Currently, under Section 11 of the *Legislative Assembly Act 1979* (NI), the Administrator appoints a Returning Officer and, under Section 5 of the Act, the Returning Officer is responsible for preparing and maintaining the electoral roll.

and

- that the *Legislative Assembly Act 1979* (NI) be amended to reflect the amendments to the Commonwealth statutes.

Eligibility to Vote and Stand for Election

4.94 The *Legislative Assembly Act 1979* (NI) regulates the electoral roll and election of Members for the Legislative Assembly.²⁰³ It is compulsory for qualified electors to be enrolled and to vote.²⁰⁴ To be qualified to enrol to vote in a general election, a person must be 18 years old and have resided on the Island for 900 days during the four year period immediately preceding application to enrol.²⁰⁵ A person can be disenfranchised if they have been absent for 150 days in the 240 days immediately preceding closure of the electoral roll.²⁰⁶ There were approximately 1100 qualified electors enrolled at the time of this report.

4.95 There is no requirement for Australian citizenship to be eligible to vote or to be elected to the Legislative Assembly. In June 2002, the Committee tabled its report, *Norfolk Island Electoral Matters*, in which it made two key recommendations. The first was that the *Norfolk Island Act 1979* (Cth) be amended to provide:

that Australian citizenship be reinstated as a requirement for eligibility to vote for and be elected to the Norfolk Island Legislative Assembly, with appropriate safeguards for the right to vote of all those currently on the electoral roll.²⁰⁷

The second recommendation was that the *Norfolk Island Act 1979* (Cth) be amended to provide that:

the period for which an Australian citizen must reside on Norfolk Island before being eligible to enrol to vote for the Legislative Assembly be reduced to six months.²⁰⁸

203 The Commonwealth has authority to legislate in relation to eligibility to vote and candidature for the Norfolk Island Legislative Assembly under Section 122 of the Constitution.

204 Subsection 6 (4) and Section 47, *Legislative Assembly Act 1979* (NI).

205 Subsection 6 (1), *Legislative Assembly Act 1979* (NI).

206 Subsection 7 (1) (b), *Legislative Assembly Act 1979* (NI).

207 Recommendation 1, Joint Standing Committee on the National Capital and External Territories, 2002, *Norfolk Island Electoral Matters*, Canprint, Canberra, p. 30.

208 Recommendation 3, Joint Standing Committee on the National Capital and External Territories, 2002, *Norfolk Island Electoral Matters*, Canprint, Canberra, p. 45.

4.96 In March 2003, the Norfolk Island Government introduced the *Legislative Assembly Amendment Bill 2003* (NI) in response to the Committee's recommendations. The Bill proposes to amend the *Legislative Assembly Act 1979* (NI) by requiring that Norfolk Island residents wishing to enrol to vote in Territory elections and referenda must meet the following eligibility criteria:

- be 18 years of age or over;
- have resided on Norfolk Island for a minimum of 12 months (individual or aggregate) during the two and a half years immediately preceding application for enrolment (replacing the current provision of a minimum 900 days in the preceding four years);
- have Australian citizenship or citizenship of the United Kingdom of Great Britain and Northern Ireland or New Zealand.

4.97 A person who is re-enrolling must meet the citizenship requirements for enrolment, and have resided on the Island for a minimum of five months during the eight months immediately preceding application for re-enrolment. The Bill also provides transitional arrangements to validate the enrolment of Assembly Members and residents who qualified under the pre-existing system and are entered on the electoral roll on the date the amendments come into force.

4.98 However, the Committee disagrees with the provisions of the *Legislative Assembly Amendment Bill 2003* (NI). The Committee firmly believes that its recommendations in the *Norfolk Island Electoral Matters* report must be implemented. A requirement for Australian citizenship in order to vote or stand for election to the Legislative Assembly is necessary. Australian citizenship is now a requirement, or is being considered as a requirement, for enrolment and election at local government level elsewhere in Australia. Furthermore, given the Norfolk Island Government's participation in matters which have national significance, it is vital to Australia's national interest that Territory Ministers and other Legislative Assembly Members be Australian citizens. The Committee is satisfied that adequate safeguards can be provided for non-citizens who are already enrolled and notes both the relative ease with which a New Zealand citizen may acquire Australian citizenship and the opportunity that exists in both nations for holding dual citizenship.

4.99 The Committee also maintains its belief that it is unacceptable that Australian citizens who live on Norfolk Island, and make significant

contributions to the community, should be deprived of the opportunity to exercise a fundamental democratic right for a significantly longer qualifying period than applies in all other Australian jurisdictions. This situation is inconsistent with Australia's obligations under the *International Covenant on Civil and Political Rights* and infringes Article 25 of the Covenant that enshrines the right of all citizens to vote and stand for election. It has also been condemned by the Human Rights and Equal Opportunity Commission.²⁰⁹ While acknowledging the special nature of Norfolk Island's traditions and culture, as well as the concern felt by some Islanders that these may be threatened by allowing relative newcomers a voice in Island affairs, the Committee does not accept that there is either a proven risk or a need for special protection, particularly when such protection, entrenched in electoral law, serves to deny a basic human right to a group of citizens. Accordingly, the Committee reiterates the recommendations of its 2002 report, *Norfolk Island Electoral Matters*, that the *Norfolk Island Act 1979* (Cth) be amended as follows:²¹⁰

Recommendation 27

- 4.100 **That the *Norfolk Island Act 1979* (Cth) be amended to provide that Australian citizenship be reinstated as a requirement for eligibility to vote for and be elected to the Norfolk Island Legislative Assembly, with appropriate safeguards for the right to vote of all those currently on the Norfolk Island electoral roll.**

Recommendation 28

- 4.101 **That the *Norfolk Island Act 1979* (Cth) be amended to provide that the period for which an Australian citizen must reside on Norfolk Island before being eligible to enrol to vote in Territory elections and referenda be a minimum of six months.**

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

210 Recommendation 27 should not be construed as conferring Australian citizenship, or the right to vote in Federal elections, on those currently enrolled to vote in Territory elections and referenda.

Federal Parliamentary Representation

- 4.102 The issue of Norfolk Island residents being represented in the Federal Parliament has been examined in previous inquiries. In his 1976 Royal Commission report, Sir John Nimmo drew attention “to the need for citizens of Norfolk Island to be given representation in the Commonwealth Parliament just as residents in mainland Territories are represented”.²¹¹ Sir John Nimmo argued that as Norfolk Island is a Commonwealth Territory, and not, like Lord Howe Island, part of a mainland State, it would be more appropriate for Norfolk Island to be “accorded the same representation as residents in the mainland Commonwealth Territories”.²¹² Using the mainland Commonwealth Territory of Jervis Bay which constitutes part of the Federal electorate of Fraser in the Australian Capital Territory as a model, Sir John Nimmo recommended that Norfolk Island be incorporated for electoral purposes in the Federal electorate of Canberra within the Australian Capital Territory.²¹³ He noted that this would provide Norfolk Island residents with one Member in the House of Representatives and two Senators from the Australian Capital Territory.
- 4.103 In 1991, the House of Representatives Standing Committee on Legal and Constitutional Affairs also examined the issue of Federal parliamentary representation for Norfolk Island as part of its inquiry into the legal regimes of Australia’s External Territories.²¹⁴ The Standing Committee noted that “Australian citizens resident in Norfolk Island remain the only resident Australians not entitled, as of right, to representation in the Commonwealth Parliament”.²¹⁵ Noting the “strongly held views” of some Norfolk Island residents on the issue and the history of the Island, the Standing Committee reluctantly recommended that Australian citizens resident on Norfolk Island be given the right of optional enrolment in a Federal

211 Nimmo, J. 1976, *Report of the Royal Commission into Matters relating to Norfolk Island*, Australian Government Publishing Service, Canberra, p. 180.

212 Nimmo, J. 1976, *Report of the Royal Commission into Matters relating to Norfolk Island*, Australian Government Publishing Service, Canberra, p. 180.

213 Nimmo, J. 1976, *Report of the Royal Commission into Matters relating to Norfolk Island*, Australian Government Publishing Service, Canberra, p. 181.

214 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.

215 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. 146.

electorate.²¹⁶ The Standing Committee pointed out that this recommendation of optional enrolment is “contrary to the important principles which apply elsewhere in Australia”.²¹⁷ Two Assembly initiated referendums were held in 1991 on questions relating to the Standing Committee’s inquiry and the issue of Federal parliamentary representation. In both referendums, the case for Federal parliamentary representation was defeated.²¹⁸

4.104 Nonetheless, in 1992 the Commonwealth *Electoral Act 1918* and the *Referendum (Machinery Provisions) Act 1984* were amended to provide some Norfolk Island residents with the option to vote in Federal elections and referendums. A new section, 95AA, dealing with Norfolk Islander entitlement to be enrolled in a State or Territory electoral division, was inserted into the *Electoral Act 1918* (Cth). Under Section 95AA of the Act, Australian citizens who are resident on Norfolk Island and qualify for enrolment have the option of enrolling in either:

- an electoral division of a State for which they last had an entitlement to be enrolled, or in which any of their next of kin are enrolled, or in which they were born, or with which they have a close connection; or
- if none of these provisions apply, in an electoral division of a Territory.²¹⁹

The electorate of Canberra in the Australian Capital Territory serves as the default electorate. The total number of Norfolk Island residents currently on the Commonwealth Electoral Roll is 149.²²⁰

216 Recommendation 39, 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. 148.

217 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. 148.

218 See Department of Transport and Regional Services, Submissions, p. 93; and Hoare, M. 1999, *Norfolk Island: A Revised and Enlarged History 1774-1998* (5th Ed), Central Queensland University Press, St. Lucia, Queensland, pp. 165-6.

219 Section 95AA, *Electoral Act 1918* (Cth).

220 The breakdown of Norfolk Island residents enrolled by State is:

ACT	82
NSW	39
QLD	21
VIC	4
SA	2

4.105 The Committee agrees with the House of Representatives Standing Committee on Legal and Constitutional Affairs in its 1991 Report that “the right to vote is an absolute right which should not be denied to those people of Norfolk Island who wish to exercise their right”.²²¹ The Committee is also aware of the frequent criticism of some Island residents that the people of Norfolk Island are not directly represented in the Federal Parliament.²²² Mr Ric Robinson, in particular, makes this point most eloquently in relation to the Committee’s inquiry:

Now we have this Australian Parliamentary Committee, (consisting of members who were not elected by the people of Norfolk Island, nor do they represent Norfolk Island), giving advice to a Minister, (who is also not elected by, nor does he represent the people of Norfolk Island), on how the Island is to be governed. Is this Australian democracy at work?²²³

4.106 In the Committee’s view, this anomaly should not be allowed to continue. The Committee strongly believes that, as a part of Australia, Norfolk Island must have direct representation in the Federal Parliament. In the same way that the Indian Ocean Territories have dedicated representatives in the Federal Parliament through their inclusion, for electoral purposes, in the Northern Territory, Norfolk Island must be provided with a dedicated representative in the House of Representatives able to speak on residents’ behalf and air their concerns.

4.107 The Committee, therefore, proposes that Norfolk Island be included in a Federal electoral division of a mainland Territory. The Committee agrees with the view of Sir John Nimmo that as a Commonwealth Territory, Norfolk Island should be provided with the same representation as residents in the other Commonwealth Territories.²²⁴ The two other self-governing Territories, the Northern Territory and the Australian Capital Territory, both enjoy direct Federal representation. In the Committee’s view, the Federal electorate of

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Figures provided by the Australian Electoral Commission.

221 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. 147.

222 Robinson, McCullough, Bennett, Nobbs, Submissions.

223 Robinson, Submissions, p. 5.

224 Nimmo, J. 1976, *Report of the Royal Commission into Matters relating to Norfolk Island*, Australian Government Publishing Service, Canberra, p. 180.

Canberra within the Australian Capital Territory would be the most suitable. This would provide Norfolk Island residents with one Member in the House of Representatives and two Senators from the Australian Capital Territory. The Member of the House of Representatives for Canberra would then assume responsibility for representing Norfolk Island residents and their interests in Federal Parliament and for interceding on their behalf with the Federal Government and bureaucracy. The Senators for the Australian Capital Territory would also provide a similar role.

- 4.108 Furthermore, the Committee strongly believes that it is the duty of all Australians, who qualify to enrol and vote, to do so. The Committee, therefore, recommends that the existing arrangement for optional enrolment by Norfolk Island residents be replaced with compulsory enrolment for all Norfolk Island residents who qualify under Section 93 of the *Electoral Act 1918* (Cth). Those Norfolk Island residents currently enrolled in a number of different Federal electorates spread across the country under the existing provisions of the *Electoral Act 1918* (Cth) should change their enrolment to the Federal Electoral Division of Canberra. All other Norfolk Island residents who qualify for enrolment, and are currently not enrolled, should enrol in the Federal Electoral Division of Canberra.

Recommendation 29

- 4.109 **That the *Electoral Act 1918* (Cth) and other relevant Commonwealth statutes be amended to provide for the inclusion of Norfolk Island in the Federal electorate of Canberra for the purposes of voting in Federal elections and referendums, and that:**
- **the existing provision, under the *Electoral Act 1918* (Cth), for optional enrolment by Norfolk Island residents be replaced with compulsory enrolment for all Norfolk Island residents who qualify under Section 93 of the *Electoral Act 1918* (Cth);**
 - **those Norfolk Island residents currently enrolled in Federal electorates under the provisions of the *Electoral Act 1918* (Cth) to change their enrolment to the Federal Electoral Division of Canberra; and**
 - **Norfolk Island residents who qualify for enrolment must, following the amendment, do so in the Federal Electoral Division of Canberra.**

The Adequacy of the Territory's Laws

- 4.110 The responsibility to develop policy and make laws to meet the regulatory needs of society is a primary function of government. In all jurisdictions, the conduct of government business requires that high level legal and legal policy advice is available to government. The capacity to draft new laws, review and update existing legislation and respond to new and emerging regulatory requirements is essential. The demands on law making have become increasingly complex and require a capacity to monitor the effectiveness of regulatory regimes and the ability to respond to deficiencies or newly emerging needs. On Norfolk Island, the demand for legal, legal policy and legislative drafting skills has increased as the Territory has acquired an increased measure of internal self-government. In a polity of some two thousand people, the burden of keeping pace with the demands for a comprehensive legislative programme adequate to discharge State and Federal type responsibilities is an impossible one.
- 4.111 Norfolk Island's law-making capacity has been the subject of previous inquiries and reports.²²⁵ In 1996, the then Norfolk Island Minister for Health and Education, Mrs Nadia Lozzi-Cuthbertson MLA, acknowledged the:

inadequacy of our criminal law. Not only are its terms generally archaic and obscure, the legislation is not readily available. While the existence of sentencing options such as whipping and sentencing to irons may seem quaint, the reality is that such features are a blot on our jurisdiction and quite probably a breach of international obligations on civil and political rights.²²⁶

In 1997, the Commonwealth Grants Commission recommended that a review of Norfolk Island laws would be beneficial, but noted that it was unlikely that the Administration had either the expertise or the financial resources to undertake it.²²⁷

225 See, for example, Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra.

226 Mrs Nadia Lozzi-Cuthbertson MLA, December 1996, Foreword, *Norfolk Island Proposed Crimes Bill 1996 and Crimes (Offences Against Government) Bill 1996: Exposure Draft*.

227 Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, p. 206.

- 4.112 There is little to suggest that the conditions prevailing at the time of the Grants Commission inquiry have changed at all.²²⁸ The current murder and arson investigations have highlighted the deficiencies in Norfolk Island's legal regime and justice system and the urgent need for reform. Witnesses to the Committee's inquiry also raised concerns with the Territory's legal infrastructure including, but not limited to, out-of-date and inadequate criminal law, road traffic rules, child welfare law, and the lack of a guardianship law.²²⁹ The need for wholesale reform of Norfolk Island's criminal, evidence and sentencing laws has long been acknowledged.²³⁰ Yet little reform has been apparent to date, other than the passage of the *Crimes (Forensic Procedures) Act 2002* (NI) in April 2002 to meet a specific need relating to the police investigation of the murder of Ms Janelle Patton.
- 4.113 Many witnesses pointed to the weaknesses in the *Employment Act 1988* (NI), including an inadequate workers compensation scheme and occupational health and safety regime, and recently proposed opt out provisions for overtime payments. In a recent letter to the Editor of *The Norfolk Islander* newsletter, Mr Michael King, a member of the

228 In February 2001, the Hon. David Buffett MLA, Minister responsible for legal matters, initiated a review of the Territory courts and justice administration and established a Justice and Courts Reform Committee. In September 2001, Mr Buffett announced that drafting instructions had been prepared "with a view to establishing a comprehensive framework for the criminal jurisdiction including the following proposed discussion drafts: Crimes Bill, Criminal Trial Procedure Bill, Police Procedures and Powers Bill, Sentencing Bill, Bail Bill and Young Offenders Bill". In November 2001, the Minister tabled an exposure draft of a new Evidence Bill, but explained that "drafting resources have really been unable to keep up" with the rest of the justice package. On 19 March 2003, the Chief Minister informed the Legislative Assembly that "budget and resource constraints will pose significant barriers to Norfolk Island attempts to reform its justice system – as it will with other Norfolk Island Government policy goals".

229 Norfolk Island criminal and child welfare laws date from the 1930s. For example: "The *Criminal Law Act 1960* (NI) applies the *Crimes Act 1900* (NSW) as at 16 December 1936 and with specified modifications as a law of Norfolk Island. The applied Crimes Act, notwithstanding some significant amendments, is in many respects outdated and inappropriate for contemporary social conditions in Norfolk Island." In effect, the *Criminal Law Act 1960* (NI) "adopted by reference legislation which then was 23 years old and superseded in its own jurisdiction". Norfolk Island Government, December 1996, *Norfolk Island Proposed Crimes Bill 1996 and Crimes (Offences Against Government) Bill 1996: Exposure Draft*, pp. 8, 16.

230 See, for example, 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; Norfolk Island Government, December 1996, *Norfolk Island Proposed Crimes Bill 1996 and Crimes (Offences Against Government) Bill 1996: Exposure Draft*; and Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, pp. 190-91.

Norfolk Island Employment Conciliation Board, noted, despite 15 years since the *Employment Act 1988* (NI) was introduced:

the absence of an ongoing public education programme, the total lack of any prosecutions under the Act, the absence of a meaningful OHS inspectorate, the absence of required reports to the Parliament on the operation of the Act ... if the Government had expressed a commitment through proper funding and forceful administration, the Act would have a strong and robust standing in community affairs, rather than the feeble footing which it has ... it's about ensuring an attractive working environment for our own children so they don't have to leave the island in search of a fair go.²³¹

- 4.114 Norfolk Island company law has not maintained parallel provisions with Australian corporate law and the lack of bankruptcy law has been an ongoing and unresolved issue for many years.²³² It is questionable whether the Territory has the capacity to maintain and administer such a body of complex law. The *Legal Profession Act 1993* (NI) is not in force or applied, leaving the legal profession to operate without effective regulation or disciplinary procedures. It is also questionable whether the *Legal Profession Act 1993* (NI) provides for a truly independent regulatory body and would be effective if commenced. Despite this, no alternative arrangements with a mainland jurisdiction have been pursued.²³³ The Territory lacked legislation to ensure protection of human rights, until the Commonwealth's legislation was extended to Norfolk Island.²³⁴ The

231 Mr Michael King, 1 November 2003, Letter to the Editor, *The Norfolk Islander*. The Department of Workplace Relations advised that consultations took place with the Norfolk Island Administration during the development of the *Employment Act 1988* (NI) to ensure minimum standards under International Labour Organisation (ILO) Conventions were fulfilled at that time. The *Workplace Relations Act 1996* (Cth) does not apply to Norfolk Island. Application of the following ILO Conventions is currently subject to consultation: Discrimination (Employment and Occupation) 1958; Workers Representatives 1971; Termination of Employment 1982; Vocational Rehabilitation and Employment (Disabled Persons) 1983 and Workers' Claims (Employer Insolvency) 1992.

232 *Companies Act 1985* (NI).

233 Part 1 (definitions) and section 45 and 46 (commencement and regulations), *Legal Profession Act 1993* (NI) are the only operative parts of the Act commenced on 13 May 1993.

234 In its Third Periodic Report under the ICCPR, Australia reported to the UN Human Rights Committee that Norfolk Island lacked legislation to protect human rights and undertook to negotiate an extension of Federal law to the Territory. See Sections 5 and 6, *Human Rights and Equal Opportunity Commission Act 1986* (Cth); Section 4, *Race Discrimination Act 1975* (Cth); Section 9 (1), *Sex Discrimination Act 1984* (Cth); Section 2 (1), *Disability Discrimination Act 1992* (Cth).

Committee is seriously concerned that the Territory's laws, such as its criminal and immigration laws, breach Australia's obligations under the *International Covenant on Civil and Political Rights*.²³⁵

- 4.115 The Committee has already highlighted problems with legislation covering social security, health and medical assistance, and the lack of adequate procedural rights to review government decisions. The requirement in the *Norfolk Island Act 1979* (Cth) that a Federal law must be expressly extended to the Territory to apply also contributes to confusion about which Federal laws apply to the Island.
- 4.116 The people of Norfolk Island are entitled to expect that local laws provide regulatory regimes that are up-to-date and based on sound policy, their rights are protected and the legislative priorities of the Government reflect community needs. Given the large volume of work involved in updating laws and meeting new legislative requirements, the Committee believes the current legislative programme is already beyond the capacity of the Norfolk Island Government and the likelihood of being able to implement comprehensive reform extremely remote.²³⁶
- 4.117 Australia has an obligation to ensure that everyone within its territory and subject to its jurisdiction, including those residing on the Norfolk Island, are guaranteed equal treatment before the law and equal protection of the law.²³⁷ Australia has obligations, for example, to protect the rights of the child and the interests of those who suffer from mental illness. There is a national interest in ensuring that bankruptcy and insolvency laws are in place and that the regulation of companies meets basic Australian standards. The Committee is not in a position to conduct a detailed audit of the laws of Norfolk Island and the extent to which they are adequately and appropriately framed, resourced and applied. However, it is the Federal Government's responsibility to ensure that Territory laws and the application and enforcement of those laws meet Australia's international legal obligations. As a matter of principle, it is

235 The *Crimes Bill 1996* Exposure Draft highlights a range of "inappropriate provisions", including "the notional retention of capital offences [and] the availability of ... whipping for juveniles as well as sentencing to irons ... the mere retention of such provisions may represent a breach of Australia's obligations under the International Covenant on Civil and Political Rights which was ratified by Australia in 1980." Norfolk Island Government, December 1996, *Norfolk Island Proposed Crimes Bill 1996 and Crimes (Offences Against Government) Bill 1996: Exposure Draft*, p. 8.

236 Tenth Norfolk Island Legislative Assembly, Legislative Programme as at 7 July 2003.

237 Articles 2 and 26, *International Covenant on Civil and Political Rights*.

undesirable that the legal infrastructure of Norfolk Island be allowed to lag behind mainland standards especially where this exposes the vulnerable to lack of protection or impacts on the national interest.

- 4.118 The Federal Government's policy of internal self-government for Norfolk Island therefore means that it must accept some responsibility for ensuring that skilled legal drafting services are available. A service delivery agreement with the Commonwealth Office of Parliamentary Counsel and the Commonwealth Attorney-General's Department would ensure that experienced and appropriate public sector legislative drafting services are provided to the Territory Government. Any proposal that private law firms perform this function should be rejected outright.
- 4.119 It is essential that the Federal Government fund a legislative drafter to specifically work on Territory law reform, and not the legislative programme of the Territory Government of the day. There is a clear need for Federal Government oversight, in consultation with the Norfolk Island Government, to determine which Territory laws must be reformed, when and the content of the new laws, in particular to ensure that these laws conform with national standards and international obligations. The starting point would be to redraft Norfolk Island legislation of importance to both the Federal and Norfolk Island governments and agreed upon by both, and over time move onto less important laws. Therefore, the Committee recommends the following:

Recommendation 30

- 4.120 **That, with the assistance of the Federal Government, the Norfolk Island Government immediately commence:**
- **a phased reform of Norfolk Island law, with priority for redrafting of existing laws to be determined by both the Federal and Territory governments, with the Federal Government having the final say in the case of disagreement;**
 - **a new and dedicated legislative drafter be funded, supported by and report to the Commonwealth Office of Parliamentary Counsel and Commonwealth Attorney-General's Department to draft the aforementioned reforms; and**
 - **the new laws, once drafted, be implemented by an Ordinance**

introduced into the Norfolk Island Legislative Assembly by the Governor-General pursuant to Section 26 of the *Norfolk Island Act 1979* (Cth).

Recommendation 31

- 4.121 That, with the assistance of the Federal Government, the Norfolk Island Government enter into a service delivery agreement with the Commonwealth Office of Parliamentary Counsel and the Commonwealth Attorney-General's Department for the provision of its usual drafting services.

Recommendation 32

- 4.122 That the Federal Government assist the Norfolk Island Government in the immediate reform of the laws of Norfolk Island in relation to the following:
- review the Territory's child welfare law to ensure that it conforms with the *Convention on the Rights of the Child* and best practice in Australia;
 - provide assistance to ensure reform of the Territory's child welfare law is complete within 12 months of acceptance of this recommendation;
 - provide assistance to ensure reform of the Territory's criminal justice laws is complete within 12 months of acceptance of this recommendation;
 - investigate the regulation of companies with a view to applying Federal company, bankruptcy and insolvency laws to the Territory;
 - ensure that proposed uniform national legal profession laws apply to legal practitioners who practice in the jurisdiction of Norfolk Island;
 - pending promulgation of the proposed national legal profession laws, legal practitioners on Norfolk Island be required to register in some other Australian legal jurisdiction; and

- **review the *Employment Act 1988* (NI) to ensure it is consistent with best practice and legislation in other Australian jurisdictions and is in compliance with International Labour Organization Conventions and Australia's other international obligations.**



Appendix A – Minister’s Statement

The Hon. Wilson Tuckey MP, Minister for Regional Services, Territories and Local Government, *The Federal Government’s Interests in, and Obligations to, Norfolk Island*, tabled in the Legislative Assembly on 25 September 2002 and published in The Norfolk Islander, 28 September 2002.

The last comprehensive public policy statement on Norfolk Island was made in 1978, and was intended to set the scene for the self-government arrangements introduced under the *Norfolk Island Act 1979*. That statement by the then Territories Minister, the Hon Bob Ellicott QC, was the outcome of extensive consultation, negotiation and discussion throughout all levels of the Federal Government. Since then there have been a number of policy statements on specific issues, dealing with particular concerns.

The most significant of the more recent statements was made in August 1999 by my predecessor, Senator the Hon Ian Macdonald. In a letter to the then Chief Minister Senator Macdonald explained the Commonwealth position on the form of self-government envisaged for Norfolk Island and the status of the Territory within the Australian Federation. He also emphasised the need for greater involvement by the Norfolk Island Government in Federal consultation processes such as Ministerial Councils and other national forums. The approach taken in that letter was formally endorsed by the Prime Minister.

Although that statement contained some references to the national interest, particularly in the context of the need for Norfolk Island to be involved in discussions on issues of national importance, it is clear to me that significant misunderstandings still exist. I agree with the view put in the

Administrator's opening speech to the Tenth Legislative Assembly that misunderstandings can generate mistrust and stand in the way of acceptance and cooperation. I therefore believe it would be helpful for all concerned if I tried to clarify the Federal Government's interests in, and responsibilities for, Norfolk Island.

At the outset I know I must acknowledge that there is one particular issue which still seems to have the power to create division on the Island. That contentious issue is of course the Island's constitutional status. Now I could spend a lot of time going through the various legal and constitutional proofs and counter some of the more imaginative claims which have been made over recent years. However, the experiences of my predecessors indicate that such an approach would not change the views of the minority elements. I will therefore simply say that the Federal Government's position hasn't changed since the 1978 policy statement I referred to earlier. As Mr Ellicott emphasised then: "Norfolk Island is part of Australia and will remain so".

Much has been said and questioned over the years concerning the extent of the Federal Government's national interests and role in Norfolk Island. While the Federal Government certainly has interests in the sense of gaining benefits, such as a strategic base for defence activities, significantly increased Exclusive Economic Zone etc, these are only a relatively small part of the Government's overall role.

Perhaps a better word to describe the Federal Government's relationship with the Island would be obligations. The Government has certain obligations to its citizens, and their environment, wherever they live within the existing Federal arrangements. These include the obligation to defend its citizens and territory, ensure that the laws under which they are governed are just and reasonable, that criminal elements are deterred from taking advantage of geographic remoteness or idiosyncratic regulatory regimes, that the environment is protected for current and future generations and that the nation's cultural heritage is preserved in all its diversity. There are also overarching obligations to ensure compliance with international agreements.

In summary, the Federal Government retains ultimate responsibility for the welfare of all Australian citizens throughout Australia and has an obligation to protect their basic individual rights. It must therefore encourage strong partnerships with all the States and Territories. In Norfolk Island's case, the principles on which the partnership is based, the areas of Commonwealth and local responsibility and the reciprocal nature of responsibilities encompass a number of unique elements.

I will try to address the main elements in more detail.

Firstly, and perhaps most importantly, the Federal Government remains committed to internal self-government for Norfolk Island and respects the rights of Norfolk Islanders to govern their day to day lives. The Federal Government also recognises the special relationship between Norfolk Island and the Norfolk Islanders of Pitcairn descent.

At the same time, Norfolk Island is part of the Australian federal system of government in which powers and functions are shared between the national, state and territory governments. As already explained in the Administrator's address, the *Norfolk Island Act 1979* confers wide ranging powers on the Assembly to make laws for the "peace, order and good government of the Territory". The exceptions, and there are only four (euthanasia, raising of defence forces, coining of money and acquisition of property on other than just terms), are listed at section 19 of the Act. This is much the same as for the Legislative Assemblies of the other self-governing Territories, the Northern Territory and the Australian Capital Territory, although the lists of exclusions are not identical.

Schedules 2 and 3 to the Norfolk Island Act do not restrict the powers of the Assembly to pass proposed laws, but rather they indicate how the assent process provided for by section 21 of the Act is to operate. In short, laws on topics that are not listed in Schedule 2 must be referred to the Territories Minister or the Governor-General. In the Norfolk Island context this "right of veto", as described by Mr Ellicott in 1978, generally relates to matters of "particular sensitivity and national importance" such as immigration, customs etc. The referral process is aimed at avoiding conflict with any relevant Federal Government laws, policies or programs or with national obligations under international law.

This brings me back to the question of what exactly are the Federal Government's national interests and obligations. While I do not believe that an all-encompassing list is possible, there are a number of broad categories which I will briefly describe.

As already mentioned, the most obvious of the national interests are national security and defence. As Australian sovereign territory within Australia's sphere of influence in the Pacific, Norfolk Island has clear strategic significance. It has been used for Australian Defence Force special operations and as a support base for patrol boats and Coastwatch aircraft conducting surveillance. In return the Federal Government guarantees to protect the Island's residents at need.

It is also in the national interest that Norfolk Island generates an Exclusive Economic Zone for Australia and significantly increases Australia's Legal Continental Shelf, as defined under the United Nations Convention on the

Law of the Sea. These areas include fisheries (and potentially oil and mineral resources) which can be used for the benefit of all Australians. From these interests flow obligations to ensure the sustainable management and conservation of living and non-living marine resources around Norfolk Island. The sea and seabed surrounding Norfolk Island from the low water mark out to 200 nautical miles (the Exclusive Economic Zone) and beyond (the Contiguous Zone) is vested in and regulated by the Federal Government in accordance with national and international laws. Similar arrangements apply to the States and the Northern Territory.

Another significant national interest is law enforcement. The Federal Government has an obligation to ensure that appropriate laws are enacted and effectively enforced to protect the residents and reputation of Norfolk Island, and Australia as a whole. For example, I am sure that the Federal Government's interest in the Island's immigration, customs and quarantine regimes is readily understood by the Norfolk Island community. Naturally it is important that the Island's laws complement the mainland regime to ensure that Australia's borders, environment and flora and fauna are protected, and that there are significant deterrents for unacceptable activities such as drug trafficking, people smuggling, financial and corporate abuses etc. It is also inevitable that national issues will arise which require a coordinated national response. Gun control is a good example.

I must also emphasise that the Federal Government's interest in Norfolk Island is an extension of its obligation to assist remote and regional areas throughout Australia. For example, the need to develop or improve telecommunications nationwide has resulted in an ongoing commitment from the Federal Government to regional programmes such as Networking the Nation. Norfolk Island continues to benefit from such programmes.

The Federal Government has related obligations to ensure the sustainable management and conservation of the Territory's unique environmental, cultural and heritage assets. To meet its obligations to protect matters of national environmental significance the Federal Government has implemented a major environmental law reform agenda through the *Environment Protection and Biodiversity Conservation Act 1999*. That Act imposes obligations on the Federal Government in relation to its interests in Norfolk Island. I should also mention here that, in its pursuit of a sustainable community, the Federal Government seeks a high standard of environmental health, economic stability and social equity in all States and Territories including Norfolk Island.

Another important obligation on the Federal Government is providing national leadership and direction in the identification, conservation and

protection of the nation's treasured places. It therefore has an obligation to ensure that these assets are managed and conserved for the benefit of all Australians including the residents of Norfolk Island. For example, the rich convict history and heritage of the Island are an important part of Australia's national heritage and culture. The Kingston and Arthur's Vale Historic Area in particular is one of the foremost national examples of a cultural landscape, with exceptional heritage values. The Federal Government has an ongoing interest in, and commitment to, the protection and conservation of the site.

These issues all converge in what could be considered an overarching responsibility to ensure good governance on the Island. Reciprocal obligations arise out of the fact that the Federal Parliament devolved legislative and executive power to Norfolk Island under the *Norfolk Island Act 1979*. The Federal Government retains residual responsibilities for the Territory's good government and proper financial management. It therefore has an obligation to ensure political stability and efficient, honest and accountable government, and to facilitate economic and social development. The Federal Government also remains responsible for ensuring that activities on Norfolk Island comply with national obligations under international law.

This leads me finally to the important issue of management of the Commonwealth's contingent liabilities in Norfolk Island. As with other Australian States and Territories, Commonwealth assistance may be required should Norfolk Island's resources ever prove insufficient. The Federal Government recognises that Norfolk Island faces unique constraints arising from its small size, remoteness, and relative economic and environmental vulnerability. The Island currently remains dependent on outside and remote markets and overly reliant on its one main industry, tourism.

Ultimately, the Federal Government's underlying interest and obligation is to provide a "safety net" and continue to accept responsibility for maintaining Norfolk Island as a viable community. However, to avoid the need for such intervention, the Federal Government retains an interest in ensuring the Territory remains as resilient as possible: for example, by maintaining a sound financial system, effective public accountability and appropriate risk management and disaster preparedness and planning. This is particularly relevant at present when the Federal and Norfolk Island Governments are working together on developing solutions to the Island's acknowledged economic difficulties and investigating alternative revenue sources.

In summary, the relationship between the Federal Government and the Norfolk Island Government creates obligations on both sides. Among other things, the Federal Government is committed to defend the Territory, protect the individual rights of its residents, encourage its sustainable development,

ensure that its environment and cultural heritage are preserved and protected and to look after its interests locally and internationally. While encouraging and promoting self-reliance, the Federal Government provides a “safety net” in the event of natural or economic catastrophes. In return, the Federal Government has the right to expect good governance, probity, law and order, the highest standards of financial regulation (to combat financial crime, regulatory abuse etc) and compliance with Australia’s international obligations.

Meeting these obligations is of course dependent on cooperation - based on mutual understanding, respect and trust.

July 2002



Appendix B – List of Submissions

1. Mr Graeme Woolley
2. Ms Nadia Lozzi-Cuthbertson
3. Mr Ric Robinson
4. Dr Colleen McCullough
5. CONFIDENTIAL
6. Mr Bruce Griffiths
7. Mr Ric Robinson (Supplementary)
8. CONFIDENTIAL
9. Mr Geoff Bennett
10. Ms Jan Nobbs
11. The Hon. R. J. Ellicott QC
12. Mr Lisle Snell
13. Commonwealth Department of Transport and Regional Services
14. Commonwealth Ombudsman
15. CONFIDENTIAL
16. Mr and Mrs Bernie and Mary Christian-Bailey
17. Mr William Blucher
18. The Hon. Ivens Buffett MLA

19. Commonwealth Department of Family and Community Services
20. Mr D. J. Morris
21. Norfolk Island Public Service Association
22. Mr Bruce Griffiths (Supplementary)
23. Ms Philippa Reeves
24. CONFIDENTIAL
25. CONFIDENTIAL
26. Professor Maev O'Collins
27. Norfolk Island Government
28. CONFIDENTIAL
29. Mr Michael King
30. Mr George Smith MLA
31. Mr Bill Sanders
32. The Hon. Adrian Cook QC
33. CONFIDENTIAL
34. CONFIDENTIAL
35. Mr Peter Woodward
36. CONFIDENTIAL
37. Commonwealth Attorney-General's Department
38. Mr Trevor Friend
39. Administrative Review Council
40. Mrs Katherine Adams-Friend
41. Commonwealth Treasury
42. CONFIDENTIAL
43. CONFIDENTIAL
44. Commonwealth Ombudsman (Supplementary)
45. Commonwealth Attorney-General's Department (Supplementary)
46. Commonwealth Attorney-General's Department (Supplementary)

47. CONFIDENTIAL
48. CONFIDENTIAL



Appendix C - List of Exhibits

1. Mr Bill Sanders

Email correspondence from Mr Craig Robinson in relation to Norfolk Telecom charging schedule.

2. Mr Ron Nobbs MLA

Excerpt from Norfolk Island *Focus 2002* Report.

3. CONFIDENTIAL

4. Mrs Florence Anderson

Email correspondence in relation to land and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

5. CONFIDENTIAL

6. Mrs Florence Anderson

Excerpt (Chapter 20 – Governance: Land and Environment) from Mosley J. G. *Island on the Brink: A Conservation Strategy for Norfolk Island*, January 2001.

7. Mrs Florence Anderson

Mosley J. G. *Island on the Brink: A Conservation Strategy for Norfolk Island*, January 2001.

8. Mrs Florence Anderson

Document regarding Travel Insurance including Sun Alliance Insurance Policy wording.

9. Mrs Florence Anderson

A Guide to the Norfolk Island Healthcare Scheme

10. CONFIDENTIAL**11. The Hon. Geoff Gardner MLA**

Transcript, *Norfolk Govt under scrutiny over services*, ABC Online, 17 July 2003.

12. The Hon. Geoff Gardner MLA

Email in relation to Norfolk Island Health System from Dr Bill Glasson, dated 22 July 2003.

13. The Hon. Geoff Gardner MLA

Letter from Dr Mervyn Thomas in relation to Norfolk Island Health System, dated 22 July 2003.

14. The Hon. Geoff Gardner MLA

Letter from Dr Bryan Yeo in relation to Norfolk Island Health System, dated 21 July 2003.

15. The Hon. Geoff Gardner MLA

Excerpt from 'Letters to the Editor', *The Norfolk Islander*, 19 July 2003.

16. The Hon. Geoff Gardner MLA

Excerpt from 'Letters to the Editor', *The Norfolk Islander*, 27 June 2003.

17. The Hon. Geoff Gardner MLA

Email from Dr John Lock in relation to Norfolk Island Health System, dated 20 July 2003.

18. CONFIDENTIAL**19. CONFIDENTIAL****20. CONFIDENTIAL****21. CONFIDENTIAL****22. CONFIDENTIAL****23. CONFIDENTIAL****24. CONFIDENTIAL**



Appendix D - Witnesses appearing at public hearings

**Norfolk Island,
Tuesday, 15 July 2003**

Private Capacity

Mr Geoff Bennett

Mr John Brown MLA¹

The Hon. Ivens Buffett MLA

The Hon. Adrian Cook QC

Mr Bruce Griffiths

Mr Michael King

Mr Ron Nobbs MLA

Mr Bill Sanders

Mr George Smith MLA

¹ Mr John Brown MLA appeared in both a private capacity and as Chairman of the Norfolk Island Legislative Assembly Select Committee into Electoral and Governance Issues.

**Norfolk Island,
Wednesday, 16 July 2003**

Private Capacity

Miss Alice Buffett

**Canberra,
Friday, 25 July 2003**

Commonwealth Ombudsman

Mr Ronald Brent, Deputy Commonwealth Ombudsman

Professor John McMillan, Commonwealth Ombudsman

Commonwealth Department of Transport and Regional Services

Ms Margaret Backhouse, Director, Self-Governing Territories, Territories and Local Government

Mr Adrian Beresford-Wylie, Assistant Secretary, Self-Governing Territories, Local Government and Natural Disaster Management.

Mr John Doherty, First Assistant Secretary, Territories and Local Government.

Private Capacity

The Hon. Robert Ellicott QC

Norfolk Island Government

The Hon. David Buffett MLA, Minister and Speaker

The Hon. Geoff Gardner MLA, Chief Minister and Minister for Intergovernment Relations

Mr Don Wright, Adviser to Norfolk Island Government

Commonwealth Attorney-General's Department

Ms Katherine Jones, Acting Assistant Secretary, Administrative Law and Civil Procedure Branch

Mr Colin Minihan, Acting Assistant Secretary, Information Law Branch