

# Territorial Limits: Norfolk Island's Immigration Act and human rights

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## 1 Background to the inquiry

### 1.1 Introduction

Norfolk Island is situated some 1,600 kilometres north-east of Sydney. A former penal colony administered first from Sydney and later from Van Diemen's Land (Tasmania), it became home to the descendants of the Bounty mutineers when Pitcairn Island to the north-east had to be abandoned. The resident population now numbers almost 1,800 and the Island caters for some 35,000 tourists annually, each staying an average seven nights.

Norfolk Island is a territory of Australia administered by the Commonwealth and granted a significant measure of self-government in 1979. The Island assembly and government have powers far beyond those of the Australian states. They control not only what falls within state jurisdiction but also social security, taxation and immigration and settlement subject to limited oversight by the Commonwealth. The Island's immigration regime is distinct from that applicable throughout the remainder of the Commonwealth. The Commonwealth's *Migration Act 1958* has no application on Norfolk Island. Instead immigration, including immigration by Australian citizens from other parts of Australia, is regulated by the Norfolk Island *Immigration Act 1980*.

In 1996 and 1997 the Human Rights and Equal Opportunity Commission (the Commission) received four complaints regarding the operation of the *Immigration Act 1980* (NI). The main allegations raised in these complaints were that

- 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

- 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.

The Commission decided to conduct a general inquiry into the *Immigration Act 1980* (NI) and the complaints were deferred pending its finalisation.

## 1.2 The Commission's functions

The Human Rights and Equal Opportunity Commission is an independent federal statutory authority established by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act). The Commission has specific legislative functions and responsibilities for the protection and promotion of human rights under the HREOC Act. In particular, the Commission can

- examine enactments for the purpose of ascertaining whether these enactments are inconsistent with or contrary to any human rights (section 11(1)(e))
- inquire into any act or practice that may be inconsistent with or contrary to any human rights (section 11(1)(f))
- make recommendations to the Minister to remedy those infringements (section 11(1)(f))
- report to the Minister on any action that should be taken to comply with relevant international instruments (section 11(1)(k)).

The HREOC Act specifically extends to Norfolk Island (sections 5 and 6).

## 1.3 Conduct of the inquiry

The inquiry was undertaken to examine whether the *Immigration Act 1980* (NI) and associated regulations, guidelines and policies are consistent with or contrary to Australia's human rights obligations, in particular the right to freedom of movement and residence and the right to equality before the law.

### Submissions

The inquiry was advertised in *The Australian* and *The Norfolk Islander* newspapers on the weekend of 12-13 July 1997. The advertisement outlined the terms of reference and called for submissions. The Commission received 15 written submissions (Appendix 1).

### Consultations

In December 1997 the Commission conducted consultations and hearings on Norfolk Island. The Human Rights Commissioner met with government ministers and other officials on 16 December and with interested members of the public on 17 and 18 December 1997. These meetings were advertised in *The Norfolk Islander* on 29 November 1997 and members of the public were invited to make an appointment to discuss issues relevant to the inquiry.

In September 1998 the Commission's draft report was circulated for comment to the four complainants, the Norfolk Island Government, the federal Attorney-General and the Minister for Territories.

## Major finding and recommendation

The Commission finds, on the basis of evidence currently before it, that the implementation of the immigration regime on Norfolk Island violates the right of all Australians to liberty of movement and freedom of choice of residence without discrimination and free from arbitrary decision making under article 12 of the *International Covenant on Civil and Political Rights* (ICCPR). The Commission further finds that even an objective and non-discriminatory immigration regime different from that of Australia as a whole may violate ICCPR article 12 because it is not necessary to protect the Island's environment or the culture of the Pitcairn descendants.

The Commission recommends that the *Migration Act 1958* (Cth) be extended to Norfolk Island and that the Island's immigration regime be repealed and the Island government's power to legislate for immigration be revoked.

## 2 Norfolk Island - an overview

Norfolk Island is located in the South Pacific Ocean, about 1,600 kilometres north-east of Sydney and 1,100 kilometres north-west of Auckland. It is a small, isolated, fertile volcanic outcrop about eight kilometres long and five kilometres wide, with an area of approximately 3,455 hectares.

Norfolk Island is a territory of Australia. It is administered under the *Norfolk Island Act 1979* (Cth) which provides the Island with a substantial degree of self-government. Its current constitutional status and governmental arrangements derive from a complex and interesting history.

### 2.1 History

#### Penal settlements

Norfolk Island was uninhabited when discovered by Captain Cook in 1774. He claimed possession of the Island for the British Crown.

The Island was first occupied by the British in 1788 soon after the first British settlement at Sydney Cove. The British established a penal settlement with both convicts and free settlers. That settlement was abandoned in 1814. The Island was re-established as a penal colony from 1825 until 1855 and then was again abandoned.

Until 1844 the Island was under the control of the Governor of New South Wales. From 1844 until 1855, when the second penal settlement was abandoned, the Island was under the control of the Governor of Van Diemen's Land (now Tasmania). From the time of the third settlement in 1856 it reverted to the control of the Governor of New South Wales.

#### The Pitcairners

Pitcairn Island was discovered in 1767 and named after the man who first saw it. Pitcairn Island is about 4,830 kilometres further north-east from Norfolk Island. It is about 3.2 kilometres long and 1.6 kilometres wide. It was uninhabited until January 1790 when mutineers from HMS *Bounty* and their Tahitian associates landed upon it. The mutineers had taken control of the *Bounty* on 29 April 1789 and sailed around the South Pacific for several months. They eventually landed on Tahiti where some decided to settle. However, nine of them decided to try to find another permanent settling place and they left Tahiti on 23 September 1789, taking with them six Tahitian men, twelve Tahitian women and a baby girl. They landed on the uninhabited Pitcairn Island in January 1790 where they set fire to the *Bounty* to remove all evidence of their presence there. They were fugitives from British justice and did not want to be found.<sup>1</sup>

The colony was discovered in 1808 and by then the colonists were committed Christians devoted to the British Crown. Conditions were harsh and resources limited for the growing community. In 1831 they consented to a British Government offer to transfer them to Tahiti. Twelve of the 87 died there and the survivors were returned to Pitcairn within months at their request. Food shortages, drought and epidemics on Pitcairn, however, soon forced the community to request the British Government to transfer them elsewhere.<sup>2</sup>

In 1854 the Pitcairners were offered Norfolk Island as their homeland. In a letter dated 5 July 1854 from the then British Consul of the Society Islands, B Toup Nicolas, the Pitcairners were advised that Norfolk Island could not be ceded to them but that for the time being no other settlers would be allowed to reside on or occupy the Island.

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 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 ...<sup>3</sup>

At a general meeting of the community on Pitcairn Island in 1855, a majority of 153 of 187 present indicated that they were ready to emigrate to Norfolk Island. On 3 May 1856 the entire Pitcairn population of 193 people embarked for Norfolk Island leaving Pitcairn Island deserted.<sup>4</sup> The group resettled on Norfolk Island on 8 June 1856. Each family was to receive a land grant. The Pitcairners initially rejected this in favour of holding the land in common. When New South Wales Governor Sir William Denison visited the Island in 1857, however, he ordered the heads of families to select allotments, rejecting farming in common.<sup>5</sup> The residual land, some 700 acres - approximately one-twelfth of the total - was reserved to the Crown.

Apparently the Pitcairners were not at first advised that land distribution would be subject to Governor Denison's approval. On 16 May 1856, after the Pitcairners had accepted the offer and left Pitcairn Island, Governor Denison wrote to Lieutenant Gregorie, his representative on Norfolk Island.

With reference to that paragraph in your instructions by which you were directed to divide the land at Norfolk Island among the families of the Pitcairn Islanders, reserving only certain portions as specified for public purposes, I have now to direct you to do this with a distinct provision that the arrangement of the land is subject to be revised and amended if necessary by the Governor of New South Wales, to whom all the arrangements connected with the settlement of Norfolk Island have been entrusted by Her Majesty.<sup>6</sup>

The document handed to the Pitcairners' chief magistrate upon their arrival at Norfolk Island in June, however, allegedly failed to include that qualification.<sup>7</sup> It was not until later that month that a proclamation making land distribution subject to the approval of the NSW Governor was read to the Pitcairners. The entire coastline, all roads and jetties were reserved for public property in addition to the 700 acres mentioned above, the existing gaol, Government House and the chaplain's house.<sup>8</sup> The Pitcairners claim that their forebears succeeded in gaining title to only about one-fourth of the total land area.<sup>9</sup>

## Separation

Coinciding with the resettlement of the Pitcairners, Norfolk Island was separated from Van Diemen's Land and created a distinct and separate Settlement by an Order-in-Council dated 24 June 1856. The New South Wales Governor Sir William Denison was appointed Governor of Norfolk Island as well and provided with full power and authority to make laws for the order, peace and good government of the said island, subject nevertheless to such rules and regulations as Her Majesty at any time by any instruction or instructions Y may think fit to prescribe.<sup>10</sup> To this end, in 1857 Governor Denison proclaimed a set of 39 laws and regulations for Norfolk Island, marking the commencement of the Island's modern legal history.<sup>11</sup> These rules, to which two were soon added at the request of the

Pitcairners, were developed by Governor Denison in consultation with the Pitcairners' leader and their elected Chief Magistrate, also a Pitcairner.<sup>12</sup> He was required to do this by his instructions.

And whereas the inhabitants of the said island are chiefly emigrants from Pitcairn's Island in the Pacific Ocean, who have been established in Norfolk Island under our authority, and who have been accustomed in the territory from which they have removed to govern themselves by laws and usages adapted to their own state of society, you are, as far as practicable ... to preserve such laws and usages, and to adapt the authority vested in you ... to their preservation and maintenance.<sup>13</sup>

Governor Denison prescribed that no new law or regulation made by the Norfolk Islanders was valid until it was confirmed by the Governor. However, a new law could be acted on after it was approved by a public meeting if it referred to a subject of immediate importance. In those circumstances, the Governor's approval was to be sought as soon as possible.<sup>14</sup> Under these rules, the people of Norfolk Island enjoyed a form of self-government until 1896. Then, without reference to the wishes of the people of the Island, Her Majesty's Government ... decided to transfer the administration of the Island to the Government of New South Wales.<sup>15</sup>

## Dependency

The laws and regulations proclaimed in 1896 modified the arrangements for management of the Island. As part of the changes, a Council of Elders was constituted, consisting of 12 members elected annually by all males over 25 years of age who had resided on the Island for over six months. The Council's duties included the maintenance of roads and public reserves. Subject to the approval of the Chief Magistrate, no longer an elected Islander but a New South Wales Government appointee, the Council could also make by-laws.<sup>16</sup>

In 1897 the Order-in-Council of 1856 was revoked and Norfolk Island was made a dependency of the Colony (and from October 1900, in anticipation of federation, the State) of New South Wales. Provision also was made for the annexation of the Island to any federal body to which New South Wales might later belong.<sup>17</sup>

In 1903 the New South Wales Government replaced the Norfolk Island Council of Elders. The new Executive Council was constituted by two elected members and four members appointed by the Governor.<sup>18</sup>

When the *Norfolk Island Act 1913* (Cth) came into operation on 1 July 1914, the Commonwealth of Australia assumed authority over the Territory of Norfolk Island, pursuant to section 122 of the Australian Constitution. Control of the Island was vested in the Australian Governor-General. The executive government of the Island was vested in a resident Administrator appointed by the Governor-General. The Administrator was under the immediate direction of the Commonwealth's Minister for Home and Territories. The Island's Executive Council was enlarged to 12 members, six nominated by the Administrator and six elected by the people of Norfolk Island.<sup>19</sup> However, the Council's powers and functions were limited. Like the previous Council, its main concerns were the maintenance of roads and public reserves and the control of noxious weeds.

In 1935 the Executive Council was replaced by an Advisory Council of eight elected members. This Council had no powers beyond advisory ones. In 1955 the Norfolk Islanders petitioned the Queen for the restoration of self-government.<sup>20</sup>

The 1913 Act was repealed by the *Norfolk Island Act 1957* (Cth), which came into operation in 1960. Under the 1957 Act, the Advisory Council was replaced by the Norfolk Island Council, consisting of eight elected members. Under amendments introduced by the *Norfolk Island Act 1963* (Cth), the Administrator was made *ex officio* Chairman of the Council. The federal government retained legislative and executive power over the Island, as the Council acted only in an advisory capacity. The Commonwealth had proposed extending a wide range of local government powers to the Council in

1960 but a majority of Islanders rejected the proposal. The veto power of the Administrator and the lack of a revenue base were sticking points.<sup>21</sup>

In 1975 a Royal Commission, headed by Sir John Nimmo, was established to investigate the future status of Norfolk Island and its constitutional relationship to Australia. Its report was tabled in the federal Parliament in November 1976.<sup>22</sup> Its key recommendations were to

- give full Commonwealth voting rights to Norfolk Island residents
- replace the Advisory Council with an elected Assembly to act like a local government, although not necessarily on the same terms as applicable on the mainland, and even, in some respects, like a state government (Recommendation 7)
- extend mainland services and obligations, notably health services, justice administration, education, social security and taxation, to Norfolk Island residents (Recommendations 11 and 15) and
- apply all Commonwealth legislation to Norfolk Island with the exception of immigration, customs, telephone and postal services (Recommendation 7).

The federal government's response to the report, while generally not accepting of the recommendations, led to the enactment of the *Norfolk Island Act 1979* (Cth), which is discussed in detail below.

## 2.2 Constitutional framework

### Current constitutional status

Norfolk Island has been recognised as an integral part of the Commonwealth of Australia since becoming a territory in 1914. It has no accepted international status independent of Australia. In a submission to the Inquiry Ric Robinson, President of the Association of Norfolk Islanders, argued

Norfolk Island is not a part of the Commonwealth of Australia, but a Dependent Territory under the authority of the Commonwealth of Australia.<sup>23</sup>

However, Norfolk Island has never been considered a 'dependent territory' or 'non self-governing territory' as defined by the United Nations. It was not included among the non self-governing territories covered by the 1946 United Nations General Assembly Resolution dealing with those territories.<sup>24</sup> It does not come within the terms of the 1960 General Assembly resolution clarifying the definition of a non self-governing territory.<sup>25</sup> That resolution refers to 'a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it'.

In 1975 a Senate report 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'.<sup>26</sup> The report also described, but did not explain, a situation of 'complete freedom of access between the mainland and Norfolk Island'.<sup>27</sup>

In 1976 the High Court of Australia held that Norfolk Island is part of the Commonwealth of Australia and that the law-making power conferred upon the Commonwealth Parliament in respect of Norfolk Island by Section 122 of the Constitution is unrestricted.<sup>28</sup> While the Commonwealth Parliament has conferred a measure of self-government on Norfolk Island, this has no implications for the status of Norfolk Island in international law and in no way alters the Island's status as a territory of Australia.

## Current governmental arrangements

The *Norfolk Island Act 1979* (Cth) establishes Norfolk Island's current legislative, administrative and judicial systems. Its object is to advance the Australian Parliament's desire and the wish of the Norfolk Island people to achieve, over a period of time, internal self-government, as a Territory under the authority of the Commonwealth.<sup>29</sup> The Act provides for an Administrator of the Territory appointed by the Governor-General,<sup>30</sup> an elected nine member Legislative Assembly<sup>31</sup> and an Executive Council, consisting of those members of the Assembly with ministerial functions and convened and presided over by the Administrator.<sup>32</sup>

The Legislative Assembly is empowered to make laws for the peace, order and good government of the Territory with the assent of the Administrator or the Governor-General as relevant. It cannot make laws to acquire property other than on just terms, to raise its own defence forces or to coin money.<sup>33</sup>

The Assembly has legislative power in respect of matters specified in Schedules 2 and 3 of the Act. Schedule 2 covers matters typically carried out by State and local governments on the mainland. Schedule 3 lists matters normally reserved for the Commonwealth, notably customs, immigration and social security.<sup>34</sup>

Once a law has been passed by the Assembly, it must be presented to the Administrator for assent. Depending on the subject matter, the Administrator may assent or withhold assent to the proposed law, return it to the Legislative Assembly with recommended amendments or reserve it for the Governor-General's pleasure.<sup>35</sup>

The Governor-General may introduce legislation into the Assembly on matters not listed in Schedules 2 and 3.<sup>36</sup> The Governor-General also may make Ordinances that override local law made under the authority of the *Norfolk Island Act 1979* and may disallow or amend a local law.<sup>37</sup>

The Administrator is required to act in accordance with the advice of the Executive Council in relation to scheduled matters<sup>38</sup> but the federal Minister for Territories retains a power to veto legislation on a Schedule 3 matter. In relation to administrative functions not among the scheduled matters, the Administrator is required to act in accordance with instructions given by the federal Minister.<sup>39</sup>

Federal laws do not apply to Norfolk Island unless explicitly stated in a particular Commonwealth Act.<sup>40</sup> The *Australian Citizenship Act 1948* (Cth) does extend to Norfolk Island, but Australian citizens resident there are the only Australians not assured of representation in the Commonwealth Parliament.<sup>41</sup> While Norfolk Islanders are entitled to enrol to vote in Australian federal elections, they are not obliged to do so like all other Australian citizens.<sup>42</sup>

Under the Australian Citizenship Act a person born on Norfolk Island is an Australian citizen provided that one parent is either an Australian citizen or a permanent resident of Australia. At the 1996 census, 81 per cent of the Island's permanent population held Australian citizenship and 16 per cent held New Zealand citizenship.

Entitlement to vote in Norfolk Island Assembly elections is also different from entitlement to vote on the mainland. Entitlement to vote on the mainland is dependent on Australian citizenship. Entitlement to vote on Norfolk Island is dependent on length of residence rather than citizenship, ancestry or immigration status. A person is eligible to enrol if he or she has been present on Norfolk Island for a total of 900 days during the four years immediately preceding the date of the application to enrol.<sup>43</sup>

## 2.3 Current socio-economic framework

### Population

The August 1996 census recorded a total Norfolk Island population of 1,772 people, comprising 1,470 permanent residents (83 per cent) and 302 temporary residents (17 per cent). Of the permanent population, 37 per cent were born on the Island, 31 per cent on the Australian mainland and 23 per cent in New Zealand. Around 47 per cent of the population are descendants of the Pitcairn Islanders who were resettled on Norfolk Island in 1856.<sup>44</sup>

The age profile of Norfolk Islanders is somewhat older than that of mainlanders. The 1996 census recorded about 21 per cent of Norfolk Island residents over 64 years compared with only 12 per cent of other Australians. About 11 per cent of Norfolk Islanders were over 70 years compared with about eight per cent of other Australians.

The size of the Island's permanent population has remained relatively stable over the past decade. A slight drop between 1991 and 1996 is attributable primarily to a decline in the number of temporary residents apparently in consequence of the residence controls applicable under the Island's own *Immigration Act 1980* (NI), as discussed in detail below. Between 1 January and 20 May 1997 the population increased by 41.<sup>45</sup>

The characteristics of the Island's population have been changing over time as a result of two trends: an exodus of younger residents, including many of Pitcairn descent and the return of some of these later in life, perhaps with children born elsewhere, and an intake of older immigrants, not necessarily of Pitcairn descent.<sup>46</sup> This trend has been evident since the late 1970s. A resident of Norfolk Island wrote in her 1978 outline of the Island's history

During recent years a steady stream of young people has left to find employment on the mainland and been replaced by mainlanders, many of whom were retired people seeking a good climate and congenial surroundings. Now, although a few islanders are returning with their families to stay, a large group of new settlers, young and old has appeared.<sup>47</sup>

### Economy

Tourism is the mainstay of Norfolk Island's economy. Around 35,000 tourists visit the Island annually, with a significant proportion arriving on package holidays from the Australian mainland and New Zealand. Estimates of the annual contribution of tourism to the Island's economy have ranged from \$23 million to \$41.4 million (1995-96 figures).<sup>48</sup>

A significant proportion of the Island's 257 business enterprises provide services for tourists, particularly accommodation and hire car services. Many enterprises, such as shops, restaurants and clubs, cater to both the local community and tourists, although their viability depends mainly on tourists.

The heavy reliance on tourism makes the Island's economy vulnerable to external factors. In 1989, for example, the economy was affected severely by the airline pilots' strike. Concerns also arose when Ansett Airlines withdrew its services on 1 July 1997. Since that time, however, regular flights by new airline operators have helped to boost tourist numbers.

Aside from tourism, there is little export income. The main exports in 1995-96 were tobacco re-exports (\$2.2 million) and palm seed/sprouts (\$0.5 million).<sup>49</sup>

Norfolk Island is heavily dependent on imports, which total around \$24 million annually. Most primary produce and all manufactured goods are imported. Imports to the Island (in order of overall expenditure)

comprise food and household supplies, consumer durables, clothing and footwear, building materials and supplies, fuel, household appliances and furnishing, tobacco and alcohol (principally for re-export), motor vehicles and rural and farming products.<sup>50</sup>

According to the Commonwealth Grants Commission, import replacement industries have developed fairly slowly on the Island. The latest of these industries are the hydroponic growing of vegetables and the growing of slow chilli-fruit.<sup>51</sup>

Estimates of the overall size of the economy have ranged from \$80 million to \$90 million. The Commonwealth Grants Commission estimated that in 1995-96 almost \$57 million was contributed by the private sector, \$11.5 million by the Norfolk Island Government, \$7.6 million in indirect taxes and charges, and \$3.8 million by the federal government. These estimates may not include fully what is considered to be a large barter or cash economy operating on the Island.

## **Employment**

According to the 1996 census, 76.5 per cent of the Island's population is in the workforce. This compares with a workforce participation rate of 63.7 per cent on mainland Australia.<sup>52</sup>

Labour force statistics for 1995-96 show that a high proportion of the relevant population is in full-time employment (87.2 per cent on Norfolk Island compared with 69.1 per cent on mainland Australia). The Island has negligible unemployment.

Reflecting the age spread of the overall population, 42.3 per cent of the workforce is aged between 45 and 64, 23.8 per cent between 35 and 44, and 33.9 per cent between 15 and 34.

The importance of tourism to Norfolk Island's economy can be gauged clearly from the labour force statistics. Almost 50 per cent of the Island's workforce is employed in the three sectors benefiting most from tourism, namely wholesale and retail trade (23.2 per cent), restaurants, hotels, accommodation and clubs (18.1 per cent) and other recreation, personal and other services (7.5 per cent). The government is also a significant employer with 18.1 per cent of the workforce.

## **Incomes**

The Commonwealth Grants Commission reported in August 1997 that, while census data show that incomes for most of the population are not high, average incomes on Norfolk Island are higher than on mainland Australia. Of the permanent population aged 15 years and over, 13.3 per cent earned a weekly income below \$200, 28.4 per cent had a weekly income between \$200 and \$400, 28.9 per cent earned between \$400 and \$600 weekly and 14.6 per cent earned over \$600 weekly. In considering these incomes, it is important to note that no income tax is payable on Norfolk Island.<sup>53</sup>

The Grants Commission also reported that between 40 and 80 very wealthy people live on the Island. It indicated, however, that the available income data are inconclusive.<sup>54</sup> Norfolk Island's gross domestic product per capita is 70 per cent above that of mainland Australia, the average per capita profit is 142 per cent above that of mainland Australia and the average per capita wage is five per cent above that of mainland Australia.<sup>55</sup>

## **Taxation**

Australian income tax and other federal taxes such as sales tax are not payable on Norfolk Island. Instead, the Norfolk Island Government levies a range of local taxes and imposts but it does not tax wealth or income. The Commonwealth Grants Commission concluded that the Island's taxation system is regressive and falls disproportionately on tourists.<sup>56</sup>

## **Household expenditure**

In October and November 1995 the Australian Bureau of Statistics conducted a survey of household income and expenditure on Norfolk Island.<sup>57</sup> On the basis of that survey the Commonwealth Grants Commission noted that Norfolk households spend nearly five per cent more than households in New South Wales.

A greater proportion of Norfolk expenditure is on fuel and power, clothing, medical care and health services, alcoholic beverages and recreation. Norfolk households spend substantially less on housing, transport and tobacco and about the same on food and non-alcoholic beverages, and household furnishings and equipment. Such a pattern is consistent with the high cost of fuel and power and medical services on the Island and the low cost of housing and transport. However, these comparisons are only indicative, as the surveys may have conceptual and technical difficulties.<sup>58</sup>

## **Government services**

The Commonwealth Grants Commission's 1997 report on Norfolk Island provided a detailed analysis of the government services available to the Island's residents. It found that a number of services which are the responsibility of the Norfolk Island Government, such as medical services, social security and education, are below Australian mainland standards.

### ***Health services***

Norfolk Island residents are not eligible to receive Medicare benefits. The Norfolk Island Government operates its own health care scheme, membership of which is compulsory for all persons aged 18 years and over ordinarily resident on the Island. Members of the scheme must pay a contribution of \$150 every six months. Under the scheme, individuals and families must pay the first \$2,500 they incur for medical expenses.

### ***Social security***

The Norfolk Island Government operates its own social security system under the *Social Services Act 1980* (NI). Four means-tested benefits are payable under that Act: an age benefit, an invalid benefit, a widowed persons benefit and a special benefit (payable to persons who are suffering hardship, are unable to earn a sufficient livelihood, are not qualified to receive any other benefit and meet an age benefit income test). Benefits are payable at around 80 per cent of mainland levels. According to the Commonwealth Grants Commission, the majority of social service benefits paid on Norfolk Island are to the aged.<sup>59</sup> There are no unemployment benefits or benefits for sole supporting parents.

### ***Education***

The Norfolk Island Government provides free infant, primary and secondary schooling on the Island, based on the New South Wales education system. Ninety-seven per cent of the school age population (ages 5 to 19) attend school on the Island, compared with 81.4 per cent on the mainland. The Grants Commission reported that the overall standard of education on the Island is comparable with that provided in centres of similar size in New South Wales. However, it found that the school finds it difficult to provide up to date services and facilities in some areas (for example, computing) and that the Island's educational services are lacking in vocational education and training courses for secondary students.<sup>60</sup>

## 3 Immigration

### 3.1 History of immigration controls and policies

Norfolk Island operates its own immigration regime under the Norfolk Island *Immigration Act 1980*. The development of immigration controls separate from those of mainland Australia reflects both the history and special circumstances of Norfolk Island.

#### Early years

On their removal from Pitcairn Island to Norfolk Island in 1856 the Pitcairners were told that at present no other settlers would be allowed to reside on or occupy the Island. At first there was no formal restriction on entry but conditions placed on land sales were aimed at restricting the immigration of non-Pitcairners. Norfolk Island was to be reserved for Pitcairners.

This original policy was subsequently undermined both officially, with the establishment of a Melanesian mission in 1866, and unofficially, with the Pitcairners themselves selling land to non-Pitcairners, who then settled on the Island. With no firm policy regarding entry to the Island, people came and went virtually unhindered.

#### *Immigration Restriction Ordinance 1922*

The first formal controls on entry to Norfolk Island were introduced when the *Immigration Restriction Ordinance 1922* commenced operation on 2 August 1922. Modelled on Australian migration legislation introduced before World War I, the Ordinance controlled immigration to Norfolk Island by means of a dictation test of not less than fifty words in any language approved by the Minister.

Entry to the Island was prohibited to persons, including Australians, in prescribed categories, including those without current passports, those suffering from a transmissible disease and those convicted of a crime for which they were sentenced to imprisonment for one year or more. The Ordinance provided for the removal of persons who breached its provisions, with the power of enforcement vested in the Administrator.

One difficulty with the Ordinance was that it did not provide security of tenure for suitable entrants, as the dictation test could be imposed at any time during an entrant's first three years on the Island. Another concern was that people born on the Island were not exempt from the provisions of the Ordinance.

Despite these problems, the Ordinance operated from 1922 until the 1960s. During most of this period, the number of people who moved to the Island was not significant, with little there to attract permanent settlers. The Island's economy was depressed and the population was declining.

During the 1960s Norfolk Island became a tourist destination where goods could be sold duty free. A large number of people moved to the Island to operate hotels and guest houses and to establish shops. People also moved to the Island to take advantage of the fact that Commonwealth income tax was not payable on income derived there. As a consequence, in a relatively short time the Island's population increased from about 800 to over 1,400 residents. Land values also increased significantly.

The Pitcairn descendants were alarmed by this rapid population growth. As the electoral laws at the time enabled people to vote in the Island's elections after only six months residency, there were particular concerns that political control of the Island and its future development could pass into the hands of people who were not born there.

### ***Immigration Ordinance 1968***

In September 1965 the Norfolk Island Council resolved to introduce more stringent immigration controls. It also resolved to abolish the dictation test which had not only proved to be unworkable but also had been removed from Commonwealth legislation a decade earlier.

Pending the introduction of more comprehensive immigration legislation, the *Immigration (Temporary Provisions) Ordinance 1967* commenced on 5 October 1967. This temporary legislation required all persons entering Norfolk Island for a period of stay in excess of 30 days to have a permit. Apart from specified exemptions, those who did not obtain permits became prohibited immigrants and were liable to deportation from the Island.

These temporary measures were replaced by the *Norfolk Island Immigration Ordinance 1968* which commenced on 1 November 1968. The 1968 Ordinance established controls over temporary entry and permanent residence on the Island. Two types of entry permit were introduced: a temporary entry permit and an 'enter and remain' permit.

Temporary entry permits could be granted for up to six months and were renewable, without any statutory limit on the number of times a permit could be renewed. The policy governing the grant of temporary entry permits required holders of those permits to depart and re-enter Norfolk Island when they changed employment. Visitors to the Island were deemed to hold a temporary entry permit for a maximum of 30 days and could apply to the Administrator in writing for an extension to a maximum of 30 days.<sup>61</sup>

Enter and remain permits could be granted indefinitely but generally their grant was subject to conditions which were appropriate to the circumstances. Policy required applicants to demonstrate adequate financial means, good health and character, and value to the Norfolk Island community.<sup>62</sup>

Under the 1968 Ordinance, a person qualified for resident status after five years of residency, but the grant of residence status was not automatic. For each application, the Administrator was required to consult with the Norfolk Island Council.

A referendum held on Norfolk Island on 4 December 1968 showed that a substantial majority were in favour of restricting immigration to the Island. A majority supported the Norfolk Island Council's resolution accepting the 1968 Ordinance.

### **Permit quotas**

The permit system established by the 1968 Ordinance was supplemented by an annual quota, imposed administratively and not backed up by legislation. An annual limit of 90 enter and remain permits was set initially but this quota was never reached.

In March 1971 the Norfolk Island Council recommended a maximum annual quota of 15 enter and remain permits. This was endorsed by the Administrator and submitted to and approved by the Minister for Territories.

In February 1972 the Norfolk Island Council resolved that a maximum of 15 certificates of residential status be granted each financial year. It also re-affirmed the annual quota of 15 enter and remain permits. At the time, a policy of '1-in-1-out' operated for enter and remain permits.

Problems developed with the quota system, however. There was soon a backlog of people eligible to become residents because the number of eligible people holding enter and remain permits exceeded the annual quota for certificates of residency. In May 1974, at the request of the federal Minister for Territories, the Administrator set aside the quota system for certificates of residency and declared all

eligible persons to be residents. The Minister also directed that no further enter and remain permits be issued pending a review of immigration policy and legislation. For those people on the Island before May 1974, the embargo on the issue of enter and remain permits was lifted in November 1978. It was lifted completely in November 1980 but reimposed from July 1982 to December 1983.

### 3.2 Reviews relevant to immigration

Two inquiries conducted during the 1970s were of significance for Norfolk Island's immigration laws and policies. In 1974 Professor Gilbert Butland conducted a study of Norfolk Island's population capacity.<sup>63</sup> In 1976 the Royal Commission on Norfolk Island chaired by Sir John Nimmo considered the future of the Island more generally.<sup>64</sup>

Butland's study considered the optimum levels of both the resident population and tourist numbers on a long term basis. The report found that Norfolk Island had a much lower population density and smaller tourist numbers annually than other islands with comparably important or dominant tourist industries.<sup>65</sup> The reasons included the long distances from nearest sources of tourists, the absence of port facilities for all-weather discharge of cargo and passengers, the absence of beach frontage and the fact that the Island's economy depended solely upon the tourist industry. Butland's recommendations, therefore, were based on what was the 'desirable' level of resident population and tourist numbers rather than what was 'possible'.<sup>66</sup>

Butland also found that the principal reasons tourists gave for visiting Norfolk Island were rest and relaxation, the unique character of the Island and its historical significance. The constantly-recurring view of tourists was that the Island should retain its 'unique character' and that it would have no attraction if it became a more commercialised resort.

Butland recommended a maximum residential population of 2,000 by 1983, with an annual growth rate of two per cent, and maximum tourist numbers of 20,000 annually by 1983.

These principles were accepted by the Norfolk Island Council on 17 October 1974 with the target date brought forward to 1980. The Norfolk Island Council and the Minister also accepted in principle the need for

- the replacement of the system of temporary entry permits and enter and remain permits with a system of conditional entry permits
- criteria to regulate the grant of conditional entry permits and residency
- a limit to the maximum permanent population
- a committee with a statutory role to consider and advise on applications for entry and residency and
- children to have an automatic right to be declared residents only if born to persons with resident status.

The 1976 Nimmo Royal Commission recommended similar population limits. The report stated

It should be accepted by all with an interest in Norfolk Island that there are obvious limits in the capacity of the Island to absorb people.<sup>67</sup>

It recommended that the population limit of 2,000 set by the Council to be reached by 1980 should be regarded as 'the absolute upper limit to be maintained unless clear evidence justifying a change is adduced'.<sup>68</sup> It further recommended that steps be taken to expedite amendments to the *Immigration Ordinance* which were approved in 1974 by the Norfolk Island Council and the Minister and that 'the

notion that formal priority should be granted to Pitcairn descendants and their spouses, when considering residency applications, be abandoned as being incompatible with the *Racial Discrimination Act 1975* [Cth].<sup>69</sup> The Nimmo report led to the enactment of the *Norfolk Island Act 1979* (Cth), although not all his recommendations were adopted.

### **3.3 Immigration Act 1980 (NI)**

Immigration became a 'Schedule 3' matter under the *Norfolk Island Act 1979*. The Norfolk Island Legislative Assembly gained legislative power with respect to immigration and the Administrator gained executive authority. The Commonwealth retained the right of veto over any proposed law dealing with immigration.<sup>70</sup>

#### **Original legislation**

On 13 August 1980 the Norfolk Island Legislative Assembly passed the Immigration Bill 1980 which repealed the *Immigration Ordinance 1968* and provided for new immigration procedures for Norfolk Island. It was almost four years before the *Immigration Act 1980* (NI) came into operation.

When the Bill was sent for assent, the Administrator received legal advice that the legislation not only contained drafting errors but also made provision for matters other than those specified in Schedules 2 and 3 of the *Norfolk Island Act 1979* (Cth). This meant that the Administrator could only either reserve the proposed law for consideration by the Governor-General or return it to the Legislative Assembly with recommended amendments.<sup>71</sup> As the Bill required extensive revision, the Administrator decided to return the Bill to the Assembly for amendment.

#### **Amended legislation**

Due to the complexities involved, it was considered necessary to rewrite the legislation. In the subsequent negotiations on amendments to the Bill, two matters delayed its finalisation.

The first point of contention was a clause in the original legislation which provided that a person of Pitcairn descent should receive preferential treatment for entry to Norfolk Island. According to the Attorney-General's Department, such a provision, if based on descent, would have constituted a form of racial discrimination and, therefore, would have contravened the *Racial Discrimination Act 1975*. An alternative clause giving preference to those with a special relationship not based solely on descent was accepted by the Legislative Assembly on 25 June 1983. An additional provision was included requiring that no power was to be exercised under the legislation in such a way as to constitute racial discrimination within the meaning of the *International Convention on the Elimination of All Forms of Racial Discrimination*.

The second point of contention was whether Commonwealth employees should be exempt from the requirement to obtain an entry permit for Norfolk Island. Such an exemption was opposed initially by the Norfolk Island Government. A compromise was reached eventually, with the Commonwealth and Norfolk Island Governments entering into a memorandum of understanding on 9 March 1984. The memorandum provided that Commonwealth officers could not be refused entry to the Island for periods of duty and that the Commonwealth would agree to the issuing of permits for those officers, with payment to be made for such permits.

The amended Bill was passed by the Legislative Assembly on 2 November 1983. It was reserved for the Governor-General's assent on 4 November 1983.

Before the legislation was submitted to the Federal Executive Council, the Minister for Immigration and Ethnic Affairs was consulted, as he had been when the original Bill was passed by the Assembly in 1980. At that time, the Immigration Minister had agreed to the proposal for a Norfolk Island

Immigration Act. However, he had expressed concern at Norfolk Island's potential to become a source of 'back door' migration to Australia, given that permanent residents of Norfolk Island were exempt from the entry permit requirements of the *Migration Act 1958* (Cth). The same concern was repeated during the consultations on the amended Bill in 1983. In response to those concerns, a memorandum of understanding was concluded between the Commonwealth and Norfolk Island Governments in relation to granting long-term permits or certificates of residency to people other than Australian or New Zealand citizens.

The *Immigration Act 1980* (NI) received the Governor-General's assent on 1 March 1984 and came into operation on 26 March 1984. It strengthened immigration controls by requiring all non-residents, including visitors, to hold entry permits and by imposing a limit on the number of persons to be granted long-term permits. Strict criteria, such as financial and employment stability and a satisfactory standard of health and character, were established for long-term entry.

The Act vests authority over immigration in the 'Executive Member', the Norfolk Island government minister for immigration, subject to review by the federal Minister for Immigration. The Act also establishes an Immigration Committee to be appointed by the Executive Member. The Immigration Committee consists of between three and five members, at least one but not more than two of whom are members of the Norfolk Island Legislative Assembly. All members must be Island residents.<sup>72</sup> The Executive Member is not a member of the Committee.<sup>73</sup> The function of the Committee is to furnish reports to the Executive Member on applications for general entry permits and residency and on any other matter that may be referred to it by the Executive Member.<sup>74</sup> The Committee may also offer advice to the Executive Member on any matter that relates to the granting of permits, immigration into Norfolk Island, the declaration of persons to be residents or any other matter concerning the operation of the Act.<sup>75</sup>

## **Policy guide**

To assist with the administration of the *Immigration Act 1980*, a policy guide was prepared by the Norfolk Island Administration in association with the Immigration Committee and the Executive Member of the Assembly. The guide was tabled in the Legislative Assembly on 7 November 1984 and has been revised several times. The current version of the guide was issued on 20 May 1996.

The guide provides information on how a person should apply for a particular entry permit, what documentation is required and the matters taken into account where the legislation allows for discretion to be exercised.

## **Entry categories**

Everyone is required to hold a permit to enter and remain on Norfolk Island with the exception of residents and certain specified persons such as members of the armed forces, diplomatic or consular representatives.<sup>76</sup> A person without a valid permit is a prohibited immigrant and may be fined or deported. There are three entry permit categories: visitors, temporary entry permit holders and general entry permit holders. In addition, the Act provides for the issue of certificates of residence.

### ***Visitors***

Visitors who enter Norfolk Island are deemed to hold a temporary entry permit for a maximum of 30 days.<sup>77</sup> If a visitor wishes to stay more than 30 days he or she needs to apply for a written permit. This permit may be granted for up to a further 30 days. However, under no circumstances can the permit be extended beyond 120 days from the date of original entry.<sup>78</sup>

Visitors are not permitted to work or participate in a business on the Island. Those who do so in breach of their permit restrictions will have the permit cancelled<sup>79</sup> and will become prohibited immigrants.<sup>80</sup> The Executive Member may then declare, by order, that the person is to be deported.<sup>81</sup>

### **Temporary entry permits**

A temporary entry permit is designed for short-term residence and is usually granted for employment purposes only. It may be granted for up to one year and may be extended for up to three years.<sup>82</sup>

Prior to granting a temporary entry permit the Executive Member must have regard to

- the availability of employment
- the person's character
- the person's health
- whether the person has a ticket to leave the Island and
- whether the person is likely to impose any burden on Island facilities.<sup>83</sup>

A number of conditions may be placed on the temporary entry permit holder to limit his or her activities.<sup>84</sup> The permit may place conditions on employment, involvement in a trade or profession, undertaking scientific or cultural research or any matter that the Executive Member considers beneficial to Norfolk Island. If a holder of a temporary entry permit is in breach of a condition to which the permit is subject, the permit may be deemed to have been cancelled.<sup>85</sup> Where the permit is cancelled the person becomes a prohibited immigrant and may be deported.<sup>86</sup> So a temporary permit holder may become liable to deportation if he or she changes jobs without government permission.

If a temporary entry permit holder leaves Norfolk Island and remains out of Norfolk Island for three months without written permission from the Executive Member or an authorised person, the permit expires and the person will be unable to re-enter the Island.<sup>87</sup>

The Immigration Act does not prevent people from applying for a temporary entry permit if an application for a general entry permit is refused. However, this is regarded as a means of by-passing the quota system applying to general entry permits. The policy of the Norfolk Island Government, affirmed by the Legislative Assembly on 17 September 1986, is not to issue temporary entry permits to people who have demonstrated an intention to reside indefinitely on the Island.<sup>88</sup>

### ***General entry permits***

General entry permits are designed for those, including Australian and New Zealand citizens, wishing to stay indefinitely or to settle on Norfolk Island. They are granted for a period of five and a half years and may be extended.<sup>89</sup> Prior to granting a general entry permit the Executive Member refers the application to the Immigration Committee for consideration. The Immigration Committee shall have regard to such matters as it considers to be relevant, in particular

- the applicant's reasons for wanting to live on Norfolk Island
- the applicant's intentions with respect to his or her livelihood on Norfolk Island and whether they are likely to be realised
- the applicant's character
- the applicant's health and
- the applicant's financial position.<sup>90</sup>

A general entry permit, if granted, is usually subject to conditions relating to any matter the Executive Member considers beneficial to Norfolk Island. If a general entry permit holder is in breach of a condition to which his or her permit is subject, the permit may be deemed to have been cancelled.<sup>91</sup> Where the permit is cancelled, the person becomes a prohibited immigrant and may be deported.<sup>92</sup>

If a holder of a general entry permit leaves Norfolk Island and remains out of Norfolk Island for 183 days in any period of a year (that is, half the year) without written permission from the Executive Member or an authorised person, the permit expires and the person will not be able to re-enter the Island.<sup>93</sup>

The Executive Member may refuse to grant a general entry permit to a person who has been convicted of an offence punishable by six months imprisonment or if a general entry permit previously granted to the applicant has been cancelled, is deemed to have been cancelled or has expired.<sup>94</sup>

### *Quota*

Under section 21 of the Act, the Executive Member may set a quota on the number of general entry permits to be granted in any year. Once the quota has been determined, the Executive Member may not grant a general entry permit if to do so would result in the quota being exceeded.

The quota system was criticised by a complainant to the Commission in a letter to the Hon. Warwick Smith, then federal Minister for Sport, Territories and Local Government.

In addition to the approval of the Government Immigration Committee the granting of General Entry Permits is subject to the provision that an annual Immigration Quota will not be exceeded, this quota fluctuates and has over the years been changed at will to suit the Government of the Day regardless of the effect such sudden changes have on persons awaiting Permits, and working towards Permanent Residency on the Island.<sup>95</sup>

If a general entry permit is refused solely on the ground that the quota is full, the applicant may request that the application remain. In that case, the Executive Member must give the application priority consideration over applications received in the following year.<sup>96</sup>

### *Special relationship*

The quota does not apply where an applicant can demonstrate a special relationship with the Island.<sup>97</sup> While the Act is silent on the meaning of 'special relationship', the 'General Guide on Immigration into Norfolk Island' suggests that the Immigration Committee advising the Executive Member, in determining whether a person has a special relationship, would have regard to

- the closeness of the applicant's relationship to a resident family
- the extent of the resident family's sponsorship of, and representations on behalf of, the applicant
- the extent of that resident's family ties with and involvement in the Norfolk Island community
- the length of the applicant's period of residence in Norfolk Island, where applicable
- the extent of the applicant's integration into the Norfolk Island community during any period of residence, where applicable
- the extent of the applicant's knowledge of Norfolk Island's culture and traditions.

According to Ms Nadia Lozzi-Cuthbertson, former Executive Member with responsibility for immigration on Norfolk Island, the special relationship clause is in practice interpreted to apply only to people who are marrying into or are somehow related to families of Pitcairn background.

... I am only aware of two cases when a permit under those provisions was granted to someone not so related.<sup>98</sup>

A complainant criticised the operation of the special relationship provision.

We are of similar opinion that is held by many residents of the Island, that for political reasons, that the Norfolk Island Government wishes to retain [its] power and predominance in the hands [of] Pitcairn lineage. Special Relationship category allows voting numbers to increase in this area.

It has been apparent over the years, by the very simple fact that ~~A~~special Relationship@ WHICH HAS NO LIMITS, strengthens this position.<sup>99</sup>

## Residents

A person who was born on Norfolk Island or one of whose parents was a resident of Norfolk Island at the time of the birth is a resident of Norfolk Island.<sup>100</sup> The Act also provides that certain persons may be declared residents pursuant to section 29. To be declared a resident, a person must be

- a general entry permit holder
- a British subject
- resident on Norfolk Island for a period of a least five years during the previous seven years
- not resident elsewhere during the five years immediately preceding the application and
- intent on continuing to reside on Norfolk Island.

An application for residence is considered by the Immigration Committee which must consider the person's suitability based on

- the extent to which the person has assimilated into the community of the Island
- good character and
- good health.<sup>101</sup>

Residents are not required to hold entry permits and may enter and leave Norfolk Island as they wish.

## Appeals

A person aggrieved by a decision relating to a visitor's permit must write to the Administrator within seven days of receiving written notice of the decision, requesting the Administrator to review the decision.<sup>102</sup>

A person aggrieved by any other decision must write to the Administrator within 14 days of receiving notice of the decision in writing, requesting that the federal Minister for Territories review the decision.<sup>103</sup> The Minister may confirm, vary, annul or substitute the decision under review. However, the Minister cannot annul a decision not to grant a general entry permit if the grant of such a permit would result in the annual quota being exceeded.

## Recent data

Data for the period 1 January 1997 to 20 May 1998, provided by the Norfolk Island Minister for Immigration, give some indication of the operation of the Immigration Act.<sup>104</sup>

Permit type	Applicants	Grants
Temporary entry permit	677	675
General entry permit	105	59
Certificate of residency	36	36

In the same period the population of Norfolk Island increased by 41.

### 3.4 1986-87 Select Committee

On 15 October 1986 the Norfolk Island Legislative Assembly established a Select Committee on Population. The Committee was required to determine the desirable future growth in Norfolk Island's population. It looked widely for guidance. The Committee issued questionnaires for people to present views or information on the Island's future population size and public hearings were held to take evidence from all who wished to appear personally. The vast majority of the responses expressed concern about the consequences of population growth. Among the recurring concerns were

- the scarcity and high costs of land on the Island
- lessening of rural landscape on the Island
- increased traffic on the roads
- the risk to the Island's tourist industry if Norfolk Island loses its natural, unspoilt charm because of too much development, commercialism and congestion
- the threat to the Island's natural environment, flora and fauna, and ecology.

The Committee found that the problem of population growth on Norfolk Island had become urgent. This was largely due to changes on the Island in the previous five years.

- The Norfolk Island Airport had been upgraded. This meant that the largest aircraft going to Norfolk Island could carry 115 passengers compared to 38 passengers in 1961.
- The flights to Norfolk Island had become quicker, easier and smoother.
- Air New South Wales had started serving the Island.
- The concerns about population growth had gone from simply being a concern about the environment to a concern that 'continued expansion will undermine the tourist industry itself - which is the island's only foundation for a stable economy'.<sup>105</sup>

The Committee considered 'that a continuation of growth at the rate of the past five years would involve far more risk to the island than possible gain'.<sup>106</sup> The Committee stated that the key to the problem was preventing tourism from growing further. The best way of doing this was with rigid controls. In its report tabled on 18 March 1987, the Select Committee recommended the adoption of policies and controls to restrict population growth on Norfolk Island, including controls on the number of visitors and changes to the Island's immigration laws. It considered that these policies would not only arrest further growth in the total population but would also 'lessen some of the congestion and commercialism that have already developed'.<sup>107</sup>

On 15 April and 27 May 1987 the Legislative Assembly debated the Select Committee's report. Many of the recommendations were adopted as policies by the Legislative Assembly.

1. No new controls on the number of temporary entry permit holders would be introduced. However, a policy prohibiting any new business from employing temporary entry residents (except within strict guidelines approved by the Legislative Assembly) should be strictly enforced.
2. Subject to reasonable transitional arrangements being provided, temporary entry permits would not be extended beyond a limit of three years except in unusual circumstances approved by the Executive Member with the advice of the Immigration Committee.
3. The number of 'mainlanders' ordinarily resident on Norfolk Island with permanent resident status or general entry permits should be maintained as it was.
4. New general entry permits (not including those issued in recognition of a 'special relationship' with the Island) should be issued throughout the year, rather than by single annual quota, with the number of such permits being equal to the reduction in the number of the existing mainlander population through departures or death.
5. General entry permits should be issued on a '1-in-1-out' basis when an existing resident leaves the Island permanently but has to sell a substantial home or business before being able to leave, providing that residency is surrendered on departure.
6. The Legislative Assembly should be able to authorise the granting of a temporary entry permit or a general entry permit, by resolution, in the case of an entrant with particular skills or abilities that would benefit the Island.
7. No additional controls should be introduced on the number of permits issued on the basis of a person's special relationship to Norfolk Island, with the number of these permits to be monitored regularly and additional controls to be considered if the number increases substantially.
8. If closer controls on the number of 'special relationship' permits should be needed in the future, standards should be tightened concerning the required closeness of the relationship with the Island.
9. The term 'special relationship' should be defined to make it clear that the special relationship must be with Norfolk Island and the community as they are at the time, and not with the Island or community as it was at some past time.

In August 1987 a number of the recommendations of the Select Committee were referred to the Administrator as proposals for amendments to the *Immigration Act*. Those amendments did not proceed. In December 1993 the Norfolk Island Government adopted a policy aimed at achieving a growth rate in the permanent population of two per cent over the succeeding two years. This growth rate has not been achieved in any year since then.

### **3.5 Compensating departure scheme**

In 1990 amendments to the *Immigration Act* led to the establishment of the compensating departure scheme (known unofficially as the 1-in-1-out scheme) from 9 April 1990. The scheme allowed a resident or a general entry permit holder to sell a 'substantial asset' such as a home or business to an incoming person who would be guaranteed a general entry permit on the condition that residency entitlements were surrendered by the vendor. The facility was designed to ease the hardship experienced when a person's departure from the Island was dependent on the disposal of a substantial asset that could not be sold locally at a reasonable price and the vendor was unable to await the entry of a purchaser through the general entry permit quota queue. In other words, vendors making a 'compensating departure declaration' ensured that their purchasers avoided the annual quota on general entry permits.<sup>108</sup>

Despite modifications to the scheme to allay Commonwealth concerns about the scope for discretionary decision-making and the potential for abuse, the scheme attracted considerable criticism. In April 1992 an Immigration Review Group established by the Norfolk Island Government reported on numerous deficiencies in the compensating departure scheme and recommended its abolition or, in the alternative, its more vigorous administration. The Review Group's view was supported by the Norfolk Island Immigration Committee.

After a lengthy debate a proposal for abolition of the scheme was put to the Legislative Assembly on 9 December 1992. The vote was tied and so the proposal failed.

A bill proposed by the Executive Member to modify the scheme was then passed unanimously on the understanding that action would be taken to abolish the scheme if after 12 months it was still not working as originally intended. The compensating departure scheme continued to operate until September 1993.

In spite of its deficiencies, the scheme was an attempt to ameliorate hardship due to the quota system. There is now no effort to do so as explained by two complainants.

As there are a number of citizens who for one reason or another wish to depart Norfolk Island, with some urgency, but are unable to dispose of their homes, because of the requirements of the immigration act which blocks their rights to freely sell to [whom]ever they wish, and restricts the right of the purchaser as he or she must conform to the policies attached to the act. We consider this act and its policies are a violation of the Australian Citizens rights to freely move within the Commonwealth of Australia.<sup>109</sup>

Once again we are faced with insurmountable difficulty because of the N.I. Immigration Act and restrictions to folk from the Mainlands. Only Norfolk Island Residents are able [to] buy the business as anyone from the mainland needs to show Accounts/books of Trading from 3-5 years and to prove viability that the business will support them.<sup>110</sup>

### **3.6 Islands in the Sun**

The House of Representatives Standing Committee on Legal and Constitutional Affairs inquiry of 1990-91 gave little consideration to the Norfolk Island immigration regime and, in particular, did not consider human rights issues. Concerns were raised with the inquiry about the politicisation of decision making on entry and resident applications. The only option for reform put forward was to remove political decision making by establishing an independent immigration tribunal.<sup>111</sup>

The Committee eventually concluded that its proposals for an independent Administrative Review Tribunal would allay concerns about the lack of objectivity in immigration decision making.<sup>112</sup>

### **3.7 *Immigration Amendment (Visa) Act 1994 (NI)***

A potential loophole in Norfolk Island's laws was discovered when an Iranian national on Norfolk Island became a prohibited immigrant and applied to the mainland authorities for refugee status. Arising from that case, the *Immigration Amendment (Visa) Act 1994* was passed by the Legislative Assembly on 21 September 1994 and was assented to on 24 May 1995. The commencement of the Act has been delayed pending the consideration of two memoranda of understanding between the Norfolk Island and Commonwealth Governments.

The Act will require all persons who do not hold current Australian or New Zealand passports or who are not permanent residents of Norfolk Island, to have a valid visa for entry to the Australian mainland before arrival on Norfolk Island. The Act also provides that the relevant Norfolk Island Minister may

grant or refuse to grant a Norfolk Island visa permitting travel to Norfolk Island. The Act imposes penalties on regular air or ship carriers which bring people to the Island without visas.

### 3.8 Submissions

The considerations which moved the 1986-87 Select Committee to make the recommendations listed above still reflect the views of some Norfolk Islanders today. In his submission to the Commission's Inquiry Mr H Sydney Curtis argued in favour of restricted immigration into Norfolk Island.

As a remote island community, the people of Norfolk Island have peculiar problems of subsistence. Unrestricted immigration would pose a severe threat to that subsistence.<sup>113</sup>

He also stated

The tourist industry is now a major contributor to the island's economy. The island's attractiveness depends in no small measure on maintenance of the present life-style and friendliness of the islanders. The tourist industry could be very seriously adversely affected by uncontrolled immigration.<sup>114</sup>

Mr Stuart Guymer also argued in favour of restricted immigration.

The ability of the Island to accept an unlimited number of residents is governed by available water supply, land suitable for necessary infrastructure and the availability of building materials. Any changes in population limitations would leave the Island wide open to exploitation by undesirable elements from both Australia and New Zealand.<sup>115</sup>

Others, however, argued on human rights grounds against the use of immigration controls to regulate the population. A complainant stated

The administration of the Immigration Act together with the attached policies allow the Norfolk Island Government to BLOCK the free movement of the Australian Citizen.<sup>116</sup>

We consider this act and its policies are a violation of the Australian Citizens rights to freely move within the Commonwealth of Australia.<sup>117</sup>

The NORFOLK ISLAND IMMIGRATION ACT 1980, and the POLICIES which are used to administrate the Act, BLOCK AUSTRALIAN MAINLAND RESIDENTS and also AUSTRALIAN NORFOLK ISLAND RESIDENTS from freely moving within the COMMONWEALTH OF AUSTRALIA.<sup>118</sup>

Another complainant argued

The Immigration Act together with its policies are used to block the movement of an in-coming Australian Citizen, should the Immigration Department consider that person unsuitable in their opinion.<sup>119</sup>

The powers which were conferred on the NORFOLK ISLAND GOVERNMENT, as the result of this Act, have many ramifications on the AUSTRALIAN CITIZEN. The Act has allowed the NORFOLK ISLAND ASSEMBLY to create LAW and POLICY, which is discriminatory and felt to be inconsistent with the RIGHTS OF THE AUSTRALIAN CITIZEN. It has created two classes of AUSTRALIAN CITIZENS.<sup>120</sup>

To reject AUSTRALIAN CITIZENS, and deny them their DEMOCRATIC RIGHT to freely reside in NORFOLK ISLAND because of AGE, RETIREMENT, MEDICAL CONDITION, or previous CRIMINAL RECORD, goes against everything the AUSTRALIAN CONSTITUTION, not only says, but also stands for.<sup>121</sup>

## 4 Freedom of movement and residence

The operation of the *Immigration Act 1980* (NI) raises a number of human rights issues. Predominant among them is the freedom of movement and residence. The questions for this inquiry are whether the Act impairs the individual's freedom to travel and reside anywhere in Australia, including Norfolk Island, and, if so, whether the impairment of that freedom can be justified by reference to one of the limitations permitted by human rights law.

### 4.1 Sources of the right

#### The Australian Constitution

Section 92 of the Australian Constitution protects freedom of interstate trade and commerce. The High Court has declared laws restricting the free movement of people throughout Australia to be unconstitutional.<sup>122</sup>

Some High Court justices have also found the right to freedom of movement to be implied in the Constitution.<sup>123</sup> For example, Justice Murphy stated that freedom of movement is a fundamental right in Australian law.

The right of persons to move freely across or within State borders is a fundamental right arising from the union of the people in an indissoluble Commonwealth ... The right is not an absolute right, but is almost absolute and could not be impaired, except on extremely strong grounds such as the administration of criminal justice in serious cases. I think that freedom to move across State borders arises from this fundamental implication of the Constitution and not ... from s.92.<sup>124</sup>

However, the Court has also emphasised that the right of freedom of movement in the Constitution is not absolute. Restrictions on movement are permissible if necessary for the promotion of public order, safety or morals.

Australian law, therefore, reflects the scope and operation of international human rights laws protecting freedom of movement.

#### ICCPR

Australia ratified the *International Covenant on Civil and Political Rights* (ICCPR) in 1980 and it forms Schedule 2 of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). The ICCPR and other international instruments define 'human rights' for the purposes of the Act which empowers the Commission to, among other functions, examine enactments of the Australian legislature or the legislature of an external territory 'for the purpose of ascertaining whether the enactments ... are ... inconsistent with or contrary to any human right'.<sup>125</sup>

The ICCPR imposes a number of obligations on State Parties, including Australia, including the obligation 'to respect and to ensure to all individuals within [their] territory and subject to [their] jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.<sup>126</sup>

ICCPR article 12 guarantees all individuals lawfully within the jurisdiction of Australia a right to move freely. It provides in relevant part

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

.....

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

The right to move freely within a State, that is, a nation state, is a right to be enjoyed by all persons lawfully in the territory (the geographical boundaries) of Australia, regardless of internal State and Territory or other borders. Persons lawfully within the territory include Australian citizens, permanent residents and non-citizens holding valid visas to enter and remain in Australia.

Article 12.1 guarantees two distinct but related rights: free movement and free choice of a place of residence. It has been interpreted as a guarantee of a right to travel and move freely about the entire territory of a nation state and establish a residence on a temporary or permanent basis without any restriction based on economic, social, racial, political or financial grounds.<sup>127</sup> It follows that the right to travel or move freely is a right of access to certain places and also a right to remain in those places.

## Race Discrimination Convention

Australia ratified the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) in 1975. It is implemented in Australian law by the *Racial Discrimination Act 1975* (Cth). Article 5 of ICERD provides in part

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State.

In *Gerhardy v Brown* the High Court considered this provision. Justice Mason stated that the right to freedom of movement and residence embraces a claim to immunity from unnecessary restrictions on one's freedom of movement and a claim to protection by law from unnecessary restrictions upon one's freedom of movement by the State or by other individuals. He also said that it includes a right of access to facilities necessary for the enjoyment of freedom of movement.<sup>128</sup>

Justice Mason acknowledged that the right is not absolute and unqualified. It is subject to compliance with regulations legitimately made in the public interest, such as traffic laws, and to the private property rights of others. For example, the right to freedom of movement does not extend to guarantee access to property in private ownership.<sup>129</sup>

## 4.2 'Territory' of Australia?

As noted in Chapter 2, Norfolk Island is a territory of Australia. It is administered by the Commonwealth but has a very high degree of self-government under federal legislation. It is an 'external territory' but that is immaterial to whether it is part of the Commonwealth of Australia.

The Association of Norfolk Islanders, with some support from members of the Norfolk Island Government and Assembly, argues that Norfolk Island is not and never has been part of Australia.

The 1914 Imperial Order-in-Council did not cede Norfolk Island to the Commonwealth of Australia, nor has the Commonwealth annexed Norfolk Island officially ... Norfolk Island is being grotesquely, stealthily and gradually incorporated into the Australian body politic without the consent of the people of

Norfolk Island ... the status of Norfolk Island has not changed since 1914, though it seems to have become the last “foreign soil” existing under the Australian umbrella ...<sup>130</sup>

The Association sees Norfolk Island as a territory administered by Australia almost in a colonial sense. This view is not a recently acquired one. It has been present in arguments about the Island’s political and legal status almost from the beginning of the settlement of Pitcairners there and certainly from the early part of this century. On that basis the Association of Norfolk Islanders argues that a separate immigration regime from that of Australia is acceptable, appropriate and necessary and does not infringe Australia’s obligations under ICCPR article 12.

The constitutional status of Norfolk Island has not been the subject of definitive decision by the High Court of Australia. However, Norfolk Island has not been listed among dependent territories by the United Nations. There are legal points to be made both for and against the Association’s position. There are also broader political and financial issues involved. In some senses at present Norfolk Island residents have the best of both worlds. They are exempt from the income and other taxes levied on mainland Australians but because they are Australian citizens they can rely on Australia to assist them when they are in need. The Island’s Government, without income tax revenue, does not offer the range of social security benefits, health care and community services found in mainland Australia. When Island residents need those services they come to the mainland and obtain them, even though they contribute little or nothing to the government revenues that are required to provide them.

This report is not the place to canvass or resolve the issue of Norfolk Island’s constitutional status. The Commission considers, nonetheless, that there will continue to be uncertainty, inequity and, potentially, human rights violations until the issue is addressed and resolved directly once and for all. Norfolk Islanders may properly be required to choose between, on the one hand, maintaining their present high degree of independence but in future without the benefits of Australian citizenship and, on the other hand, accepting that the Island is part of Australia and so accepting the full range of rights and responsibilities of Australian citizenship.

In the absence of such a choice to date, for the purposes of this report, the Commission relies on the current position in Australian law, as implied in High Court decisions, to find that, for the purposes of the ICCPR and other human rights treaties, Norfolk Island is part of the ‘territory’ of Australia and the Commonwealth is responsible for the full extension to the Island of its human rights commitments.

For the purposes of the ICCPR, in particular article 12, Norfolk Island must be considered like any other part of Australia, whether on the mainland or external to the mainland. As noted in Chapter 2, Norfolk Island is a territory of Australia. It is an ‘external territory’ but nevertheless within the geographical boundaries of Australia.

### **4.3 Breach of ICCPR article 12.1?**

Norfolk Island’s *Immigration Act 1980* restricts both freedom of movement and choice of residence for persons lawfully within Australian territory.

#### **4.3.1 Restrictions on travel and movement**

Access and entry to the Island are governed by the Act. The Commonwealth Department of Immigration and Multicultural Affairs requires Australians travelling to the Island to take a passport or a certificate of identity.<sup>131</sup> Everyone, with the exception of Island residents, members of the armed forces and diplomatic and consular officials must hold a permit to enter and remain on Norfolk Island.<sup>132</sup> These permits are issued by the Norfolk Island Administration. Most permit applicants must pay a non-refundable application fee and for their mandatory medical examination.<sup>133</sup>

Under the Act, a person who arrives at Norfolk Island as a tourist must complete and submit an arrival form. A person who fails to do so may incur a fine.<sup>134</sup> Passenger lists of all persons disembarking on the

Island must be provided by every carrier.<sup>135</sup> Written permits are not required for those who wish to travel to Norfolk Island and remain there no longer than 30 days, unless the person has been refused a permit or is a prohibited immigrant. Tourists with return airline tickets are automatically granted permits on arrival. A condition of entry is that they will not work during their stay.<sup>136</sup>

The requirement imposed on almost all entrants to obtain and hold a permit to travel to Norfolk Island is a restriction on the individual's freedom of movement because it places a condition on entry, access and stay in a part of the territory of Australia. It is also a restriction because failure to hold a permit imposes a threat of a financial penalty or deportation.

### **4.3.2 Restrictions on choice of residence**

Under the Immigration Act the only people who have an unquestioned right to live on the Island are residents and their children. The Act provides that a person who was born on Norfolk Island or one of whose parents was a resident of Norfolk Island at the time of the birth is a resident of Norfolk Island without the need for a declaration to be made.<sup>137</sup> Others may be declared residents. Those granted a general or temporary entry permit are also entitled to reside on the Island for a defined period.<sup>138</sup>

No-one else has a right to establish a residence on Norfolk Island. There is no right to establish or purchase a business on the Island because there is no guarantee that an entry permit will be granted.<sup>139</sup>

Even when granted, a general or temporary entry permit may be subject to conditions restricting the holder's right to engage in employment, to exercise a trade or profession, to establish a business or to undertake scientific or cultural research. Other conditions may also be imposed where the Executive Member considers those conditions beneficial to Norfolk Island. The Executive Member may cancel a permit if any condition is breached.<sup>140</sup> Where a permit is cancelled, the person becomes a prohibited immigrant and may be fined, deported and denied entry in the future.<sup>141</sup>

The grant of residency status to permit holders is discretionary.<sup>142</sup> The factors to be taken into account are highly subjective: the extent to which an applicant has assimilated into the community of the Island, good character and good health. Meeting the criteria for a permit does not guarantee residence. Under the Immigration Act entry may be refused if the annual quota has already been filled. The Executive Member fixes a quota on the recommendation of the Legislative Assembly.<sup>143</sup> The Act does not establish how the quota is to be determined, thus leaving the matter entirely at the discretion of the Island Government.

### **4.3.3 Finding on breach of ICCPR article 12.1**

*The Commission finds* that the Norfolk Island *Immigration Act 1980* clearly restricts both the freedom of movement and the freedom of residence as set out in ICCPR article 12.1 for most Australian citizens and lawfully resident non-citizens.

As noted above, however, these freedoms are not absolute. Australia is entitled to restrict freedom of movement and/or freedom of residence within its territory in the interests of national security, public order, public health, public morals or the rights and freedoms of others (ICCPR article 12.3).

## **4.4 Restrictions justified by ICCPR article 12.3?**

Any impairment of a person's rights to move freely and choose a residence must be closely scrutinised. The restriction of rights is always an exception and never the rule. Any restriction or limitation on an individual's right must be reasonable and proportionate to the aim it pursues. It must respond to a pressing public and social need.<sup>144</sup> Mere administrative or other convenience cannot justify the restriction of a right.

ICCPR article 12.3 establishes several elements, all of which must be satisfied before an individual's freedom of movement and/or residence may be lawfully restricted. The restriction must

- be provided by law (discussed in section 4.4.1)
- have the objective of protecting national security, public order (*ordre public*), public health or morals or the rights and freedoms of others (section 4.4.2)
- be necessary (section 4.4.3) and
- be consistent with the other rights recognised in the ICCPR (section 4.4.4).

#### 4.4.1 Provided by law

First, the restriction must be imposed by legislation or a comparable measure, for example, delegated legislation. The legislation must disclose with sufficient certainty the extent of the authorised interference with freedom of movement and the reasons for it.

[M]ere administrative provisions are insufficient. A restriction on freedom of movement by way of an administrative act is only permissible when this follows from the enforcement of law that provides for such interference with adequate certainty.<sup>145</sup>

Restrictions on freedom of movement and residence in relation to Norfolk Island are provided for by a law, the *Immigration Act 1980* (NI). However, many aspects of the implementation of that law are discretionary. In particular, decisions on applications for temporary and general permits and declarations of residency are made by the Executive Member on the advice of the Immigration Committee with little direction from the Act. The Executive Member has a wide discretion to grant or refuse a permit.<sup>146</sup> The only general restraints on this discretion are in section 73 which requires the Executive Member to act reasonably and section 74 which provides

The Minister, the Administrator or an officer shall not exercise any power under this Act in such a way as to constitute racial discrimination within the meaning of the International Convention on the Elimination of All Forms of Racial Discrimination.

Except for Island residents and people with a special relationship with Norfolk Island, an individual's entry is subject to the operation of a quota, the setting of which is at the discretion of the Legislative Assembly. Finally, there are very limited rights of appeal with respect to any decisions made under the Act and they involve an administrative (not judicial) appeal to the Commonwealth Minister.<sup>147</sup>

The Norfolk Island Government has realised, during 1998, that its Immigration Act is far too discretionary and potentially discriminatory. A proposal has been drafted to repeal the current Act and replace it with a new scheme which 'should be compatible with the system operating in Australia, update any current rules that have been found to be a problem and bring the migration norms of Norfolk Island into line with international standards of comprehensiveness and clarity'.<sup>148</sup>

To date the Immigration Act and Regulations of Norfolk Island have been general, leaving significant scope for the exercise of discretion by the Authorised Officer, the Immigration Committee and the Executive Member responsible for Immigration ... [Now] the policies that influence their decisions have to be incorporated into the law to satisfy the rule of law. The laws that bind us must be open, clear and available to all so that good government is seen to be done as well as actually done.<sup>149</sup>

Most significantly the changes proposed will

- set out the decision-making criteria in legislation rather than policy guidelines

- set out codes of procedure for decision-making concerning annual quotas, applications for entry permits and cancellation of entry permits
- provide for an appeal from the decision of the Executive Member or the Immigration Committee to an independent Administrative Review Tribunal.

The objective is to ensure the process 'is transparent, consistent and as objective as possible while retaining discretion for unexpected, unusual and special circumstances'.<sup>150</sup>

#### 4.4.2 A lawful objective

When the ICCPR was drafted, the drafters considered an extensive list of possible lawful objectives justifying restrictions on movement and residence. The list included restrictions imposed on migration in the interest of protecting 'primitive or unsophisticated communities' from exploitation.<sup>151</sup> The South African delegates argued that there should be a restriction to support the policy of apartheid and the Australian delegates referred to protecting certain Indigenous areas.<sup>152</sup>

The drafters, however, settled on a more limited list of permissible objectives: protection of national security, public order, public health or morals or the rights and freedoms of others. These categories are exhaustive and not merely illustrative. Any restriction must be justifiable by reference to one or more of those listed or it will be unlawful. The objectives which may be arguable in the case of Norfolk Island are 'public order' and 'the rights and freedoms of others'.

The *General Guide* issued by the Norfolk Island Administration on 20 May 1996 sets out the rationale for the immigration restrictions.

Inherent in the Act and its attendant policy is a desire to preserve the environment of Norfolk Island and the way of life of its permanent residents. It follows that a primary objective of the Immigration Act is to protect the rights and expectations of island residents.

#### A. Public order

A restriction on the right to travel or choose a residence based on the protection of public order may be imposed to ensure the effective working of the state and the maintenance of its systems of order and law. The types of concerns that may be covered by the public order limitation on freedom of internal movement and residency may include

- restrictions associated with the lawful deprivation of personal liberty, for example, for those convicted of or bailed on criminal charges
- common provisions for the regulation of traffic
- special measures to maintain public safety (such as blockades)
- regional planning policies and construction prohibitions in grasslands
- measures to protect nature, landscape and the environment
- measures to protect safety such as in earthquake, volcanic and landslide zones or in the event of internal unrest or threat of terrorist attack.<sup>153</sup>

The federal Attorney-General's Department has defined the concept of 'public order' as 'a legal expression intended to emphasise the whole body of political, moral, legal and economic issues essential

to the maintenance of a given social structure'.<sup>154</sup> The Department advised the Commonwealth Territories Office in 1987 and again in 1996 that, notwithstanding that the Immigration Act *prima facie* breaches ICCPR article 12.1, its restrictions are justified on the grounds of public order.

[T]his conclusion is based on the size of Norfolk Island and the limited capacity of the Island's resources, services and community to support an increased population.<sup>155</sup>

These 'public order' considerations, the Department concluded, justify the imposition of a quota and other general restrictions on persons seeking to migrate to Norfolk Island.<sup>156</sup>

The Norfolk Island Administration also cites a number of reasons that may come under the head of 'public order' as justification for the imposition of a quota and restrictions on residence

- to bring about a gradual and controlled increase in the population of Norfolk Island to a level that creates and sustains healthy economic activity for the benefit of all concerned
- to ensure immigration policy is appropriate to current economic and population trends
- burdens on the public purse
- the absence of any other law regulating immigration because the *Migration Act 1958* (Cth) does not apply
- the fragile environment and ecology of the Island
- constitutional and legal arrangements applying to Norfolk Island
- the fact that Commonwealth taxation law does not operate on Norfolk Island
- to ensure that businesses are solvent and profitable
- to ensure that the skills and qualifications of persons seeking employment match the needs of the community.<sup>157</sup>

In assessing whether the restrictions on residence are for the purpose of public order, the unique constitutional and political arrangements applying to Norfolk Island are relevant. The Commonwealth's *Migration Act 1958* does not apply in Norfolk Island and in the absence of the *Immigration Act 1980* (NI) there would be no law regulating the entry of non-Australians into Norfolk Island or from Norfolk Island into mainland Australia. However, the Commonwealth has ample legislative power to extend its migration legislation to Norfolk Island, as it has done to all other permanently inhabited external territories.

The Commonwealth Parliament may provide whatever form of government for the Island it sees fit and to this end may have regard to the size of the Island, its importance and the stages of its political and economic development.<sup>158</sup>

The Commonwealth's power to legislate with respect to Norfolk Island is plenary. As the High Court determined in *Berwick's Case*,<sup>159</sup> the power conferred on the Commonwealth by Section 122 of the Federal Constitution is, on the one hand, sufficiently wide to enable it to pass laws providing for the direct administration of Norfolk Island by the Australian Government without separate territorial administrative institutions or a separate budget and treasury and, on the other hand, wide enough to enable Parliament to endow the Island with separate political, representative and administrative institutions, having control of its own revenues.

Concern to limit population incursions in the interests of the environment and preservation of scarce resources would justify restrictions on movement. It may be, however, that restrictions such as those contained in the Immigration Act are disproportionate measures for achieving this objective. As detailed below, these interests are pursued elsewhere in Australia without separate immigration legislation.

Economic matters and the prosperity of the Island do not constitute *public order* issues. *Public order* does not extend to matters such as ensuring businesses are solvent and profitable or that the skills and qualifications of persons seeking employment match the needs of the community. The federal Attorney-General's Department has now concluded

Given the practical application of the *Immigration Act 1980* (NI), it seems clear that the law is not restricting rights consistently with the requirements of Article 12 of the ICCPR. For example, it is not restricting rights in a manner that is 'necessary for public order'. Rather, the manner in which the law is being implemented is protecting the (often lifestyle-related, economic or financial) interests of a group of people (Norfolk Island Permanent Residents and people of Pitcairn descent).<sup>160</sup>

### Case studies - restrictions on access in the interests of public order

Lord Howe Island NSW and Rottnest Island WA are two inhabited holiday islands whose environmental protection, tourism control, residential permissions and other management are entrusted to authorities established by the respective State Governments. Both are managed as public reserves.

Lord Howe Island was vested in the Crown in right of NSW in 1953 and residents lease their land from the Crown.<sup>161</sup> The Lord Howe Island Board is responsible for the control and regulation of the tourist trade and may require persons carrying on businesses or trades on the Island to be licensed and subject to such conditions as determined.<sup>162</sup> Residential leases may be transferred although in some cases Ministerial approval is required.<sup>163</sup>

Rottnest Island, situated some 20 kilometres west of Fremantle, is controlled and managed by the Rottnest Island Authority whose primary function is to provide and operate recreational and holiday facilities.<sup>164</sup> The Authority provides accommodation for the resident population of staff and their families and a primary school operates on the Island for resident children.

There is no separate immigration regime applicable to either of these island reserves.

## B. The rights and freedoms of others

The other arguable basis for limiting the right to move freely and choose a place of residence is that the exercise of those rights would impair the rights and freedoms of others. This requires an investigation of whose rights may be impaired, what those rights are and the status of those rights relative to the rights of movement and residence.

The Island Administration states that the principal objective of the Immigration Act is to protect the rights and expectations of the Island residents, namely

- the need to preserve the environment of Norfolk Island and the way of life of its permanent residents
- residents must have an adequate income and
- the special relationship of the descendants of Pitcairn Island with Norfolk Island.<sup>165</sup>

The question is whether there is a recognised *right* and/or *freedom* which requires protection to the extent of denying freedom of entry and residence to others. The sources for these rights and freedoms are the ICCPR itself, other relevant international human rights instruments and rights existing in Australian law.

## B1. Minority rights

Some Island residents argue that they should be entitled to the protection of certain minority rights as provided for in ICCPR article 27. The Association of Norfolk Islanders described 'a separate and distinct people not having its roots in the continent of Australia'<sup>166</sup> and in support of that claim Dr Colleen McCullough wrote

The fact is that a separate and distinct people having its own language, customs, traditions and culture was put here in Norfolk Island in 1856 and persisted in its occupation until Norfolk Island became the homeland ...<sup>167</sup>

ICCPR article 27 provides

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

### *What is a minority?*

ICCPR article 27 describes but does not define minority groups for the purposes of human rights protections. For the purposes of article 27 minority groups are those defined by a distinct ethnicity, religion or language. There is no universally accepted definition of 'minorities' in international law. Whether or not a group of people can be recognised as a minority will depend on objective criteria. The people of Norfolk Island do not constitute a minority group based on religion.<sup>168</sup> However, the Pitcairn descendants may constitute a minority due to their inherited language or dialect.<sup>169</sup> They may also constitute a distinct ethnic minority.

A Senate Report in 1975 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'.<sup>170</sup> That description, however, is still disputed.

Comments to the Commission included the following.

What culture? The society of Pitcairn Descendants has only 20 members and the only day that is celebrated is Bounty Day (8<sup>th</sup> June) nothing else is celebrated or practiced. The language is spoken only by islanders and then generally at home. Abolishing the Immigration Act 1980 (NI) will make no difference to this what so ever. The facts are that the descendants of Pitcairn are islanders when it suits them and Australian citizens when the situation suits them to be.<sup>171</sup>

It could not be denied that Norfolk Island is a unique area of the Commonwealth of Australia, and although there is a definite culture attached to those of Pitcairn Descent, the Island Culture and Heritage is much broader Y<sup>172</sup>

The Commission considers that Norfolk Island has a unique history which cannot be overlooked or discounted. That history has been recognised to some extent by the enactment of the *Norfolk Island Act 1979* (Cth) granting the Island a degree of self-government. The preamble to the Act states

the Parliament recognises the special relationship of the said descendants with Norfolk Island and their desire to preserve their traditions and culture:

the Parliament considers it to be desirable and to be the wish of the people of Norfolk Island that Norfolk Island achieve, over a period of time, internal self-government as a Territory under the authority of the Commonwealth and, to that end, to provide, among other things, for the establishment of a representative Legislative Assembly and of other separate political and administrative institutions on Norfolk Island ...

In his 1976 report, Sir John Nimmo concluded

It is obvious that to preserve their way of life and the present character of the Island, the influence of the Pitcairn descendants must have opportunity for expression.<sup>173</sup>

Almost half (46.8 per cent) of the present resident population of Norfolk Island are Pitcairn descendants. The Commission concludes that the Pitcairners of Norfolk Island should be regarded as constituting a distinct cultural or ethnic minority for the purpose of ICCPR article 27.

### ***What rights are protected by article 27?***

Accepting that the descendants of the Pitcairners are a minority group and able to avail themselves of the rights found in article 27, what type of protection is to be accorded to them? In its General Comment on article 27, the UN Human Rights Committee stated

[T]his article establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant.<sup>174</sup>

The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals protected under that article - for example, to enjoy a particular culture - may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority.<sup>175</sup>

In a determination brought before it under article 27, the Committee adopted a relatively broad interpretation of the rights protected by the article.

The right to enjoy one's culture cannot be determined *in abstracto*. It has to be placed in context. In this connection, the Committee observes that article 27 does not only protect traditional means of livelihood of national minorities, as indicated in the State party's submission. Therefore, that the authors may have adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking article 27 of the Covenant.<sup>176</sup>

However, while article 27 prevents *denial* of the rights listed it does not protect a minority from every impact on those rights. The case in which the comment quoted above was made was a complaint brought by 48 Sami people alleging that Finland had violated article 27. The issue was whether a proposed quarrying operation would unduly interfere with the traditional reindeer farming practices of the Sami people. The Committee determined that there had been no breach of article 27.<sup>177</sup>

A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, *measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27* [emphasis added].<sup>178</sup>

With respect to a need for residents to restrict immigration so as to protect the minority rights of Pitcairn descendants, the Commission received no evidence that their rights to enjoy their culture or use their language would be at risk in the absence of immigration controls.

### ***Does the protection of minority rights justify restrictions on freedom of movement?***

The UN Human Rights Committee has considered the relationship between ICCPR articles 27 and 12 in a case involving Canada.<sup>179</sup> The issue was whether the Canadian Government was justified in refusing a right of residence on an Indian reserve to an Indian woman and her family because she had married a

non-Indian man. In other words, the Committee considered the Government's justification for restricting her freedom of residence in the interests of protecting the Indian community from non-Indian residents.

The Committee recognizes the need to define the category of persons entitled to live on a reserve, for such purposes as those explained by the Government regarding protection of its resources and preservation of the identity of its people. However, the obligations which the Government has since undertaken under the Covenant must also be taken into account.

In this respect, the Committee is of the view that statutory restrictions affecting the right to residence on a reserve of a person belonging to the minority concerned, must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant, read as a whole. Article 27 must be construed and applied in the light of the other provisions mentioned above, such as articles 12, 17 and 23 in so far as they may be relevant to the particular case, and also the provisions against discrimination, such as articles 2, 3 and 26, as the case may be.

The Committee has made it clear that article 27 minority rights must be exercised consistently with other ICCPR rights.

## **B2. Indigenous rights and self-determination**

The Association of Norfolk Islanders (formerly the Society of Pitcairn Descendants), a group of Norfolk Island residents, claims that the Pitcairn descendants are an Indigenous people. The Association has made representations to the British Government and the United Nations Working Group on Indigenous Peoples seeking recognition as an Indigenous people entitled to self-determination.

In a letter to the Commission the author Dr Colleen McCullough, an Island resident married to a Pitcairn descendant, noted that the Pitcairners were 'the first people to occupy Norfolk Island as a people' having been 'transported from [their] original homeland' and constituting an 'integrally knit populace of common and distinctive genetic makeup; an entire populace'.<sup>180</sup>

It is an incontrovertible fact that the whole Pitcairn people was transported to Norfolk Island in 1856, complete with its hierarchy, its customs, its traditions, its culture, and even its relics, treasures, pet animals and inanimate goods.<sup>Y</sup>

There is nothing in the mass of data about indigenes which says that a people cannot be successively indigenous to two (or even more) different geographical locations.<sup>Y</sup> Indigenousness is not a matter of race, creed or skin colour: it is the occupation of a geographical entity wherein no other people resides, and is validated by continuance, by the putting down of roots, by the reverence accorded to a homeland.<sup>181</sup>

Other comments, on the other hand, disagreed with this assessment.

While the culture of the Pitcairn Descendants is colourful and different to any other group in the Australian Commonwealth, this is not the culture or heritage of an Indigenous people. It is a culture derived by the melding of cultures from other Nations, in the main the United Kingdom and Tahiti. The Pitcairn language exists, but again this has evolved from the melding of other older languages. The same can be said in respect of Customs and Traditions as exist. Never the less the Culture of the Pitcairn Descendants does contain elements of history and tradition that are worthy of preservation. I do not however feel that the incursion of non Pitcairn Descendants into the Island Community is in any way going to destroy the Culture as exists.<sup>182</sup>

The Commonwealth has consistently taken the position that the Pitcairn descendants are not Indigenous people of Norfolk Island and have no right to self-determination.<sup>183</sup>

There is no universally accepted definition of 'Indigenous' in international law.<sup>184</sup> In his 1986 report, the Special Rapporteur on the Prevention of Discrimination and Protection of Minorities, Mr Martinez Cobo, proposed the following criteria which have gained wide acceptance.

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the society now prevailing in those territories or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.<sup>185</sup>

Having regard to their history, the Pitcairn descendants cannot be described as Indigenous people. They are indigenous neither to Norfolk Island nor to Pitcairn Island. Accordingly, there is no basis for asserting that there exists any right or claim to self-determination which may be used to legitimise a restriction on the rights of others to move freely or establish a residence on Norfolk Island.

### Case studies - restriction of access in the interests of Indigenous rights

#### *Pitjantjatjara Land Rights Act 1981*

One example of a legislative regime which restricts the freedom of movement and residence of most Australians is the *Pitjantjatjara Land Rights Act 1981* (SA). This Act resulted from extensive negotiations between the South Australian Government and the Pitjantjatjara Council and vests title to the lands comprising 103,000 square kilometres in north-west South Australia in the Pitjantjatjara Peoples. The Act provides effective recognition and security of title in lands with which the Anangu Pitjantjatjara have had a connection for more than 40,000 years.

It is to be seen as a legislative measure which seeks to convert the traditional land ownership of the Pitjantjatjara people into a modern legal framework approximating as closely as may be to the central feature of traditional Aboriginal ownership.<sup>186</sup>

The Act expressly restricts rights of access to the lands. Section 19 makes unauthorised entry by non-Pitjantjatjara an offence. That restriction was the subject of challenge by a non-Pitjantjatjara Aboriginal man, Mr Brown, on the ground that it was inconsistent with the *Racial Discrimination Act 1975* (Cth) and ICERD article 5(d)(i). Mr Brown had been charged with unauthorised entry. He argued that his freedom of movement was being impaired because he was not a Pitjantjatjara and, therefore, the restriction was racially discriminatory.

Justice Mason concluded that the Pitjantjatjara lands were, and remain, private property. If there is discrimination, it is not based on race but on ownership. The owners of the land are protected by the Act against unauthorised incursions by non-owners. Justice Mason continued

*The point has already been made that freedom of movement considered as a human right or fundamental freedom, does not generally extend to access to privately owned lands ...*

*However, in exceptional circumstances freedom of movement may include access to privately owned lands. If, for example, the purpose and effect of vesting extensive tracts of land in private ownership and denying a right of access to non-owners was to impede or defeat the individual's freedom of movement across a State or, more relevantly, to exclude persons of a particular race from exercising their freedom of movement across a State, the vesting of ownership and the denial of access would then constitute an interference with freedom of movement and amount to racial discrimination within the meaning of the Convention.*

*Although the lands occupy an infertile, sparsely inhabited and relatively undeveloped portion of the State, in which the Pitjantjatjara peoples have long had close social, economic and spiritual affiliations and responsibilities in accordance with Aboriginal tradition, the fact that the lands constitute one tenth approximately of the area of the State of South Australia, suggests that the*

*vesting of title to the lands and the restrictions on access imposed by s.19 on non-Pitjantjatjaras amounted to an impairment of their freedom of movement.*<sup>187</sup>

Having come to this conclusion, Justice Mason joined the rest of the Court in justifying the racial discrimination involved in section 19 as a special measure within the meaning of ICERD article 1.4 as authorised by section 8(1) of the *Racial Discrimination Act 1975* (Cth).

*Article 1.4 proceeds on the footing that certain groups or individuals may require protection in order to ensure to them equal enjoyment or exercise of human rights and fundamental freedoms and that, but for some such provision as art. 1.4, the giving of this protection would in some situations at least amount to racial discrimination.*<sup>188</sup>

There are a number of features which distinguish the Pitjantjatjara Land Rights Act from the regime which exists in Norfolk Island under the Norfolk Island Act and the Immigration Act. First, the Pitjantjatjara Land Rights Act effectively creates private interests in land. Restriction of access to the Pitjantjatjara lands is in effect the same as restrictions on access to other private property, although the control mechanism is different. The *Norfolk Island Act 1979* (Cth), by way of contrast, did not vest private property rights in the people of Norfolk Island but only the power to make laws with respect to the peace, order and good government of the Island. While private property rights exist on the Island, they are rights that accrue to individual residents and not to the Islanders as a group. Restrictions on access to those private properties mirror restrictions applicable in South Australia and throughout Australia.

Further, the High Court held that, even if the effect of the Pitjantjatjara Land Rights Act was to impair an individual's rights to move freely, that restriction was justified on the grounds that the Act was a special measure as defined by ICERD article 1.4 and permitted by section 8 of the *Racial Discrimination Act 1975* (Cth). The Immigration Act does not constitute a special measure or an exception to the general prohibition of racial discrimination in the ICCPR as it does not operate by selection on race. Indeed, the Act expressly prohibits decisions being made in contravention of ICERD.

#### *Torres Strait Regional Authority*

Meriam Island in the Torres Strait was the land subject to native title claim in the Mabo Case before the High Court in 1992.<sup>189</sup> The Islands of the Torres Strait are within the sovereignty of Queensland. Much of the land is already administered as freehold Indigenous land or native title or is subject to claim. The Indigenous culture of the Islands is promoted and protected by the Torres Strait Island Regional Authority established under the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth). For example, the Authority is charged with formulating and implementing programs for Torres Strait Islanders, and Aboriginal persons, living in the Torres Strait area and for protecting Islander cultural materials.<sup>190</sup>

There is no separate immigration regime in the Torres Strait Islands and no special restriction on liberty of movement or freedom of residence.

### **4.4.3 The restriction must be necessary**

The third element of a justification for restricting the freedoms of movement and residence is the requirement that the restrictions be *necessary* to achieve the intended objective, in this case public order or minority rights. The reference to *necessity* stems from the need to limit objectively the authority of a national legislature to interfere with freedom of movement.<sup>191</sup>

A restriction on this right is thus consistent with the legal proviso in Art.12(3) not when the State concerned believes that it serves one of the listed purposes for interference but rather when it is necessary for achieving that purpose.<sup>192</sup>

[T]he concept of necessity also implies that the limitation imposed be proportional or appropriately related to the overriding societal interest which renders the limitation necessary.<sup>193</sup>

The federal Attorney-General's Department warned in 1987, and again in 1996, that care should be taken to ensure that entry and residence controls do not exceed what is necessary to protect the Island.<sup>194</sup> The following issues need to be considered in assessing whether the restrictions imposed by the Immigration Act are necessary.

- Is the restriction more than merely reasonable or desirable?
- Is there a pressing social need to restrain an individual's right to move freely throughout Australia or to choose a place of residence?
- Would the failure to impose these restrictions have adverse consequences which are legitimately feared by Australia as a whole?
- How broad are the restrictions?

The earlier advice from the Attorney-General's Department indicates that care should be taken to ensure that entry and residence controls do not exceed what is *necessary* to protect the Island. It indicates that quotas should take account of new circumstances and be flexible. Although these matters are not explained or discussed in any detail, the example is given of the obligation imposed on applicants seeking to establish a business on the Island that they demonstrate the degree of benefit which would be derived by the economy and community from that business.

These requirements may be regarded as unduly onerous and the argument might be put that new businesses, even where these cover the same ground as existing businesses, are nevertheless beneficial to the Island in that they offer a healthy level of competition. If this argument proves to be valid, it could not be said that the requirements satisfy the demands of Article 12(1) in the sense that they are regarded as necessary to preserve public order.<sup>195</sup>

The onus is on the Norfolk Island Administration and the Commonwealth to establish that the Island's immigration legislation and policy are *necessary* to secure public order and/or the minority rights of Pitcairn descendants. The test is whether the regime is the only one, or the least restrictive one, which will achieve the lawful objectives pursued. Moreover, it must involve the least possible interference in the rights and freedoms of others.

It might be argued that the unique lifestyle and ambience on Norfolk Island could be equally well preserved by a different system from that which currently prevails. If a different system could be devised and implemented, it could no longer be said that the current system was necessary. If so, the current restrictions on freedom of movement would no longer be justifiable.<sup>196</sup>

#### 4.4.4 Compatible with other ICCPR rights

The final requirement for lawfulness of a restriction on the freedoms of movement and residence is that the restriction must be consistent with other rights in the ICCPR.

Nothing in the present Covenant may be interpreted as implying for any State, *group or person* any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.<sup>197</sup>

In effect no one person's or group's rights prevail over those of another. There is no hierarchy in the enjoyment of rights. What must be achieved is a balance of rights. The operation of the *Immigration Act 1980* (NI) is questionable in this respect, particularly regarding its compatibility with the Covenant's proscription of discrimination and its guarantee of equality before the law.

ICCPR article 2 provides in part

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

ICCPR article 26 provides

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

The implementation of the Immigration Act discriminates among Australians on prohibited grounds in respect of freedom of movement and residence (ICCPR article 12). With respect to the quota, although racial discrimination is proscribed by section 74 and while the nature of a 'special relationship' is explicitly not dependent on Pitcairner heritage, in practice the overwhelming number of general entry permits granted outside the quota to those establishing a 'special relationship' have been awarded to people with Pitcairn heritage or associations.

The practical import of the 'special relationship' category has been clarified by a former Minister for Immigration.

... the 'special relationship' clause has been irrelevant since the introduction of the 2% per annum growth population policy and ... very few 'special relationship' applications had been made by persons other than those who were marrying into or were somehow related to families of Pitcairn background ... The special relationship clause does not, in any event, create a separate category of permit it merely provides an avenue to overcome quota restrictions, but no quota restriction has existed for several years (i.e. unfilled quota positions have been available throughout the last several years).<sup>198</sup>

The criteria for the grant of entry permits have the potential, and the very real likelihood, to operate discriminatorily. Criteria include the applicant's health which is intended to exclude people with disabilities and the availability of employment which could operate to exclude people on the basis of their age. In March 1996 the then Norfolk Island Minister stated

At present retired persons of whatever nationality are not normally granted GEPs [General Entry Permits] to enter Norfolk Island if they do not intend to purchase a business and become actively involved in the local economy.

I am however proposing changes to the current Immigration Policy which will allow a number of such people to be considered provided they meet the normal health, good character and financial independence criteria, as well as having and maintaining adequate levels of health insurance.<sup>199</sup>

On 20 March 1996 the Norfolk Island Legislative Assembly amended the *General Guide to Immigration* to provide that up to one-quarter of the annual General Entry Permit quota would be available to retirees provided they 'can demonstrate they have sufficient assured independent income' and 'will continue to maintain private health insurance'. The General Entry Permit criterion of 'financial position' discriminates on the ground of property.

Subjective discretionary criteria such as 'character', reasons for wanting to live on Norfolk Island and whether the person is likely to impose a burden on the Island's facilities are far too wide and leave open the probability of discrimination on the grounds of property, social origin, birth and like status. The Norfolk Island Government justifies these criteria by reference to the absence of Commonwealth social security, Medicare and other benefits on the Island.<sup>200</sup> Instead of discriminating among Australians on

prohibited grounds, however, the response should be to extend those benefits to people on Norfolk Island.

Not every differentiation of treatment will constitute discrimination. Different treatment will be acceptable in international law if the criteria for differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.<sup>201</sup> The discrimination inherent in the implementation of Norfolk Island's Immigration Act, however, does not satisfy this description. In particular, the criteria are too widely drawn to be reasonable, there is too much room for subjective and arbitrary decision-making and the aim of protecting a certain lifestyle, one which includes freedom from Australian tax liability, is not legitimised by the ICCPR.

Current proposals to replace the Immigration Act do not deal with all the Commission's concerns regarding the subjective and potentially discriminatory entry criteria. It is not proposed, for example, to repeal criteria such as financial position, character or health. Rather the intention is merely to transfer these criteria from policy into the new legislation.

#### 4.4.5 Findings on satisfaction of ICCPR article 12.3

ICCPR article 12.3 requires that any restriction on freedom of movement and choice of residence be provided by law which is sufficiently certain and consistent with other ICCPR rights. These requirements are offended by the *Immigration Act 1980* (NI) because most decision-making is discretionary, the discretion is largely unfettered by statutory guidelines and the criteria are subjective, arbitrary and potentially discriminatory. The Office of International Law in the federal Attorney-General's Department has come to the same conclusion.

The Office of International Law is now of the view that the manner in which the *Immigration Act 1980* (NI) is implemented potentially places Australia in breach of its international obligations. Specifically, it appears that the implementation of the *Immigration Act 1980* (NI) places Australia in breach, or potentially in breach, of:

- C The International Convention on the Elimination of All Forms of Racial Discrimination - by favouring people of Pitcairn descent over others; and
- C Article 12(1) of the ICCPR, on the basis that the restriction of the freedom of movement has not been done for necessary reasons of public order.<sup>202</sup>

The objectives of protection of public order, notably the unique environment of Norfolk Island, and the minority rights of the Pitcairn descendants are lawful objectives. These objectives would justify a proportionate restriction on freedom of access to the Island and residence there.

The Attorney-General's Department has submitted that the objectionable features of the *Immigration Act 1980* (NI) would be overcome by reforming the policies and practices adopted in the implementation of the Act to eliminate arbitrariness and prohibited discrimination and by establishing an independent administrative review tribunal with power to review immigration and residency decisions made under the Act.

The policy guidelines which implement the *Immigration Act 1980* (NI) appear to be in breach of the ICCPR, rather than the Act itself. Therefore, it would not be necessary to repeal [the Act].<sup>203</sup>

Proposals for a new immigration regime are currently under consideration by the Norfolk Island Government as described above.

However, the Commission cannot agree that the only objectionable feature of the separate immigration regime is the way in which it is implemented. Of primary importance is the fact that the need for a separate regime has not been made out. The core question for this inquiry is whether a separate

Islander-controlled immigration regime is *necessary* to achieve the protection of public order and minority rights on Norfolk Island.

### Case study - protecting other island territories

The Commonwealth has two distant island territories in the Indian Ocean.

Christmas Island is some 2,600 kilometres from Perth. From 1900 it was administered as part of the Settlement of Singapore, a British colony. In 1957 it was excised from Singapore and transferred to Australia.<sup>204</sup> Many of its laws remained identical to those of Singapore at the date of the transfer until 1992 when the laws of Western Australia were extended to apply in the Territory.<sup>205</sup> At about this time the Commonwealth established a scheme to sell its properties - both commercial and some 2,000 residential units - on the island. Residents were at first given preference in the purchase of houses while commercial properties were offered for open sale. Western Australian law applies to the transfer of land while the Christmas Island Council, a fully incorporated local government under the *Local Government Act 1995* (WA), deals with applications for rezoning and related land use matters.

The Cocos (Keeling) Islands were annexed by Britain in 1857, having been a 'fiefdom' of the Clunies-Ross family. The family stayed on until the 1980s when their land holdings were purchased by the Commonwealth. The Islands were incorporated in the Settlement of Singapore in 1903 and transferred to Australia in 1955. In an act of self-determination in 1984 the Cocos Malay population chose full integration into Australia.<sup>206</sup> As on Christmas Island, the laws of Western Australia were made applicable in 1992.<sup>207</sup> All land on the two occupied islands, Home and West, in this group was Commonwealth owned until a scheme to sell individual houses was established in the early 1990s.

There is no separate immigration regime in either of the Indian Ocean Territories and no special restriction on liberty of movement or freedom of residence.

These examples establish that measures of protection for island and regional cultures, environments and community infrastructure can be devised without offending liberty of movement and freedom of choice of residence and within the overall migration regime established by the Commonwealth.

The responsible Commonwealth department, the Department of Transport and Regional Development, concluded

Y Norfolk Island is now the only remaining inhabited Island Territory to which that Act [*Migration Act 1958* (Cth)] has not been extended. Reasonable comparisons can be drawn between the nature of measures necessary to protect the culture of Island communities, environment and community infrastructure in the Indian Ocean Territories and on Norfolk Island. The Indian Ocean Territories are remote, fragile and culturally distinct, particularly Cocos. With the extension of the *Migration Act 1958* to the Indian Ocean Territories, other regulatory measures have been sufficiently efficacious for protection purposes Y

Accordingly, it can be said that, as a matter of fact, a separate migration regime is not **necessary** on Norfolk Island to protect the culture of the Pitcairn descendants, the Island environment and/or the community infrastructure.<sup>208</sup>

Complainants reiterated the view that planning controls would sufficiently protect the interests, rights and freedoms at stake.

*The Immigration Act 1980* is not required, as your Commission portrays anything can be regulated by lawful operations of planning and zoning regulations. At the present time the Norfolk Island Government avoids facing its responsibilities and uses the *Immigration Act 1980* as a cleaver to govern. This in turn protects its political power, insuring that its control can never be challenged by new residents, and doubly insured by the restriction of new residents from voting for a period. I see no

justification for the continuation of this objectionable and detestable Immigration Act which has destroyed the dignity of many Australians that I have known.<sup>209</sup>

Y the Norfolk Island Assembly believes that if the Immigration Laws are abolished there will be a massive influx of people coming here to live. Remote, isolated life on an island is not everyone's cup of tea, just as living in remote rural areas of Australia is not for everyone. This won't happen, besides population growth can be controlled by land usage.<sup>210</sup>

As an Island, Norfolk is a land mass of finite area, bounded by the Pacific Ocean on all sides, there is no way to increase the land available. Therefore if proper and adequate Planning/Building Regulations were put in place, and adhered to, the Island Population would be self determined in relation to number Y

In effect the introduction of properly policed regulations on land sub-division and residential building permits, coupled with suitable business planning regulations would have the same control over the general Island population. In simple terms if you control the number of houses and businesses on the Island you automatically control the size of the population.<sup>211</sup>

No credible evidence to the contrary was presented by the Norfolk Island Government, only comments on vacant land.

There are far too many blocks of vacant land in Norfolk Island for planning to control immigration into Norfolk Island, and far too many blocks which may be subject to application for further subdivision or multiple occupancy. To remove immigration controls would risk placing unmanageable strain on areas such as [health, education, social welfare].<sup>212</sup>

*The Commission finds that the Immigration Act 1980 (NI) cannot be justified as necessary as required by ICCPR article 12.3. It pursues objectives some of which are lawful. However, it does so in a way that is disproportionate. Practical and effective alternatives exist which are at once equally effective in securing the desired objectives and much less offensive to other rights and freedoms, including freedom of movement and residence and freedom from discrimination.*

## 4.5 Recommendations

In light of the Commission's findings that the *Immigration Act 1980* (NI) breaches the rights to liberty of movement and freedom of choice of residence in ICCPR article 12, and cannot be justified under article 12.3, we make the following recommendations.

**Recommendation 1:** That the Commonwealth extend the operation of the *Migration Act 1958* (Cth) in full to the territory of Norfolk Island. 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 2:** That the Norfolk Island Assembly regulate the permanent resident population and tourist numbers by the lawful operation of planning and zoning regulations.

**Recommendation 3:** That conduct which is either prohibited or required of people on Norfolk Island be regulated by legislation, regulations or by-laws unconnected with entry or residence status and that penalties for prohibited conduct exclude deportation from Norfolk Island.

## Appendix 1: Submissions

Submission number	Name
1	Nadia Lozzi-Cuthbertson
2	Kate Davis
3	Richard Swansborough
4	Ric Ion-Robinson, President, The Association of Norfolk Islanders
6,7	H Sydney Curtis
8	Stewart Guymre
9	C Clifton
10	Dr Simon Barraclough, School of Public Health, Latrobe University
11	Allan B Tomlinson
12	Shirley Henderson
13	Graeme Woolley
14	Mervil Hoare
15	Lee Robinson
16	Albert Fletcher Buffett, Health and Quarantine Officer, Administration of Norfolk Island

## Appendix 2: Participants

Commissioner	Chris Sidoti, Human Rights Commissioner
Recording and analysis of submissions	Rasmus Kieffer-Kristensen
Research and writing	Kate Eastman, Rasmus Kieffer-Kristensen, Ole Wendler Pedersen, Meredith Wilkie

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- <sup>1</sup>. Sir John Nimmo, Report of the Royal Commission into matters relating to Norfolk Island, Canberra, 1976, (Nimmo Report) pages 26-29.
  - <sup>2</sup>. Nimmo Report, note 1, pages 30-32.
  - <sup>3</sup>. Quoted in the Nimmo Report, note 1, page 41.
  - <sup>4</sup>. Two groups of Pitcairners subsequently resettled on Pitcairn Island where their descendants still live today: Nimmo Report, note 1, page 34.
  - <sup>5</sup>. Nimmo Report, note 1, pages 43-44.
  - <sup>6</sup>. Quoted in 'Bloodless Genocide: A Political History of the Pitcairn People in Norfolk Island from 1856 to 1996', ('Bloodless Genocide'), authored on behalf of the Society of Pitcairn Descendants at <http://www.ozemail.com.au/~jbp/pds/bdlgen1.html>
  - <sup>7</sup>. 'Bloodless Genocide', note 6. This document was allegedly confiscated in 1859 by Sir William on a visit to Norfolk Island.
  - <sup>8</sup>. 'Bloodless Genocide', note 6.
  - <sup>9</sup>. 'Bloodless Genocide', note 6.
  - <sup>10</sup>. H Renfree, *The Federal Judicial System of Australia*, Sydney, 1984, pages 754-755, quoted in House of Representatives Standing Committee on Legal Constitutional Affairs, *Islands in the Sun: The Legal Regimes of Australia's External Territories and the Jervis Bay Territory*, Canberra, 1991, page 133.
  - <sup>11</sup>. House of Representatives Standing Committee on Legal Constitutional Affairs, *Islands in the Sun: The Legal Regimes of Australia's External Territories and the Jervis Bay Territory, (Islands in the Sun)*, Canberra, 1991, page 755.
  - <sup>12</sup>. Nimmo Report, note 1, page 44.
  - <sup>13</sup>. Quoted in the Nimmo Report, note 1, page 42.

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14. Merval Hoare, *Norfolk Island: An Outline of Its History 1774-1977*, University of Queensland Press, Brisbane, 2nd edition, 1978, page 77.
15. From the speech delivered in the Islands courtroom on 14 November 1896 by then Governor Viscount Hampden: quoted in 'Bloodless Genocide', note 6.
16. Nimmo Report, note 1, page 47.
17. Hoare, note 14, page 106.
18. Nimmo Report, note 1, page 48.
19. Nimmo Report, note 1, page 49.
20. 'Bloodless Genocide', note 6.
21. Nimmo Report, note 1, pages 50-51.
22. Sir John Nimmo, *Report of the Royal Commission into matters relating to Norfolk Island*, Canberra, 1976.
23. Submission No. 4. This is also argued in a letter dated 14 June 1996 to Ric Robinson from Clive Alderton, UK Foreign & Commonwealth Office, stating 'Norfolk Island is legally a dependent territory of the Commonwealth of Australia'. This is in accordance with *Halsbury's Laws of England*, which defines a dependent territory as 'A country, province or territory which, at least in respect of the conduct of its external affairs, is subject to the control of the government or a state or country of which it is not an integral part'.
24. General Assembly Resolution 66(1), 14 December 1946.
25. General Assembly Resolution 1541 (XV), 15 December 1960.
26. Senate Standing Committee on Foreign Affairs and Defence, *Report on United Nations Involvement with Australia's Territories, (United Nations Involvement)*, Australian Government Publishing Service, Canberra, 1975, page 112.
27. *United Nations Involvement*, note 26, page 112.
28. *Berwick Limited v R R Gray, Deputy Commissioner for Taxation* (1976) 133 CLR 603.
29. Preamble, *Norfolk Island Act 1979* (Cth).
30. *Norfolk Island Act 1979* (Cth), section 5.
31. Section 31.
32. Section 11.
33. Section 19.
34. Section 25.
35. Section 21.
36. Section 26.
37. Section 27.
38. Section 7(1)(a)-(c).
39. Section 7(1)(e).
40. Section 18.
41. *Islands in the Sun* page 221.
42. Letter to a Norfolk Island resident dated 17 October 1995 from Mr Jon Stanhope, Senior Adviser, Office of the Attorney-General, Complainant NI2 file. Mr Stanhope pointed out that residents of all other Australian Territories, including Christmas and Cocos (Keeling) Islands, are obliged to enrol.
43. This applies to Australian as well as non-Australian citizens: *Legislative Assembly Act 1979* (NI) section 6.
44. The statistics on population are derived from the *Norfolk Island Census of Population and Housing, 1996*. The *Census and Statistics Act 1905* (Cth) does not extend to Norfolk Island. However, the Norfolk Island Government conducted a population census in August 1996 simultaneously with the Commonwealth's census.
45. Letter to HREOC dated 22 June 1998 from John Brown, Norfolk Island Minister for Health and Immigration.
46. Commonwealth Grants Commission, *Report on Norfolk Island 1997*, Australian Government Publishing Service, Canberra, 1997, page 24.
47. Hoare, note 14, page 142.

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48. Commonwealth Grants Commission, note 46, page 36.
49. Access Economics, *Norfolk Island: Recent Economic Performance, Present Situation and Future Economic Viability. Is There a Case For Change?*, Canberra, March 1997, cited in Commonwealth Grants Commission, note 46.
50. Access Economics, note 49, cited in Commonwealth Grants Commission, note 46.
51. Commonwealth Grants Commission, note 46, page 37.
52. The statistics on employment have been derived from the Norfolk Island Census of Housing and Population, 1996, cited in Commonwealth Grants Commission, note 46, pages 39-41.
53. Commonwealth Grants Commission, note 46, page 26.
54. Commonwealth Grants Commission, note 46, page 25.
55. Commonwealth Grants Commission, note 46, pages 39-40.
56. Commonwealth Grants Commission, note 46, pages xiv, 149.
57. Australian Bureau of Statistics, *Norfolk Island Household Expenditure Survey, 1995*.
58. Commonwealth Grants Commission, note 46, page 26.
59. Commonwealth Grants Commission, note 46, page 96.
60. Commonwealth Grants Commission, note 46, page 80.
61. Sir John Nimmo, *Report of the Royal Commission into matters relating to Norfolk Island*, Canberra, 1976 (Nimmo Report), pages 260-261.
62. Nimmo Report, note 1, pages 261-262.
63. Professor Gilbert J Butland, Report to the Department of the Capital Territory of the Australian Government, *A Long Term Population Study of Norfolk Island*, 1974 (Butland Report).
64. Nimmo Report, note 1.
65. The population density on Norfolk Island is 51 per square kilometre. This is much lower than comparable islands such as Bermuda and Guernsey. The number of tourists visiting Norfolk Island each year is also a lot smaller than for these other islands: Butland Report, note 3, page 26.
66. Butland Report, note 3, page 27.
67. Nimmo Report, note 1, page 272.
68. Nimmo Report, note 1, page 272.
69. Nimmo Report, note 1, page 273.
70. *Norfolk Island Act 1979* (Cth) sections 21(6) and 23.
71. *Norfolk Island Act 1979* (Cth) section 21.
72. *Immigration Act 1980* (NI) section 6(2).
73. Section 6(3) and (4).
74. Section 9(1).
75. Section 9(2).
76. Section 72(1).
77. Section 15(1).
78. Section 15(5).
79. Section 15(6)(a).
80. Section 25.
81. Section 45.
82. Section 16(1) and (2).
83. Section 17(2)
84. Section 17.
85. Section 23(1).

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86. Sections 25 and 45.
87. Section 22(1) and (2)(a).
88. The Administration of Norfolk Island, *Immigration into Norfolk Island. A General Guide*, 20 May 1996, (*A General Guide*), page 2.
89. *Immigration Act 1980* (NI) section 20(1).
90. Section 19(2).
91. Section 23(1).
92. Sections 25 and 45.
93. Section 22(1) and (2)(b).
94. Section 18(4).
95. Complainant NI4, letter dated 17 April 1997 to Hon. Warwick Smith, then Federal Minister for Territories, page 2.
96. *Immigration Act 1980* (NI) section 21(3).
97. Section 18(1).
98. Submission No. 1, page 3.
99. Complainant NI2, letter to HREOC dated 24 October 1996.
100. *Immigration Act 1980* (NI) section 28(1).
101. Section 32.
102. Section 85(1).
103. Section 84(1).
104. Letter to HREOC dated 22 June 1998 from John Brown, Norfolk Island Minister for Health and Immigration.
105. Norfolk Island Legislative Assembly Select Committee on Population, *The Past, Present and Future Population of Norfolk Island*, 1987, page 11.
106. Norfolk Island Legislative Assembly Select Committee on Population, note 45, page 9.
107. Norfolk Island Legislative Assembly Select Committee on Population, note 45, page 9.
108. *Immigration Amendment Act 1990* (NI) sections 21A-D.
109. Complainant NI1, letter to HREOC dated 11 March 1996, page 1.
110. Complainant NI3, letter to HREOC dated 18 January 1996, page 3.
111. House of Representatives Standing Committee on Legal Constitutional Affairs, *Islands in the Sun: The Legal Regimes of Australia's External Territories and the Jervis Bay Territory, (Islands in the Sun)*, Canberra, 1991, page 223.
112. *Islands in the Sun*, note 51, page 152.
113. Submission No. 7, page 2.
114. Submission No. 7, page 6.
115. Submission No. 8, page 1.
116. Complainant NI1, letter to HREOC dated 6 June 1996, page 2.
117. Complainant NI1, letter to HREOC dated 11 March 1996, page 1.
118. Complainant NI1, letter to HREOC dated 12 December 1995, page 1 (capital letters as in original).
119. Complainants NI1 and NI2, letter dated 7 April 1996 to the Hon. Warwick Smith MP, then Minister for Territories, page 2.
120. Complainants NI1 and NI2, letter to HREOC dated 8 April 1996, page 1 (capital letters as in original).
121. Complainant NI2, letter to HREOC dated 14 December 1995 (capital letters as in original).
122. For example, in *R v Smithers; ex parte Benson* (1912) 16 CLR 99, the High Court was asked to rule on the constitutional validity of the *Influx of Criminals Prevention Act 1903* (NSW). Benson had been convicted and imprisoned in Victoria for the offence of having insufficient lawful means of support. When he was released he travelled to Sydney in New South Wales to secure employment only to be arrested, charged and imprisoned there

- for the same vagrancy=offence. He argued that the NSW Act was invalid because it breached Sections 92 and 117 of the Constitution. The Court held that the Act impaired his right to move between States.
123. See in particular Justice Murphy in *McGraw Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 637; *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54; *Buck v Bavone* (1976) 135 CLR 110; *R v Smithers; ex parte Benson* (1912) 16 CLR 99; *Gratwick v Johnson* (1945) 70 CLR 1. See also *Cole v Whitfield* (1987-1988) 165 CLR 361, at pages 393 and 406 and *Gerhardy v Brown* (1985) 57 ALR 472.
124. *Buck v Bavone* (1976) 135 CLR 110, at page 137.
125. *Human Rights and Equal Opportunity Commission Act 1986* (Cth) section 11(1)(e).
126. Article 2.1.
127. Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, N.P. Engel, Kehl am Rhein, 1993, page 202; P Sieghart, *International Law of Human Rights*, Clarendon Press, Oxford, 1983, pages 181-188. On 30 March 1998 the UN Human Rights Committee met to discuss a draft General Comment on article 12. The General Comment has yet to be published but the Committee has said that it will clarify the intention of the article and how it relates to other rights in the Covenant. The Comment will also provide guidelines and safeguards for interpreting restrictions to freedom of movement: Press Release HR/CT/512 Human Rights Committee Takes up Draft General Comment on article 12 of the Civil and Political Rights Covenant on Freedom of Movement, 30 March 1998.
- See also the Special Rapporteurs' reports: J D Ingles, *Study of the Discrimination in Respect of the Right of Everyone to Leave Any Country, including His Own and to Return to His Country*, 1963, UN Doc. E/CN.4/Sub.2/1990/47; C L C Mubanga-Chipoya, *The right of everyone to leave any country, including his own, and return to his country*, 1988, UN Doc. E/CN.4/1988 UN /35, Add.1 and Add.1/Corr.1; and more recently, V Boutkevitch, *Working paper on the right to freedom of movement and related issues*, 29 July 1997, UN Doc. E/CN.4/Sub.2/1997/22.
128. (1985) 57 ALR 472, at pages 495-496.
129. *Gerhardy v Brown*, note 7, pages 495-496.
130. Letter to HREOC dated 16 October 1998 from the Association of Norfolk Islanders, pages 2-3.
131. Letter to HREOC dated 5 August 1996 from the Government of Norfolk Island, page 3.
132. *Immigration Act 1980* (NI) sections 11 and 72(1).
133. The Administration of Norfolk Island, *Immigration into Norfolk Island. A General Guide*, 20 May 1996, (*A General Guide*), page 4, paragraph 2.2. and page 17, paragraph 6.1.
134. *Immigration Act 1980* (NI) section 86.
135. *Immigration Act 1980* (NI) section 87.
136. Letter to HREOC dated 5 August 1996 from the Government of Norfolk Island. See also *Immigration Act 1980* (NI) section 15.
137. *Immigration Act 1980* (NI) section 28.
138. Pursuant to *Immigration Act 1980* (NI) section 29.
139. *A General Guide*, note 12, page 4, paragraph 2.3.
140. *Immigration Act 1980* (NI) section 20(3).
141. Part V.
142. Section 32.
143. Section 21(1).
144. Mubanga-Chipoya Report, note 6, article 6(c).
145. Nowak, note 6, page 209. Interpretations of equivalent provisions of the European Convention of Human Rights elaborate that any restriction on a person's rights must have a legal basis and a law which imposes such a limitation must be a law that is adequately accessible, so that the citizen has an indication of the circumstances of the legal rules applicable to a given case. Further, any law must be formulated with sufficient precision to enable the citizen to regulate his or her conduct. He or she must be able to foresee, to a degree that is reasonable in the circumstances, the consequences that a given action may entail: *Sunday Times Case* (1979-1980) 2 EHRR 245, paragraph 4.
146. *Immigration Act 1980* (NI) section 14.
147. Sections 84 and 85.

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148. Overview of Norfolk Island's Migration Law Initiative, draft 3, 17 November 1998, page 1.
149. Overview of Norfolk Island's Migration Law Initiative, draft 3, 17 November 1998, page 1.
150. Overview of Norfolk Island's Migration Law Initiative, draft 3, 17 November 1998, page 7.
151. M J Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights*, Martinus Nijhoff Publisher, Dordrecht, 1987, page 252, referring to the Commission on Human Rights, Third Session, 1948, in consideration of a UK proposal.
152. Bossuyt, note 30, page 252.
153. Nowak, note 6, page 213.
154. Quoted in letter to HREOC dated 18 November 1998 from Human Rights Branch, Attorney-General's Department, page 3.
155. Letter dated 14 August 1996 from Office of International Law, Attorney General's Department to Territories Office, Department of the Environment, Sport and Territories, page 4, paragraph 15.
156. Letter dated 14 August 1996 from Office of International Law, Attorney General's Department to Territories Office, Department of the Environment, Sport and Territories, pages 3 and 4.
157. 'Response of the Norfolk Island Government to Concerns and Matters Raised by the Human Rights and Equal Opportunity Commission in June 1996', 5 August 1996, pages 10-14.
158. Sir John Nimmo, *Report of the Royal Commission into matters relating to Norfolk Island*, Canberra, 1976 (Nimmo Report), page 59.
159. *Berwick Limited v R R Gray, Deputy Commissioner of Taxation* (1976) 133 CLR 603.
160. Letter to HREOC dated 18 November 1998 from Human Rights Branch, Attorney-General's Department, page 4.
161. *Lord Howe Island Act 1953* (NSW) sections 16 and 21.
162. *Lord Howe Island Act 1953* (NSW) section 13.
163. *Lord Howe Island Act 1953* (NSW) section 23.
164. *Rottnest Island Authority Act 1987* (WA) section 11(1).
165. 'Response of the Norfolk Island Government to Concerns and Matters Raised by the Human Rights and Equal Opportunity Commission in June 1996', 5 August 1996, pages 10-11.
166. Letter to HREOC dated 16 October 1998 from the Association of Norfolk Islanders, page 1.
167. Letter to HREOC dated 25 September 1998 from Dr Colleen McCullough, page 3.
168. At the date of the 1996 census 11.5 per cent identified as Catholics, 37.4 per cent Anglicans and 14.5 per cent Uniting Church.
169. English is the common language among Norfolk Islanders. However, there is a unique language brought to the Island by the Pitcairners. It is a combination of platt Deutch, 18th Century English and Tahitian.
170. Senate Standing Committee on Foreign Affairs and Defence, *United Nations Involvement with Australia's Territories*, Australian Government Publishing Service, Canberra, 1975, page 112.
171. Complainant NI2, letter to HREOC dated 28 September 1998, page 1.
172. Complainant NI4, letter to HREOC dated 1 October 1998, page 4.
173. Nimmo Report, note 37, page 87.
174. Human Rights Committee, General Comment No. 23, 1994, paragraph 1, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI\GEN\1\Rev.1.
175. General Comment No. 23, note 53, paragraph 3.2.
176. *Länsman v Finland*, Communication 511/1992, UN Doc. CCPR/C/52/D/511/1992, views delivered 8 November 1994, paragraph 9.3.
177. The decision is consistent with the Committee's views in other communications concerning article 27 and minorities: *Ominayak and other members, Lubicon Lake Band v Canada*, Communication 167/1984, UN Doc. A/45/40 Annex IX.A; *Kitok v Sweden*, Communication 197/1985, UN Doc. A/43/40 Annex VII.G; and *R L v Canada*, Communication 358/1989, UN Doc. CCPR/C/43/D/358/1989.
178. *Länsman v Finland*, note 55, paragraph 9.4.

179. *Lovelace v Canada*, Communication 24/1977, UN Doc. CCPR/C/OP/1, views delivered 30 July 1981. Ms Lovelace was born and registered a Maliseet Indian but lost her rights and status under the Indian Act when she married a non-Indian. One of the rights was the right to live on a reserve. She petitioned the UN Human Rights Committee claiming breaches of the ICCPR including a breach of her rights under article 27 as a member of a minority group.
180. Letter to HREOC dated 24 September 1998 from Dr Colleen McCullough, page 1.
181. Letter to HREOC dated 24 September 1998 from Dr Colleen McCullough, page 3.
182. Complainant NI4, letter to HREOC dated 1 October 1998, page 4.
183. Commonwealth Grants Commission, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, 1997, page 18.
184. R L Barsh, 'Indigenous Peoples and the United Nations Commission on Human Rights: A Case of Immovable Object and Irresistible Force' (1996) 18 *Human Rights Quarterly* 782; J Cornassel and T Primeau, 'Indigenous "Sovereignty" and International Law: Revised Strategies for Pursuing "Self Determination"' (1995) 17 *Human Rights Quarterly* 343; E-I Daes, 'Indigenous people and their relationship to land: preliminary working paper', UN Doc. E/CN.4/Sub.2/1997/17 and Corr.1.
185. UN Doc. E/CN.4/Sub.2/1986/7 and Add.4, paragraphs 379-382. See also S Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights*, Zed Books, The Federation Press, 1998.
186. *Gerhardy v Brown*, note 7, Justice Mason at page 496.
187. *Gerhardy v Brown*, note 7, Justice Mason at pages 496-497.
188. *Gerhardy v Brown*, note 7, Justice Mason at page 497.
189. *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
190. *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth), section 142A(1)(b) and (h).
191. Nowak, note 6, page 211.
192. Nowak, note 6, page 211.
193. H Hannum, *The Right to Leave and Return in International Law and Practice*, Martinus Nijhoff Publisher, Dordrecht, 1987, page 27.
194. Letter dated 14 August 1996 from Office of International Law, Attorney-General's Department, to Territories Office, Department of the Environment, Sport and Territories, page 4, paragraph 17.
195. Letter dated 14 August 1996 from Office of International Law, Attorney-General's Department, to Territories Office, Department of the Environment, Sport and Territories, page 5, paragraph 20.
196. Letter dated 14 August 1996 from Office of International Law, Attorney-General's Department, to Territories Office, Department of the Environment, Sport and Territories, page 5, paragraph 21.
197. ICCPR article 5.1.
198. Letter to HREOC dated 19 November 1998 from John Brown, Norfolk Island Minister for Health and Immigration, page 2.
199. Letter to Complainant NI2 dated 8 March 1996 from Nadia Lozzi-Cuthbertson, Norfolk Island Minister for Health and Education.
200. 'Response of the Norfolk Island Government to Concerns and Matters Raised by the Human Rights and Equal Opportunity Commission in June 1996', 5 August 1996, page 8.
201. Human Rights Committee, General Comment No. 18, 1989, paragraph 13, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.1.
202. Letter to HREOC dated 18 November 1998 from Human Rights Branch, Attorney-General's Department, page 4.
203. Letter to HREOC dated 18 November 1998 from Human Rights Branch, Attorney-General's Department, page 4.
204. *Christmas Island Act 1958* (Cth).
205. *Territories Law Reform Act 1992* (Cth).
206. House of Representatives Standing Committee on Legal Constitutional Affairs, *Islands in the Sun: The Legal Regimes of Australia's External Territories and the Jervis Bay Territory, (Islands in the Sun)*, Canberra, 1991, pages 70-71.
207. *Territories Law Reform Act 1992* (Cth).

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208. Letter to HREOC dated 9 October 1998 from Allen Hawke, Secretary, Department of Transport and Regional Development, page 1.
209. Complainant NI1, letter to HREOC dated 2 October 1998, page 1.
210. Complainant NI2, letter to HREOC dated 28 September 1998, page 1.
211. Complainant NI4, letter to HREOC dated 1 October 1998, page 2.
212. Letter to HREOC dated 19 November 1998 from John Brown, Norfolk Island Minister for Health and Immigration, page 2.