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The Parliament of the Commonwealth of Australia

# **Norfolk Island Electoral Matters**

Joint Standing Committee on the National Capital and External Territories

June 2002  
Canberra

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ISBN [Click **here** and type ISBN Number]



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## Foreword

This report is the latest of a number of reviews of electoral matters on Norfolk Island, which have resulted from changes to the Norfolk Island Act made in 1985. At that time, the Government repealed the provisions of the act that referred to citizenship. The repeal of sections relating to British citizenship created inconsistencies between electoral laws on Norfolk Island and the rest of Australia.

In 1990, the Hon David Simmons, then Minister for Territories, sought to correct these anomalies and bring Norfolk Island into line with the rest of Australia. The House Legal and Constitutional Committee in its report, *Islands in the Sun*, tabled in 1991, recommended that 'the residency provision should be coupled with a citizenship requirement so that only Australian citizens are eligible to stand or vote in Legislative Assembly elections'. The recommendation was not implemented at the time.

In 1998, the Hon Alex Somlyay, Minister for Territories, also sought to redress the anomalies in the Norfolk Island Act. He argued that a number of changes had occurred since 1985 to make the matter more important. Two High Court decisions in 1992 and 1996 reinforced the principle that 'allegiance to a foreign power' disqualified people from membership of the Federal Parliament. In addition, increasing powers, more akin to State and Federal responsibilities than local government, had been devolved to the Norfolk Island Government over the period from 1979. These have increased rather than diminished the need for Australian citizenship to underpin elections on Norfolk Island. The Minister's intentions were not followed through by the time of the dissolution of the Parliament for the 1998 election.

Finally, in 1999, Senator the Hon Ian MacDonald, Minister for Regional Services, Territories and Local Government, introduced amendments to the Norfolk Island Act to limit the franchise to Australian citizens and to reduce the period of residence eligibility from 900 days to six months. The matter was referred to the

Senate Legal and Constitutional Committee, which, in 1999, conducted an inquiry into the proposed Bill, but it was not able to visit Norfolk Island. In its report of August 1999, the majority of the Senate Committee recommended that the amendments go ahead. However, in rejecting the amendments, the Opposition Senators responded to the concerns of groups on the Island and their claim that there had been insufficient consultation with them on the matter. The Senate voted against the proposed amendments to the Norfolk Island Act in March 2000.

In November 2000, the Joint Standing Committee on the National Capital and External Territories undertook this inquiry into electoral matters on Norfolk Island at the request of the Minister, Senator Macdonald. An extensive inquiry was undertaken. It is documented in Chapter 1 of the report.

The conclusions of this report are consistent with the findings of all the preceding inquiries. The Committee believes that the legislation proposed in 1999 had sufficient protections for those already enrolled and therefore no one would be disenfranchised by the changes. Furthermore, the Committee believes that the Norfolk Island electoral laws should be consistent with those of the rest of Australia and that, as a matter of fundamental principle, Australian citizenship should be the essential basis of the right to vote anywhere in Australia.

The Committee is grateful to all those who participated in the inquiry.

**Senator Ross Lightfoot**  
**Chairman**



## **Membership of the Committee**

### **39<sup>th</sup> Parliament Membership of the Committee**

**Chair**            Senator Ross Lightfoot

**Deputy Chair**   Senator Trish Crossin

**Members**        Mr Ross Cameron MP

Ms Annette Ellis MP

Mr Gary Nehl MP

Mr Paul Neville MP

The Hon Warren Snowdon MP

The Hon Alex Somlyay MP

Senator Brian Greig

Senator Kate Lundy

Senator John Watson

Senator Sue West

**Secretary**            Mr Richard Selth

**Inquiry Secretary**   Ms Sue Irvine

**Research Officer**    Ms Emma Herd

**Administrative Officers** Ms Anna Gadzinski  
(from July 2001)

Ms Sarah Steele  
(until June 2001)

## **40<sup>th</sup> Parliament Membership of the Committee**

**Chair**            Senator Ross Lightfoot

**Deputy Chair**   Senator Trish Crossin

<b>Members</b>	The Hon Ian Causley MP	Senator Richard Colbeck (Discharged 27.06.02)
	Ms Annette Ellis MP	Senator Brian Greig
	Mr Michael Johnson MP	Senator Kate Lundy
	Mr Paul Neville MP	Senator Nigel Scullion (Appointed 27.06.02)
	The Hon Warren Snowdon MP	Senator Sue West
	Mr Cameron Thompson MP	

## **Committee Secretariat**

**Secretary**            Mrs Margaret Swieringa

**Inquiry Secretary**    Mr Quinton Clements

**Research Officers**    Mrs Sonya Fladun

**Administrative Officers** Ms Tiana Gray

Mrs Belinda McCann

Mr Daniel Miletic



## **Terms of reference**

The Joint Standing Committee on the National Capital and External Territories has been asked to inquire into and report on:

The consistency of the laws relating to eligibility to vote and candidature for the Legislative Assembly of the Territory of Norfolk Island with other Australian jurisdictions, in particular:

- (a) Whether Australian citizenship should be a requirement for eligibility to vote for, or be elected to, the Legislative Assembly;
- (b) The time period before which an Australian citizen resident in the Territory can enrol to vote for the local legislature.

First referred on 1<sup>st</sup> November 2000, 39<sup>th</sup> Parliament.

Re-referred on 5 April 2002, 40<sup>th</sup> Parliament.



## List of recommendations

### 3 Citizenship

#### Recommendation 1

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

The Committee further recommends that these changes be incorporated into the Commonwealth *Norfolk Island Act 1979*.

#### Recommendation 2

The Committee recommends that the Government amend all appropriate legislation, including the *Norfolk Island Act 1979* and the *Commonwealth Electoral Act 1918*, to ensure that all elections and referenda on Norfolk Island come under the supervision of the Australian Electoral Commission.

### 4 Residency

#### Recommendation 3

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

The Committee further recommends that this change be incorporated into the Commonwealth *Norfolk Island Act 1979*.



## Introduction

### Background to the inquiry and reference to the Committee

- 1.1 On 1 November 2000, the then Minister for Regional Services, Territories and Local Government, Senator the Hon Ian Macdonald, referred matters relating to eligibility to vote and candidature for the Legislative Assembly of the Territory of Norfolk Island to the Joint Standing Committee on the National Capital and External Territories. The full terms of reference are set out at the beginning of this report.
- 1.2 The inquiry arose following the report in August 1999 of the Senate Legal and Constitutional Legislation Committee (Senate LCLC) on the Norfolk Island Amendment Bill 1999, and the Senate's subsequent rejection of that bill in March 2000.
- 1.3 In addition to altering a number of other unrelated items,<sup>1</sup> the Bill sought to regularise anomalies in Norfolk Island voting and citizenship requirements, which differ significantly from those of other Australian jurisdictions.
- 1.4 The proposal to refer the matter of electoral reform on Norfolk Island for further inquiry and consultation appeared as a recommendation in the dissenting report of the non-government members of the Senate LCLC. The dissenting Senators expressed the view that:

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1 The Norfolk Island Amendment Bill 1999 sought to amend the *Norfolk Island Act 1979* in three areas: the appointment of Deputy Administrators, Commonwealth oversight of firearm legislation and electoral issues, only the last of which is relevant to this inquiry.

the matters of electoral reform contained in this Bill require wider consultation and much more consideration than the Senate Legal and Constitutional Committee was able to give.<sup>2</sup>

- 1.5 The non-government Senators recommended that the Bill not be proceeded with and that the matter of electoral reform in Norfolk Island be referred to the Joint Standing Committee on the National Capital and External Territories (JSCNCET) for an inquiry which would include consultation with the Norfolk Island Government and the residents of Norfolk Island.
- 1.6 Concerns about insufficient consultation were also expressed during debate on the Bill in the Senate, where the non-government parties again suggested that the electoral issues should be referred to the JSCNCET. The second reading of the Bill was resolved in the negative in the Senate on 9 March 2000. The Minister subsequently referred the matter to the JSCNCET, which adopted the reference on 29 November 2000.
- 1.7 The inquiry was advertised in *The Australian* on 6 December 2000, in *The Norfolk Islander* on 9 December 2000 and on the Committee's website.

## Conduct of the inquiry

- 1.8 Non-government Senators who opposed the Bill in 1999 did so partly because they felt that there had not been sufficient consultation with the Norfolk Island community about the electoral issues. The Norfolk Island Government of the time made an extensive submission to the Senate LCLC, and some members spoke at length to that committee at a public hearing in Sydney, but the Senate Committee did not travel to Norfolk Island at that time.
- 1.9 The Joint Standing Committee was conscious of the need to address this perceived shortcoming. The Committee endeavoured to ensure that every opportunity was given to Norfolk Island residents to make submissions to the Committee, as it believed that the issues were significant. It allocated a full day for public hearings on Norfolk Island on 22 March 2001, and also held a hearing in Canberra on 2 April 2001. The Norfolk Island hearing was publicised in the local newspaper, and, where possible, the Committee contacted people who had made a submission to the Senate inquiry. At the public hearing on Norfolk Island, the Chairman made a

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2 Senate Legal and Constitutional Legislation Committee, *Consideration of legislation referred to the committee: Norfolk Island Amendment Bill 1999*, August 1999, p. 25.

statement inviting further submissions, and leaflets encouraging a further response and providing contact details for the Committee were made available. Submissions continued to be accepted throughout the inquiry. Some Islanders also took the opportunity of sending in relevant background material which became Committee exhibits.

- 1.10 In response to a request from the Norfolk Island Government (NIG) to present further evidence following the public hearing on Norfolk Island, the Committee agreed to representatives of the NIG appearing at the hearing in Canberra on 2 April 2001, scheduled to hear evidence from the Territories Office of the Department of Transport and Regional Services. Bad weather prevented the NIG group from travelling from Norfolk Island for that hearing, but the Committee agreed to accept in writing any further evidence that the NIG wished to present. No further submission was received from the Norfolk Island Government of the Ninth Assembly.
- 1.11 The inquiry lapsed with the dissolution of the 39<sup>th</sup> Parliament on 8 October 2001. The National Capital and External Territories Committee was re-established on 14 February 2002 in the House of Representatives and 15 February 2002 in the Senate. On 5 April 2002, The Hon Wilson Tuckey, MP, Minister for Regional Services, Territories and Local Government, re-referred the inquiry to the Committee. Given the lapse of time since the last hearings, letters were sent to all previous witnesses to the inquiry asking for any further information in relation to the matter. Three submissions were received and considered by the Committee in the context of the draft report.
- 1.12 The Committee became aware of certain misconceptions among Norfolk Islanders who gave evidence. One was that evidence given in person carried more weight than that presented in writing. The Committee wishes to emphasise that all evidence was given full consideration, and that written submissions and transcripts of public hearings were provided to all Members of the Committee.

## Committee concerns

- 1.13 The Committee was required to conduct *in camera* hearings and to receive confidential submissions for this inquiry. The Committee is concerned that, although a number of people expressed opinions contrary to that of the Norfolk Island Government, few of those people were prepared to speak in public about their views. While some witnesses were prepared for their opposing views to be published by the Committee, they stated

that they were fearful or uncomfortable about presenting them in a public forum. The Committee is concerned that some witnesses who gave *in camera* evidence expressed fear of recrimination for speaking to the Committee.

1.14 One correspondent who is a Temporary Entry Permit (TEP) holder stated:

I ask you not to include [my letter] in the public submission record. It bothers me that I have to ask this and I think that this in itself is a matter of concern, that open criticism or opposing views are not tolerated on the island, particularly by people who have no rights.

1.15 The Committee has noted that people who do not attach their names to letters to the editor of the local newspaper, *The Norfolk Islander*, especially TEP holders, are often responded to with derision, and that reasonable arguments are mocked or dismissed as evidence of ignorance of local ways. Some respondents imply that a TEP has no right to offer suggestions or criticism, and express the attitude that ‘if you don’t like the way things are here, leave’, which appears both intolerant and short sighted, given the extent to which Norfolk Island residents depend on the services and expertise provided by TEP holders.

1.16 The Committee is concerned that if intolerance of this kind is displayed openly in signed, public letters, then it is quite reasonable to believe that some people with opinions which challenge the status quo may not have come forward to express them to the Committee. The Committee believes that the strength of a democratic society can be measured by the degree of tolerance it displays for ideas that differ from the mainstream. Any measures that are taken to reduce opportunities for people to make their opinions known may be seen as measures which could undermine the strength of a democratic community.

## **Norfolk Island and the Commonwealth**

### **The constitutional status of Norfolk Island**

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

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

- 2.2 According to the Commonwealth Grants Commission:

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

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

association' arrangement the Cook Islands and Niue have with New Zealand.<sup>2</sup>

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

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

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

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

5 The High Court decided in 1976 that Norfolk Island was a part of the Commonwealth of Australia. (*Berwick Limited v R R Gray, Deputy Commissioner for Taxation (1976) 133 CLR 603*) The 1999 Human Rights and Equal Opportunity Commission report on Norfolk Island noted on p 8 that: 'While the Commonwealth Parliament has conferred a measure of self-government on Norfolk Island, this has no implications for the status of Norfolk Island in international law and in no way alters the Island's status as a territory of Australia.'

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

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

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

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

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

## The governance of Norfolk Island

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

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

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

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

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

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

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

- 2.9 Since 1979, the Island has been governed under the provisions of the *Norfolk Island Act 1979* (Cth), which provides the basis of the Island's legislative, administrative and judicial systems. The Act devolved power to Norfolk Island to elect its own government, to have its own administration and to have major responsibility for raising its own revenue. The government consists of a nine member Legislative Assembly, elected for three year terms.
- 2.10 The Act granted a greater degree of self government than had been recommended by the 1975-76 Royal Commission into the Island's future status, headed by Sir John Nimmo.<sup>9</sup> The Nimmo Report recommended, among other things, that all Commonwealth legislation apply on Norfolk Island. Under the 1979 Act, Commonwealth legislation does not extend to Norfolk Island unless it is specifically expressed to do so. If it does apply, it overrides local law.
- 2.11 The powers of the Norfolk Island Government incorporate the functions of both local and state governments, in a manner similar to the Northern Territory or the Australian Capital Territory, but they also include a range of functions which are exercised exclusively by the Commonwealth in mainland Australia. The Act divides the legislative functions and responsibilities of the Assembly into Schedule 2, which includes matters normally performed by state and local governments, and Schedule 3, which covers matters normally reserved for the Commonwealth, such as customs, quarantine, immigration and social security.
- 2.12 Bills passed by the Legislative Assembly are presented to the Administrator for assent. The Administrator is appointed by the Governor-General and is responsible to the Commonwealth Minister responsible for territories. The Minister retains the power to veto legislation on Schedule 3 matters.
- 2.13 The preamble to the 1979 Act stated that it should be reviewed after five years to decide whether self government should be extended. Although many additional powers have subsequently been transferred to the Norfolk Island Government, no review of the act has been undertaken.
- 2.14 In 1996-97 the Commonwealth Grants Commission (CGC) undertook a comprehensive and independent inquiry into Norfolk Island's economic capacity, financial and administrative arrangements and government
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<sup>9</sup> J. Nimmo, *Report of the Royal Commission into Matters relating to Norfolk Island, October 1976*, AGPS, Canberra 1976 (the Nimmo Report).

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

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

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

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

## Responsibility for electoral matters on Norfolk Island

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

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

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

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

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

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

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

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

## The current situation

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

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

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

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

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

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

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

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

## Relations between Norfolk Island and the Commonwealth

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

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

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

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

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

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

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

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

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

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

- 2.25 The Committee notes both the strong position taken by some Islanders and the Human Rights and Equal Opportunity Commission, but does not consider that addressing the electoral issues under scrutiny in this inquiry
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16 Mr Michael King, Transcript, pp 28-29.

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

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

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

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

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

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

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

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

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

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

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

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

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

## Citizenship

It is a basic tenet of Australia's electoral system that those elected to State, Territory and Federal Parliament must be Australian citizens. Until 1985 it was also the case for Norfolk Island.<sup>1</sup>

- 3.1 The Committee believes that this tenet of representative government, that a country's voters and elected representatives must be citizens of that country, is widely accepted among the world's democratic countries.
- 3.2 A study of potential restrictions on the right to vote in 63 democracies found that in 48 countries the right to vote was restricted to citizens, while only four countries did not require citizenship.<sup>2</sup> In these four countries residency does not automatically lead to enfranchisement. Some countries have long residence requirements for non-citizens. New Zealand, for example, requires that non-citizens be permanent residents in order to be allowed to vote, and citizens in order to stand for election.
- 3.3 The eleven remaining democracies in the study grant the vote to non-citizens from specific countries: all but one of these are former British colonies which give the right to vote to residents who are citizens of another Commonwealth country. The 'Commonwealth clauses' found in Australia and Canada limit this right to British subjects who were on the electoral roll before a specified date, which led the authors of the study to conclude that the experience of these two countries suggests that existing 'Commonwealth clauses' may eventually disappear.<sup>3</sup>

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1 Department of Transport and Regional Services, Submissions, p 97.

2 Blais, Massicotte and Yoshinaka, 'Deciding who has the right to vote: a comparative analysis of election laws', *Electoral Studies* 20 (2001), pp 41-62. The authors' main sources of data were the constitutions and electoral laws and regulations of the 63 countries.

3 Blais, Massicotte and Yoshinaka, 'Deciding who has the right to vote: a comparative analysis of election laws', *Electoral Studies* 20 (2001), p 52.

- 3.4 The concept of citizenship defines membership of the nation-state, as well as the rights and obligations derived from that membership, such as being subject to its laws and entitled to its protection:

Voting in Federal, State and local elections is a powerful way for citizens to have a say in the decision-making which affects the quality of people's lives.<sup>4</sup>

- 3.5 Successive Commonwealth governments and High Court decisions have confirmed that Australian citizenship should be a prerequisite for membership of an Australian parliament. Australian citizenship is a requirement for both enrolment and election in all states and other self-governing territories, including the other territory legislative assemblies to which the Commonwealth has delegated a range of powers for self-government.<sup>5</sup>
- 3.6 Citizenship is also a requirement in some jurisdictions, and being considered in others, for enrolment and election at the local government level.<sup>6</sup>

## Removal of the citizenship requirement

- 3.7 People born on Norfolk Island have Australian citizenship in the same way that people born on the mainland have. The *Australian Citizenship Act 1948* applied on Norfolk Island from its inception in the same way that it did on the mainland until 1985. In that year the Commonwealth Government removed references to 'British subjects' from the Act and consequential changes to Commonwealth, state and territory electoral laws restricted future enrolment to Australian citizens only. Based on the preference expressed by the Norfolk Island Government of the day, the Commonwealth Government repealed all the provisions of the *Norfolk Island Act 1979* which related to citizenship.
- 3.8 The reason for the change was the desire to remove references to 'British subject' which were seen as discriminatory. The *Australian Citizenship Amendment Act 1983* had sought to remove all discriminations apparent in the existing act. As a consequence, the Norfolk Island Assembly was offered the choice of references to 'British subject' in the *Norfolk Island Act*

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4 Department of Immigration and Multicultural Affairs web page on citizenship, <http://www.immi.gov.au/citizen/index.html>, quoted in Department of Transport and Regional Services, Submissions, p 95.

5 Department of Transport and Regional Services, Submissions, p 96.

6 Department of Transport and Regional Services, Submissions, p 96.

1979 being deleted, which was consistent with amendments for the Commonwealth and state parliaments, or of the citizenship requirement being deleted altogether, which was consistent with the requirements for local governments at that time.

- 3.9 On 11 December 1984 Ms E B Reed MLA, the Norfolk Island Minister for Community Services, advised the Administrator that ‘the Government has no difficulty with the proposal that the phrase [‘British Subject’] should be omitted from enactments in which it occurs, and is prepared to introduce legislation to that effect.’ The letter also expressed a preference for deleting citizenship requirements entirely:

However, the Government is reluctant to replace the present requirements with a requirement that Australian citizenship be necessary for the purposes of the enactments mentioned in your letter. The Government would prefer to delete citizenship requirements entirely.<sup>7</sup>

- 3.10 As the status of the Legislative Assembly at the time, in terms of powers and responsibilities, was closer to that of a shire council or other form of local government, the Commonwealth Government acceded.

## **Attempts to reinstate the citizenship requirement**

- 3.11 Norfolk Island has made considerable progress towards internal self-government since the time when the citizenship requirement was abandoned, with the transfer of many additional powers. The Norfolk Island Government now has a considerably wider range of powers than the states, including responsibility for important, exclusive, Commonwealth functions such as immigration, customs and quarantine matters.

- 3.12 As early as 1990 the then Commonwealth Minister for Territories noted that the justification for not requiring Australian citizenship for membership of the Legislative Assembly, on the basis that it was the practice applying at the local government level, no longer seemed appropriate. He observed that:

The Norfolk Island Government now has authority over a wide range of Federal and State-type functions including social security, radio and television, immigration, customs, telecommunications, labour and industrial relations, public health, energy planning and

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7 EB Reed, letter to Air Vice Marshal RE Trebilco, 11 December 1984, Exhibit 2.

regulation, registration of medical practitioners, public works, to name but a few. The relationship between the Commonwealth and Norfolk Island is now more akin to a Federal-State relationship than a Federal-local government relationship. In these circumstances, the justification for not requiring Australian citizenship for membership of the Legislative Assembly on the basis of practice applying at the local government level would no longer seem appropriate.<sup>8</sup>

- 3.13 The Minister also raised the related issue of citizenship as a prerequisite for enrolment to vote in Assembly elections. He suggested that the franchise of non-Australian citizens currently on the Norfolk Island electoral roll could be preserved using the approach adopted by the Commonwealth for British subjects who were already enrolled in 1984, i.e. that they be permitted to remain on the roll regardless of citizenship. The Minister asked for the views of the members of the Assembly on both matters. The Assembly debated and opposed the proposal.
- 3.14 The Committee believes that the level of government that the Norfolk Island Assembly was perceived to be in the mid-1980s, both by the Commonwealth and by its own members, was the main reason for eliminating the citizenship requirement at that time. With the very significant increase in the responsibilities of the Norfolk Island Government since then, the situation has changed and it is now appropriate that the Australian citizenship requirement be reinstated.
- 3.15 The Senate Legal and Constitutional Legislation Committee noted in 1999 that there had been a move towards the requirement of Australian citizenship even at the local government level. According to the DOTRS submission to the current inquiry:

in most States and Territories, Australian citizenship is now a requirement, or is being considered as a requirement, for enrolment and election at the local government level.<sup>9</sup>

For example, amendments to the South Australian *Local Government (Elections) Act 1999* provide that a candidate must be an Australian citizen or a prescribed person. Section 9 of the Northern Territory *Local Government Act* requires that all members of local councils be Australian citizens.

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8 The Hon David Simmons MP, letter to the Hon D Buffett MLA, President, Norfolk Island Legislative Assembly, 24 October 1990, Exhibit 3.

9 Department of Transport and Regional Services, Submissions, p 96.

- 3.16 It seems anomalous that while local government, with its important but limited functions and responsibilities, is requiring Australian citizenship as a prerequisite for enrolment and election, a jurisdiction in Australia with a range of functions and responsibilities at Commonwealth level does not. Executive Members or Ministers of the Norfolk Island Government not only regularly deal with matters of national significance and are involved in inter-governmental relations, but also sit on Australian Ministerial Councils and participate in Commonwealth delegations negotiating international agreements with other nation states.<sup>10</sup>
- 3.17 The Committee believes that it is in Australia's national interest that Ministers and other members of the Legislative Assembly on Norfolk Island be Australian citizens.
- 3.18 The issue of Australian citizenship in the external territories was examined in 1990-91 by the House of Representatives Standing Committee on Legal and Constitutional Affairs which recommended in its report that:
- Australian citizenship be a requirement for eligibility to stand for election or to vote in the Norfolk Island Legislative Assembly election, for all new enrollees registering on the Norfolk Island electoral roll on or after a commencement date to be determined before the end of 1991.<sup>11</sup>
- 3.19 A submitter to that inquiry, the late Ms Merval Hoare, who also gave evidence to the current inquiry, expressed a view on an Options Paper which was circulated on the Island prior to the public hearings in order to give the community an opportunity to comment:
- Moreover, in retaining the status quo, Option 1, there is always the possibility, far-fetched as it may seem today, that we could get a majority of five members in the Assembly who did not hold Australian citizenship, had no allegiance to Australia, and perhaps were even hostile to Australia. Such a situation could have very serious repercussions in Australia as well as on Norfolk.<sup>12</sup>
- 3.20 Writing to this Committee in February 2001, Ms Hoare said:

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10 Department of Transport and Regional Services, Transcript, p 108.

11 House of Representatives Legal and Constitutional Affairs Committee, *Islands in the Sun: The Legal Regimes of the External Territories and the Jervis Bay Territory*, March 1991.

12 Ms Merval Hoare, Submission to inquiry into the legal regimes of the External Territories by the House of Representatives Standing Committee on Legal and Constitutional Affairs, 25 October 1990.

Norfolk Island is passing through a very difficult time of social and political unrest ... We have the haves and have-nots, those who seek to distance the island politically from Australia and those who look to Australia as a protector, and conflict in the Assembly ... Eleven years on I believe the risk of a majority of Assembly members being hostile to Australia still exists.<sup>13</sup>

- 3.21 Mr Michael King, a Norfolk Islander whose background includes two periods as a minister in the local Assembly and one term as Chief Minister, told the Committee that he believes that only Australian citizens should be able to participate in electoral affairs:

particularly given the wide and extensive range of powers and functions that the Norfolk Island Assembly and government have. It is not a local government. They have very extensive and very real legislative powers and authorities ...

In fact, it is very tempting to suggest that the inclusion of non-Australian citizens in elected public office has already adversely impacted on Norfolk's culture and tradition. My experience in elected office is that anti-Australian attitude or sentiment has already impeded the progress of self-government by generating or spawning that unproductive, uncomfortable relationship between Norfolk Island and the Commonwealth.<sup>14</sup>

- 3.22 In 1997, the Commonwealth Grants Commission report commented wryly that 'Australian citizens who do not pass the eligibility rules cannot vote, and non-Australian citizens who pass the rules can vote.'<sup>15</sup> The current electoral situation on Norfolk Island:

can and does result in non-Australian citizens, who are elected to the Assembly, making decisions on behalf of some Australian citizens who are prevented from voting.<sup>16</sup>

- 3.23 The Committee notes a parallel incongruity in a Norfolk Island referendum where non-Australian citizens were able to vote to deny the right to vote to Australian citizens.<sup>17</sup>

- 3.24 In 1998, another Commonwealth Minister for Territories raised the issue of citizenship with the Norfolk Island Government.<sup>18</sup> The Minister pointed

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13 Ms Merval Hoare, Submissions, pp 10-11.

14 Mr Michael King, Transcript, p 20.

15 Commonwealth Grants Commission, Report on Norfolk Island 1997, p 185.

16 Commonwealth Grants Commission, Report on Norfolk Island 1997, p 186.

17 Referendum held on 12 May 1999.

out that the Norfolk Island Assembly was the only parliament in Australia where it was not mandatory to be an Australian citizen to enrol to vote, to be an assembly member or to be minister in the government. The Minister's letter also noted that the proposal to reinstate the citizenship requirement would only restore provisions which had existed when self-government was originally granted, and that since 1979 there had been a parliamentary inquiry and two High Court decisions which supported the requirement for the primary loyalty of members of an Australian Parliament to be to Australia.<sup>19</sup>

- 3.25 The Commonwealth Government has attempted unsuccessfully over a number of years to persuade the Norfolk Island Government to reinstate the Australian citizenship requirement. While there is little evidence that the community was involved in any way in the decision to delete the requirement in 1984, the Norfolk Island Government now points to the results of several referenda as proof that Norfolk Islanders have changed their minds significantly about something that was taken for granted until the mid-1980s. The relevance of the referenda results as evidence of strong community preference is discussed below.
- 3.26 The Committee notes that there is little evidence that the decision by the Norfolk Island Government in 1985 to drop the citizenship requirement was discussed in the Assembly, let alone canvassed more widely in the island community. There is no reference to the subject in the Assembly Hansards for that period.

## Commonwealth position

- 3.27 Representatives of the Department of Transport and Regional Services succinctly expressed the Commonwealth's position on Norfolk Island's laws relating to eligibility to vote and candidature for the Legislative Assembly:

The Federal Government has proposed changes to the Norfolk Island electoral arrangements to protect the political rights of Australian citizens; to preserve the existing rights of those currently enrolled on the Norfolk Island electoral roll; and to

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18 Letter from the Hon Alex Somlyay MP, 21 March 1998. Attachment A, Department of Transport and Regional Services, Submissions, p. 258.

19 *Sykes v Cleary* (1992) 176 CLR 77 and *Free v Kelly* (1996) 185 CLR 296.

ensure that Australian citizenship is a prerequisite to stand as a candidate for the Norfolk Island Legislative Assembly.<sup>20</sup>

None of these matters are outside the Commonwealth's power to legislate. Indeed, the Commonwealth has a legitimate and continuing interest and role in Norfolk Island electoral matters. Federal Parliament retains ultimate responsibility for Territory electoral systems consistent with the Australian Constitution, electoral law and policy, and Australia's international obligations.<sup>21</sup>

It is the Federal Government's position that the proposed changes are necessary and appropriate to bring electoral provisions on Norfolk Island in line with those in all other Australian Parliaments and to ensure the voting rights of all Australians are preserved.<sup>22</sup>

3.28 In its submission the Department stressed that amendments proposed by the Commonwealth Government in the 1999 Bill would have ensured that:

no one who *remains enrolled* on the Norfolk Island electoral roll would lose an existing right to vote ... Those Members of the Legislative Assembly who were not Australian citizens would have been entitled to serve out the current period for which they were elected. Thereafter, if they wished to stand for election, they could have sought Australian citizenship.<sup>23</sup>

## Norfolk Island objections

3.29 The submission from the Norfolk Island Government, which was essentially the same as that submitted to the earlier Senate inquiry, raised two objections to the proposed electoral amendments: the adverse impact on the Island's self-identity, and perceived practical problems and inequities. It also expressed the opinion that there should be more discussion of the issues at inter-governmental meetings, that it was resentful that the matter had been referred to a committee of inquiry, and

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20 Department of Transport and Regional Services, Transcript, p 107.

21 Department of Transport and Regional Services, Transcript, p 106.

22 Department of Transport and Regional Services, Transcript, p 108.

23 Department of Transport and Regional Services, Submission, p 101.

that, if changes to the electoral system are to be made, they should be made through local legislation.

- 3.30 The first objection focused on Norfolk Island's constitutional relationship with Australia, which it claimed has long been a matter of controversy. The Committee agrees with the view expressed by the Department of Transport and Regional Services at the public hearing on 2 April 2001:

In summary, it would appear that those on Norfolk Island who oppose the proposed changes, oppose them as much from the standpoint of the Commonwealth's right to make these changes, as they do based on the merits or otherwise of the proposed changes.<sup>24</sup>

- 3.31 There is no question of the rights and powers of the Commonwealth to act in this area. This is discussed in Chapter 2.

- 3.32 The second objection expressed in the submission focused on the fact that a considerable part of the population might be disenfranchised. Sixteen per cent of the permanent population of Norfolk Island are New Zealand citizens, including Pitcairn Island descendants who were born in New Zealand. However, as indicated above, the Commonwealth has made it clear that:

No one who remains enrolled on the Norfolk Island electoral roll will lose any existing right to vote for the Legislative Assembly as a result of the proposed changes.

The citizenship requirement will only apply to all new enrollees on the Norfolk Island electoral roll. Those non-Australian residents wanting to play a meaningful role in local governance have the option of taking out Australian citizenship.<sup>25</sup>

and:

Thus, the only people likely to be affected would be those non-Australian citizens who were not yet enrolled, who wished to enrol in the future, and who failed to take out Australian citizenship.<sup>26</sup>

- 3.33 The Committee has encountered some opponents to the idea of electoral change who, either from ignorance or in using hyperbole to express their disagreement with the proposals, have omitted reference to the safeguards that have been proposed for the electoral rights of New Zealanders who

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24 Department of Transport and Regional Services, Transcript, p 107.

25 Department of Transport and Regional Services, Transcript, p 108.

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

are already on the Norfolk Island electoral roll. This has not been helpful in advancing public knowledge or understanding of the proposed changes.

- 3.34 Given that under the proposals of the 1999 bill no current elector would lose the vote and any future resident could apply for citizenship in order to be eligible to vote, the claim by the Norfolk Island Government that such a proposal would ‘disenfranchise and discriminate against’ a section of the Norfolk Island community appears to be without foundation.<sup>27</sup>
- 3.35 The Norfolk Island Government’s claim was echoed in a comment in the first submission from the Human Rights and Equal Opportunity Commission, that: ‘A pre-requisite of Australian citizenship will have the immediate effect of disenfranchising at least the approximately 16% of Norfolk Islanders with New Zealand citizenship.’<sup>28</sup> This observation appears to have been made without taking into consideration the fact that Australian citizenship had been an original requirement under the *Norfolk Island Act 1979*, that New Zealanders who had the vote in the period from 1979 until 1985 had it on the basis that they were British subjects and that there was always intended to be provision for those already enrolled to remain so, as well as the option of dual citizenship.
- 3.36 Given that no existing right was to be withdrawn, that all those already on the electoral roll would continue to have the right to vote, the suggestion in the HREOC submission that a citizenship requirement that denied a right previously conferred on an individual was inconsistent with the ICCPR is not relevant to consideration of the proposals of the 1999 bill. It also appears not to have taken into account the other factors outlined above.
- 3.37 The HREOC comment was enthusiastically seized upon by Members of the Assembly and incorporated into the Norfolk Island Government submission during the public hearing on 22 March 2001,<sup>29</sup> without careful reading and the realisation that it was based on a false premise. The Committee expects that as people become more familiar with the logic of the proposals there will be less of a negative reaction. Hence its belief that there is a need on Norfolk Island for the ready dissemination of factual

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27 Government of Norfolk Island, Submissions, p 140.

28 Human Rights and Equal Opportunity Commission, Submissions, p 170.

29 The Norfolk Island Government seeks to add to its conclusion and recommendations at page 31 of its substantive submission in the following terms:

4 (a) That the Committee should, in all the circumstances, reach a conclusion that any changes to the electoral system in Norfolk Island, as contemplated by the terms of reference, would be in breach of, or inconsistent with, the International Covenant on Civil and Political Rights, in force for Australia.

information about fundamental issues such as those which form the basis of this inquiry, as well as opportunities for public debate in which those with differing or minority opinions can express them without fear of intimidation.

- 3.38 The Committee is aware that in recognition of the close relationship between Australia and New Zealand, there is a special provision to facilitate the taking out of Australian citizenship by a New Zealander.
- 3.39 Concerns have been expressed that, under the amendment proposed in the 1999 bill, non-Australians who have lived for a years on Norfolk Island and are currently enrolled may become disenfranchised by leaving the Island for a period and having their names removed from the electoral roll. Such a concern could readily be addressed by the Norfolk Island Government, for example, by increasing the period of time before an absent elector's name is removed from the roll.<sup>30</sup> The Norfolk Island Government also has the option of varying its policy on people seeking residency on the basis of a 'special relationship' with the Island. The Committee was advised of the difficulties that second and third generations of Pitcairn descendants may encounter when wishing to settle on the Island where their parents or grandparents were born.
- 3.40 Concerns that the children and grandchildren of New Zealanders on Norfolk Island may be disenfranchised in the future overlook two considerations: the relative ease with which a New Zealander may acquire Australian citizenship without renouncing New Zealand citizenship, and the fact that a child born of a long-term resident of Norfolk Island is automatically an Australian citizen even if neither parent is an Australian.<sup>31</sup>
- 3.41 The Norfolk Island Government believes that since electoral law is within its wide-ranging powers, any changes such as those proposed in the Norfolk Island Amendment Bill 1999 should be made through its own local legislation:

Any change of requirements to the qualifications of electors on the Norfolk Island Electoral Roll, or for election to the Legislative Assembly, are matters within the responsibility of the Norfolk Island Government under the *Legislative Assembly Act 1979*.<sup>32</sup>

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30 Currently 150 days in the previous 240 days. DOTRS Submission p. 104, Government of Norfolk Island Submission p. 146.

31 The *Citizenship Amendment Act 1986* (Cth) changed the law concerning citizenship by birth so that children born in Australia (including Norfolk Island) are Australian citizens by birth if one parent was an Australian citizen or *permanent resident*.

32 Norfolk Island Government, Submissions, p 165.

3.42 While accepting that changes could be made this way, the Committee does not believe that the issue would be dealt with if left to the Norfolk Island Government. A succession of Assemblies since 1990 has rejected suggestions that the changes are needed, and inter-governmental discussions about the issue have not led to an acceptance that the changes are legitimate interests of the Commonwealth on behalf of its citizens. Where the Norfolk Island Government does not discharge its obligations to the people of Norfolk Island, it is both appropriate and lawful for the Commonwealth to intervene. This observation was made by the Commonwealth Grants Commission in its 1997 report and is still a consideration which guides Commonwealth actions.<sup>33</sup>

3.43 A former Norfolk Island Chief Minister supported this view:

They have the capacity; they have the power to do a whole host of things – which they have not used. So it is not a strong argument to say to any joint standing committee or committee of the Commonwealth parliament, ‘Stay out of our affairs; we’ll look after these things ourselves.’ I personally do not have any confidence in their being able to do that or in their going ahead and doing it.<sup>34</sup>

## The referenda

3.44 The Norfolk Island Government instigated two referenda on the electoral issues that were the subject of the proposed amendments to the *Norfolk Island Act 1979*, i.e. citizenship and residency requirements. One was conducted in August 1998 and a second was held in May 1999.<sup>35</sup> Both

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33 Commonwealth Grants Commission, *Report on Norfolk Island 1997*, p 17. Department of Transport and Regional Services, Submissions, p 107.

34 Mr Michael King, Transcript, p 22.

35 Referendum initiated by the Norfolk Island Government, August 1998:

*The Australian Government has recently indicated its intention to bring about changes to Norfolk Island’s electoral process. Given this situation do you feel that it is appropriate that the Australian Government in Canberra dictates the electoral process for Norfolk Island?*

Total on Roll – 1114. Results: Yes – 184, No – 719, Informal – 14, Failed to vote – 197.

Referendum initiated by the Norfolk Island Government, May 1999:

*Do you agree with the Australian Federal Government’s proposal to alter the Norfolk Island Act so that:*

(a) *people who have been ordinarily resident in the Island for six months will in the future be entitled to enrol on the electoral roll for Legislative Assembly elections; and*

(b) *Australian citizenship will in the future be required as a qualification to be elected to the Assembly and as a qualification for people who in future apply for enrolment on the electoral roll for Assembly election?*

referenda resulted in a negative vote, which is the basis for the Norfolk Island Government's claim that the community does not want change. The Committee not only has concerns about the validity of both referenda as a gauge of public opinion, but also believes that it is not appropriate to grant or withhold a fundamental right of citizens on the results of a referendum.

Those people disenfranchised by the Territory's current laws were not entitled to vote at either referendum. As a consequence, people of whom approximately 20% were not Australian citizens, took a decision which negatively affected a group of Australian citizens who did not meet the requirements to participate in the electoral process on Norfolk Island.<sup>36</sup>

- 3.45 The Committee believes that voting rights are a national issue for decision at a national level. While citizenship may not be needed in order to have a say in purely local issues such as pothole repair and garbage removal, which in the past was the situation for local governments around Australia and in other countries, it is an important requirement when a legislature has the primary responsibility for the welfare of the community, as well as responsibilities at a national level. Norfolk Island, with self-government, now has responsibilities for matters at the state and national level.
- 3.46 Put simply, Australian citizens should not be denied a fundamental right on the basis of 700 votes in a referendum of approximately 1100 people, some of whom are not themselves Australian citizens.
- 3.47 Notwithstanding that the Committee does not believe that a referendum result is a sufficient basis to deny citizens the right to vote, the Committee also wishes to express its concern at the process of framing the referenda questions and the possible motives behind this. The design of the two referenda was seriously flawed. The first contained emotive language without the pretence of objectivity:
- do you feel that it is appropriate that the Australian Government in Canberra dictates the electoral process for Norfolk Island?
- 3.48 As one witness told the Committee, the resulting 'no' vote was:

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Total on Roll – 1100. Results: Yes – 247, No – 691, Informal – 26, Failed to vote 146.

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

probably the result you would get if you had a referendum in New South Wales and asked the people whether they wanted a Commonwealth government interfering in their affairs.<sup>37</sup>

3.49 The referendum conducted in 1999, while containing the neutral language of the Commonwealth proposal, combined two questions so that voters were obliged to answer both with a single yes or no. The Committee has heard evidence that some people would have said yes for one proposal and no for the other, but voted in the negative overall. The Committee notes that the information contained within this double question was incomplete in that it did not convey the fact that the existing right to vote of people already on the roll was to be protected. Despite this omission, the Committee notes that there was a significant increase in the number of 'yes' votes in this referendum, where the question was more neutral and more detailed.

3.50 Ms Merval Hoare told the Committee on Norfolk Island that:

Regarding the referendums, the questions have generally been phrased to get a certain response.<sup>38</sup>

3.51 Mr Michael King made some frank observations about the use of referenda to gauge public opinion on Norfolk Island:

I hate CIRs, citizen initiated referenda, yet I have used them on both sides. I have used them outside the parliament...and we used them to force elections and to force certain actions. We understand the issue of framing your questions to attract the negative answers. We understand how to get people to sign petitions by suggesting to them that they know all about the paper that is in front of them-when they do not know a darn thing about it, and yet they sign it anyway. Over here you only have to get one-third, I think, of the electorate to force a referendum question.

People vote on their emotions rather than the facts. There was a referendum that we had when I was in government... We put out 1000 information packs with 'the facts', and we wanted people to inform themselves of all the facts before they voted at the referendum. Only five of these packs were picked up... People were not interested in informing themselves fully on the facts of the issue.

...when you have a referendum question that is initiated by a parliament seeking an answer in a particular way, and they get to

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37 Mr Michael King, Transcript, p 25.

38 Ms Merval Hoare, Transcript, p 19.

frame the question and they have the resources to push the issue one way or another to fire up the emotion in the community, the outcome is almost inevitable.<sup>39</sup>

- 3.52 The Committee believes that if referenda are to be accepted as a valid method of gauging public opinion on other important issues, the procedures required for either the government or citizens to initiate one must be re-examined. Guidelines for the framing of neutral, accurate, complete, single-response questions need to be framed and implemented.
- 3.53 The Committee also believes that there is a need for an accountable system of delivering to every voter, and the general community, information about the issues involved in a referendum. Accurate and comprehensive statements for and against a proposal need to be disseminated to every household in much the same way as the Australian Electoral Commission provides this service before a Federal referendum. While this might seem an onerous responsibility for such a small community, its importance must not be underestimated if the referendum process is to have validity and credibility.

## Conclusions

- 3.54 The Committee believes that a requirement for Australian citizenship in order to vote or stand for election to the Legislative Assembly is appropriate. It is satisfied that adequate safeguards can be provided for non-citizens who are already enrolled and notes both the relative ease with which a New Zealand citizen may acquire Australian citizenship and the opportunity that exists in both nations for holding dual citizenship.
- 3.55 Since Norfolk Island has made very considerable progress towards self-government, and has assumed powers and responsibilities far beyond that of a local government, the justification for continuing the situation agreed to by the Commonwealth and Norfolk Island governments in the 1980s no longer exists. The Committee also notes that Australian citizenship is now a requirement, or is being considered as a requirement, for enrolment and election at local government level on the mainland.
- 3.56 The Committee believes that, given the Norfolk Island Government's participation in matters which have national significance, it is vital to Australia's national interest that Ministers and other Legislative Assembly members be Australian citizens.

- 3.57 If the proposals of the 1999 bill are implemented, there will be no change to the level of Norfolk Island's self-government. Neither the changes, nor the fact of making the changes through Commonwealth legislation rather than in local legislation, should affect Norfolk Island's level of self-government as feared and suggested by some witnesses. The *Norfolk Island Act 1979* is an appropriate instrument for an issue as fundamental as citizenship, and a requirement to be an Australian citizen or a British subject appeared in the original Act.
- 3.58 As successive Norfolk Island governments have rejected proposals to reinstate the requirement, despite assuming a great deal of additional responsibility, the Committee believes that at this stage it is unlikely that a Norfolk Island Government would act to bring about change through its own legislation. It is a legitimate and responsible action of the Commonwealth Government to require Australian citizenship as a qualification to vote and stand for election, with provision for those already entitled to vote to retain the vote, and the readily accessible option of dual citizenship.
- 3.59 The Committee doubts the value of the referenda conducted on Norfolk Island as a measure of public opinion generally, and regards referenda as especially inappropriate as a means of determining who can vote.
- 3.60 The Committee believes that the Norfolk Island community needs to have greater access to information about important issues such as those raised by this inquiry. It also sees a need for the establishment of means to encourage lively and informed debate about issues relating to the democratic process and other vital issues, in a climate where differing or minority opinions may be expressed without fear of intimidation.

### Recommendation 1

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

**The Committee further recommends that these changes be incorporated into the Commonwealth *Norfolk Island Act 1979*.**

**Recommendation 2**

- 3.62 **The Committee recommends that the Government amend all appropriate legislation, including the *Norfolk Island Act 1979* and the *Commonwealth Electoral Act 1918*, to ensure that all elections and referenda on Norfolk Island come under the supervision of the Australian Electoral Commission.**

## Residency

it is a personal injustice to withhold from any one, unless for the prevention of greater evils, the ordinary privilege of having his voice reckoned in the disposal of affairs in which he has the same interest as other people.<sup>1</sup>

- 4.1 The current residency requirement for registration to vote on Norfolk Island, stated in Section 6 (1) of the *Legislative Assembly Act 1979* (NI), is that a person be present on the Island for 900 days (approximately two and a half years) during the period of four years immediately preceding their application.
- 4.2 To be eligible for election to the Legislative Assembly the *Norfolk Island Act 1979* (Cth) requires a person to have lived on Norfolk Island for five years immediately preceding the date of nomination. According to the submission from the Department of Transport and Regional Services there has been no move to alter this requirement.<sup>2</sup>
- 4.3 Residence requirements of any kind are far from the norm. The *Electoral Studies* paper found that only eighteen of the 63 democracies examined required an *electoral district* residence period. These ranged from one month in Australia and New Zealand to six months in France, Mali, Panama, Papua New Guinea and the Philippines. The same number required a minimum period of residence *in the country*, ranging from three months to seven years, with a median requirement of twelve months. The residency requirements generally do not apply to returning citizens; they

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1 John Stuart Mill, *Considerations on Representative Government*, Chapter VIII – Of the Extension of the Suffrage, p. 279.

2 Department of Transport and Regional Services, Submissions, p 105.

apply in most of the eighteen countries to citizens of other Commonwealth countries. As noted in Chapter 3, in the large majority of the 63 democracies, electors by definition, are citizens.<sup>3</sup>

- 4.4 The study found that among those countries that did have residency requirements, 'strong' democracies tended to require shorter periods of residence in the electoral district (average: 2.8 months) than 'weak' ones (5.2 months).<sup>4</sup> The table of democracies was established by listing all countries with the two highest scores (1 or 2) on the political rights available in 1996 according to Freedom House (1997), and with a population of at least 100,000. Countries given a political rights rating of 1 by Freedom House are considered 'strong' democracies and those given a rating of 2 are labelled 'weak' democracies.<sup>5</sup> Both Australia and New Zealand were deemed to be strong democracies.
- 4.5 It is as a result of such data that the Committee has examined the current residency requirements which apply on Norfolk Island, which is, by definition, an integral part of one of the world's strongest democracies.

## Commonwealth position

- 4.6 The attitude of successive Commonwealth governments is clearly expressed in the submission by the Department of Transport and Regional Services, which is responsible for the external territories:

The right to vote in the electoral jurisdiction of one's usual place of residence is a fundamental right of all Australian citizens in all parts of Australia. It is the cornerstone of representative government. In this context the first principle of a democratic system of government should be the extension of franchise rather than the restriction of the franchise by the imposition of excessive residence requirements.<sup>6</sup>

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3 Blais, Massicotte and Yoshinaka, 'Deciding who has the right to vote: a comparative analysis of election laws', *Electoral Studies* 20 (2001), pp 54-56.

4 Blais, Massicotte and Yoshinaka, 'Deciding who has the right to vote: a comparative analysis of election laws', *Electoral Studies* 20 (2001), p 55.

5 Blais, Massicotte and Yoshinaka, 'Deciding who has the right to vote: a comparative analysis of election laws', *Electoral Studies* 20 (2001), pp 42-43. Eleven countries were dropped from the study either because their federal election laws varied according to the state or canton (USA and Switzerland) or because appropriate information could not be found.

6 Department of Transport and Regional Services, Submissions, p 101.

- 4.7 In Australia the minimum period of residence to be ‘ordinarily resident’ for electoral purposes is one month in all mainland jurisdictions. Tasmania has a six months minimum residency requirement although a review by that state of the Tasmanian Electoral Act has suggested that Tasmania should be brought into line with other states and the Commonwealth on this issue.<sup>7</sup>
- 4.8 The United Nations Human Rights Committee has commented on Article 25 of the International Covenant on Civil and Political Rights (ICCPR) that ‘If residence requirements apply to registration, they must be reasonable.’ The Human Rights and Equal Opportunity Commission has stated in its submission to this inquiry:
- At present, by reason of the residency requirement in the *Legislative Assembly Act 1979* (NI), an Australian citizen relocating to Norfolk Island is effectively deprived of the right to participate in public affairs at a local level for a period of at least 900 days.
- ... it would arguably be unreasonable to impose a local residency requirement that effectively treats Australian citizens relocating to Norfolk Island as though they were citizens of a foreign state.<sup>8</sup>
- 4.9 The Department of Transport and Regional Services stated in its submission that the requirement of an aggregated physical presence on the Island of 900 days in the previous four years discriminates against elements within the Norfolk Island community.<sup>9</sup> It effectively disenfranchises Australian citizens who live and work on Norfolk Island, particularly the holders of Temporary Entry Permits (TEPs) and most holders of General Entry Permits (GEPs).<sup>10</sup>

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7 Discussion papers may be viewed on the Tasmanian electoral office website at [www.electoral.tas.gov.au](http://www.electoral.tas.gov.au)

8 Human Rights and Equal Opportunity Commission, Submission, p 175.

9 Department of Transport and Regional Services, Submissions, p 102.

10 Temporary Entry Permits (TEPs) are designed for short-term residence, and may be granted subject to conditions for up to one year, extendable to three years or more in special circumstances (eg an applicant possesses required work skills not otherwise readily available on-Island). They are usually granted for employment purposes only. TEPs are generally applicable to the itinerant workforce and are not subject to a quota.

General Entry Permits (GEPs) are designed for those wishing to stay indefinitely, or to settle on, Norfolk Island. They are usually granted subject to conditions, remain in force for 5.5 years and may be extended. An applicant must generally make a declaration of intent to reside on NI for the foreseeable future and to make a substantial commitment in terms of purchase of property and/or a business. Other than those granted on the basis of a ‘special relationship’ with Norfolk Island new GEPs are subject to a quota that is set annually by the Norfolk Island Legislative Assembly.

Department of Transport and Regional Services, Submissions, p 112.

- 4.10 Representatives of the Department further stated at the public hearing on 2 April 2001 that the residency period of 900 days was:
- neither fair nor equitable. Nor is it reasonable.<sup>11</sup>
- 4.11 The Department's submission informed the Committee that the Commonwealth Government:
- is concerned that Australians in an Australian Territory are being denied the right to vote by being required to wait two and a half years to apply for enrolment on the electoral roll ... the Government is further concerned that at the same time, non-Australian citizens can be elected to an Australian legislature and determine the future of an Australian Territory, while Australian citizens are denied their right to vote for that legislature.<sup>12</sup>
- 4.12 By contrast, under the *Commonwealth Electoral Act 1918*, a Norfolk Islander can take up residence anywhere in Australia and qualify for enrolment after one month (section 95AA).
- 4.13 The Committee has been informed of advice from the Norfolk Island Immigration Officer that the average period of residency for the majority of TEP holders is six months. Many of these workers are young and engaged mainly in the areas of hospitality and services. It is unlikely therefore that, even with a residency requirement reduced to six months, there would be a significant increase in the numbers on the electoral roll.
- 4.14 There are TEPs, however, who remain for a longer period, including professionals such as teachers, doctors, managers, police officers, bank officers, public servants and clergy, who have chosen or been appointed to work on Norfolk Island.
- These Norfolk Islanders contribute to Norfolk Island in very real ways. They also enrol their children in the Norfolk Island School, they contribute to and support the local economy, and they rely on the Island's public health system and community services, and are required to contribute to the public health insurance system and taxes and levies.<sup>13</sup>
- 4.15 The Commonwealth Government has proposed a qualifying period of six months which would help assuage the concerns of some on Norfolk Island who fear that newcomers would have little appreciation for the Island's culture and well-being. Traditionalists on Norfolk Island may take

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11 Department of Transport and Regional Services, Transcript, p 102.

12 Department of Transport and Regional Services, Submissions, p 102.

13 Department of Transport and Regional Services, Transcript, p 103.

comfort that this was the qualifying period for enrolment on the electoral roll for over a hundred years from the earliest days of Pitcairner settlement.<sup>14</sup> The Committee believes that this period, while considerably longer than normally required in an Australian jurisdiction, is a workable compromise given the overriding obligation that exists for Australia to provide all citizens with reasonable access to the vote.

- 4.16 Without a reasonable residency period of six months, the Australian TEPs and GEPs who provide valuable services to the Island are in effect 'guest workers, without political rights'.<sup>15</sup>
- 4.17 The Norfolk Island Government has, in fact, recognised the need to reduce the residency requirement in some circumstances, reducing the number of days to 150 for permanent residents who have previously resided on Norfolk Island for a total of at least ten years. This recommendation which arose in the Assembly in 1999 was to be addressed in a review of the *Legislative Assembly Act 1979* (NI). The review of the Act lapsed with the last Assembly and is not currently a priority for the present Government.<sup>16</sup>

## International obligations

- 4.18 In addition to its concerns that Norfolk Island, as a part of Australia, should be a demonstrably strong democratic community, the Committee has been advised that the existing electoral arrangements on Norfolk Island do not meet Australia's international obligations. The Attorney-General's Department advised DOTRS that Article 25 of the International Covenant on Civil and Political Rights provides that all citizens must have reasonable access to vote and be elected and to take part in public affairs.<sup>17</sup> The United Nations Human Rights Committee noted in its General Comment on Article 25 that: 'If residence requirements apply to registration, they must be reasonable ...'.<sup>18</sup>

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14 This residency requirement existed from 1857 with the Declaration of Laws and Regulations on Norfolk Island until the amendment of the electoral laws by the Norfolk Island Council Ordinance 1968. Department of Transport and Regional Services, Submissions, p 104.

15 Department of Transport and Regional Services, Transcripts, p 103.

16 Correspondence, Mr Owen Walsh, Department of Transport and Regional Services to the Committee Secretary, Joint Standing Committee on the National Capital and External Territories, 15 March 2002, Exhibit 4.

17 Legal advice obtained by DOTRS from the Office of International Law, Attorney-General's Department, 1 March 2001.

18 Human Rights and Equal Opportunities Commission, Submissions, p. 175.

- 4.19 The advice from the Attorney-General's Department indicated that it is likely that Section 6(1) of the *Legislative Assembly Act 1979* (NI) which requires that a person must be present in Norfolk Island for a total of 900 days during the period of four years immediately preceding their application for enrolment, is a breach of this Article in that 900 days may be an 'unreasonable restriction'.<sup>19</sup>
- 4.20 In fact, the Human Rights and Equal Opportunity Commission notified the Norfolk Island Government in November 1994 that the electoral laws requiring a physical presence on Norfolk Island for 900 days before being eligible to vote were in breach of Australia's international obligations under Article 25 of the ICCPR. In a letter to Ms Monica Anderson MLA, convenor of the Assembly's Select Committee on Electoral and Constitutional Matters, the Human Rights Commissioner, Mr Brian Burdekin, suggested that the legislation be appropriately amended at the earliest opportunity. That request was not considered in the 1995 report of that committee or by any Norfolk Island government to date.

## Norfolk Island opinions

- 4.21 The Norfolk Island Government claimed in its submission, and in evidence given to the Committee at the public hearing on Norfolk Island, that its current residency requirements are needed because the Island is unique and vulnerable, both culturally and environmentally. It claimed that the proposed changes contained in the Norfolk Island Amendment Bill 1999 would have threatened its culture and Pitcairn heritage. It argued that people need to live on the Island for an extended period and demonstrate their commitment to the community before they are entitled to vote.
- 4.22 This view was also expressed by representatives of the Society of Pitcairn Descendants in a written submission, as well as at the public hearing on Norfolk Island in March 2001, and by several other Island residents who spoke to the Committee.
- 4.23 On the other hand, however, forty residents, led by local historian and respected elder, the late Ms Merval Hoare, signed a submission strongly supporting the requirement of Australian citizenship and a residency

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<sup>19</sup> This advice also noted the likelihood that section 38 of the *Norfolk Island Act 1979*, requiring a person to be ordinarily resident for five years immediately preceding the date of nomination, breaches the rights of Australian citizens to stand for election under Article 25 of the ICCPR.

requirement that was consistent with the time period applying in other Australian jurisdictions.

- 4.24 For various reasons, some of which are outlined in Chapter 2, the Committee is unable to estimate how widely held the differing points of view are. One witness told the Committee: 'I do not think you are going to be able to determine what the majority thinks.'<sup>20</sup> The Committee finds it significant that a number of Norfolk Island residents requested that their evidence be given *in camera*, or at least in private, because they feared retribution or at least unpleasantness, and some submittees and correspondents also sought confidentiality. This, in addition to the outrage and scorn expressed about the vulnerable TEPs who write unsigned letters to the local newspaper, indicates to the Committee that it may be quite difficult for an individual to question the claims of Members of the Assembly and others who express their opinions forcefully.
- 4.25 As discussed in Chapter 3, the Committee does not regard the referenda results as convincing evidence that there is no need to change the existing system. This is because of the lack of neutrality in the wording of the first referendum, and because of the lack of evidence in relation to both referenda that voters had fully understood the issues and the relevant arguments. In particular, the Committee notes that the people most affected by the current residency restrictions would not be able to vote in any Norfolk Island referendum. A fundamental human right should not be determined by a majority vote, because of the danger that presents for removing rights from entitled minorities.
- 4.26 The Committee is disturbed to note the level of mistrust and negativity that is expressed about actions undertaken by the Commonwealth Government, and suspects that the local culture tolerates an element of exaggeration and playing to the fear of being 'big brothered'.
- 4.27 The Committee shares the views expressed in the DOTRS submission:
- Norfolk Island's history and its natural and cultural heritage are unique. However, Norfolk Island's circumstances are not. There are other communities elsewhere in Australia, many of which are isolated or are island communities, which also claim a distinct cultural heritage and history, a long and unbroken occupation of a region or an area, and who have economic interests and needs that differ from the rest of Australia. They would also regard themselves as culturally and ethnically distinct, fragile and

vulnerable and share with Norfolk a concern about 'new' people adversely affecting their community fabric.<sup>21</sup>

- 4.28 For a range of reasons the Committee believes an extraordinarily long residency requirement of 900 days appears to serve no valid purpose.

Opponents of the reforms have failed to identify how the changes would be inimical to the traditions and culture of Norfolk Island.

...

Concern has been expressed by some that the change to the residency status will see a swamping of the voting pool on Norfolk Island with a group of people who lack any understanding of local culture, tradition or lifestyle ...

The assumption that mainlanders like doctors, teachers, senior public servants and business people who choose to work on Norfolk Island lack the ability to develop and understanding or appreciation of local culture and lifestyle in a six-month period is not supported by any evidence.<sup>22</sup>

- 4.29 While acknowledging that the fears of some witnesses about electoral change are genuinely and keenly felt, the Committee can see no demonstrated link between an unrestricted franchise and a risk to Norfolk Island culture. Even if such a risk existed, the Committee believes that it would be contained through the very tight immigration controls imposed by the Norfolk Island Government. These ensure that the population does not increase rapidly to an unsustainable size. The qualifications for TEPs, GEPs and permanent residence are sufficiently stringent to minimise the risk that criminals or other unsuitable people will settle on the Island.
- 4.30 The Committee believes that it is extremely difficult to establish an arbitrary point in time at which a person may be deemed to have sufficient understanding of or commitment to a place. It is not apparent how such a determination could ever be an accountable or democratic process. The Committee is aware that the criteria used to determine whether a GEP, after five and a half years of residence, has the resources, character and commitment to become a permanent resident may be seen as intrusive, open-ended and a subjective assessment.<sup>23</sup>

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

22 Department of Transport and Regional Services, Transcript, p 105.

23 GEP applicants must demonstrate an intention to take up ordinary residence in Norfolk Island and this involves an in-depth scrutiny of their financial, business and personal affairs. Normal GEP criteria require consideration of an applicant's character, health, financial position, reasons for wishing to live on Norfolk Island, and intentions with respect to livelihood and

In essence, the grant of a GEP acknowledges that a person has made a 'permanent' commitment to Norfolk Island. (It is the Norfolk Island Government's policy not to issue TEPs to those who have demonstrated an intention to reside indefinitely on the Island.)<sup>24</sup>

4.31 The Department points out that the criteria for people applying for a GEP under the 'special relationship' provisions of the Norfolk Island Immigration Act are even more onerous. Applicants must satisfy all the normal criteria as well as undergo an assessment of their circumstances against the policy criteria set out in the Immigration Policy Guide.<sup>25</sup>

4.32 In essence, those who meet these very stringent requirements are no better off in terms of their entitlement to vote than TEPs. A resident explained the disgruntlement that the residency requirement causes among Island-born people who wish to return:

On the one hand, you have an Islander who is born here or who has spent a long time here and has simply gone away for a couple of years. They come back and find that they have to wait for two and a half years before they can participate in affairs. It is a fair argument for them to stand up and say that they want to be counted as well.<sup>26</sup>

4.33 The submission from DOTRS observed:

A long on-Island physical presence does not necessarily translate into an understanding of Norfolk Island's politics or system of governance. A 1995 inquiry by a Norfolk Island Legislative Assembly Select Committee into Electoral and Constitutional Matters noted that, notwithstanding the residential electoral

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whether those intentions are likely to be realised. Department of Transport and Regional Services, Submissions, p 291.

24 Department of Transport and Regional Services, Submissions, p 291.

25 These criteria include:

- 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 family's 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; and
- the extent of the applicant's knowledge of Norfolk Island's culture and traditions.

Department of Transport and Regional Services, Submissions, p 291.

26 Mr Michael King, transcript, p 21.

requirements, Norfolk Island residents had little understanding of Norfolk Island's electoral system.<sup>27</sup>

- 4.34 Representatives of the Norfolk Island Government explained that, despite its intense isolation in the early years of settlement, Norfolk Island culture has always been welcoming and accepting of strangers. It would appear that most Norfolk Islanders are aware of the benefits that have come to the Island as its isolation has diminished. The argument for a long qualifying period to ensure that new voters think like Norfolk Islanders may be challenged on a number of grounds, not the least of which is that the quest for like-mindedness within a community is not necessarily a desirable objective. All communities require the input of new and different points of view if they are to remain dynamic. A dynamic community will find many positive ways to preserve and to ensure respect for its heritage.
- 4.35 The Committee was told by representatives of the Department of Transport and Regional Services, the Commonwealth department responsible for liaison with the external territories, that:
- Norfolk Island is the most historic of Australia's external Territories and integral to Australia's national heritage. The traditions and culture of the Pitcairn descendants are acknowledged in the Preamble to the *Norfolk Island Act 1979* and highly valued as part of multicultural Australia, but not to the extent that they should impinge on the rights of other Australians.<sup>28</sup>
- 4.36 The Committee was further advised that:
- Australian citizenship and one to six months' residence within a community remains the expected electoral norm. All other Australian jurisdictions and communities trust the good sense of those who choose to live in their communities.<sup>29</sup>
- 4.37 The Committee does not believe that the parties who have opposed the reduction in the residency requirement most vociferously have demonstrated a direct link between voting by TEPs and any undermining of the Norfolk Island culture. The Committee considers that even if such a link could be demonstrated, the evidence of harm would need to be very strong indeed to justify a system which impinges so strongly on the

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27 Department of Transport and Regional Services, Submissions, p 103-104. Report of the Select Committee on Electoral and Constitutional Matters, Norfolk Island October 1995, Page 34, paragraph 3.101.

28 Department of Transport and Regional Services, Transcript, p 105.

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

normal right of a citizen to vote. The Committee stresses again that it believes that a strong democracy is an inclusive one.

4.38 The Committee does not accept the logic behind the desire to deny a say in matters which may affect them strongly to those who have applied and been accepted to come to the Island to live and work. If individuals have made the required commitment and have been deemed suitable to be granted a General Entry Permit, it seems unreasonable then to impose a further long-term residency requirement before allowing them to participate in Island affairs on an equal basis with other residents, some of whom may quite possibly not have the commitment to the Island represented by the purchase of property and/or the establishment of a business required of GEPs, and who may not be intending to remain on the Island indefinitely.

4.39 The Committee sees a parallel between the ICCPR objective of ensuring that any franchise restrictions are reasonable and the view expressed by HREOC that any immigration controls must be necessary.

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>30</sup>

4.40 While it is not within the scope of this inquiry to examine such measures, the Committee believes that there are many ways of preserving and strengthening the much valued traditions of Norfolk Island without resorting to measures which give the community the appearance of being a less than fully democratic entity.

## Conclusions

4.41 The Committee believes that it is unacceptable that Australian citizens who live on Norfolk Island, and make significant contributions to the community, should be deprived of the opportunity to exercise a fundamental democratic right for thirty times longer than the qualifying period in all mainland jurisdictions. The situation offends the principles of the International Covenant on Civil and Political Rights and has been

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<sup>30</sup> Human Rights and Equal Opportunity Commission, *Territorial Limits: Norfolk Island's Immigration Act and Human Rights*, March 1999, p 52.

called into question by Australia's own Human Rights and Equal Opportunity Commission.

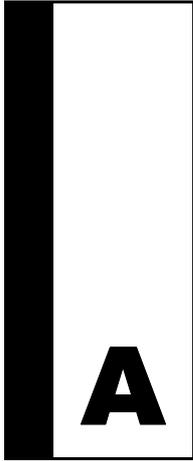
- 4.42 While acknowledging the special nature of Norfolk Island's traditions and culture, as well as the concern felt by some Islanders that these may be threatened by allowing relative newcomers a voice in Island affairs, the Committee does not accept that there is either a proven risk or a need for special protection, particularly when such protection, entrenched in electoral law, serves to deny a basic human right to a group of citizens.
- 4.43 The Committee is concerned that a minority group of citizens, conspicuously entitled to the vote by national and international standards, is being disenfranchised by a system established in part to counteract an unproven risk and which is generally accepted because of apathy or ignorance of the important human rights issue at stake. The Committee believes that while well-intentioned, the basis for the exclusion which the 900 day residency requirement imposes is not well informed. The Committee believes that most Norfolk Islanders have a love of democracy and would be distressed to be viewed internationally as a community which denies a basic right to a minority group within it.
- 4.44 The Committee does not accept that a referendum conducted on Norfolk Island under existing procedures is an appropriate forum for establishing informed public opinion, particularly on an issue as fundamental as protecting the rights of minority groups. It is not appropriate that a majority group with an entitlement, i.e. the vote, should vote to deprive a disenfranchised minority group of the same entitlement.
- 4.45 It is for this reason, in addition to the conspicuous lack of interest of successive Norfolk Island governments in electoral reform, that the Committee believes that the Commonwealth Government should take responsibility for ensuring, through changes to the *Norfolk Island Act 1979*, that no Australian citizen resident on Norfolk Island is deprived of the fundamental right to vote by the existing unreasonable residency restriction.
- 4.46 While the necessary changes could be enacted by the Legislative Assembly, the Committee considers that given the Commonwealth Government's domestic and international obligations, it is a matter best covered by Commonwealth legislation. The Committee is aware that the new Legislative Assembly may have a view which differs widely from its predecessors. While recommending that the Commonwealth move to amend the *Norfolk Island Act 1979*, the Committee would welcome a positive approach to electoral reform by the new Norfolk Island Assembly.

- 4.47 The Commonwealth proposal of a six month residency requirement is a compromise which is appropriate at this stage, although the Committee notes that even this reduced period is still considerably in excess of that prevailing in nearly all other Australian jurisdictions, and in approximately seventy per cent of the world's democracies.

### **Recommendation 3**

- 4.48 **The Committee recommends that the period for which an Australian citizen must reside on Norfolk Island before being eligible to enrol to vote for the Legislative Assembly be reduced to six months.**

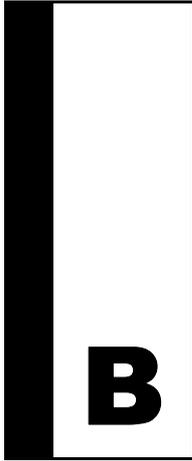
**The Committee further recommends that this change be incorporated into the Commonwealth *Norfolk Island Act 1979*.**



## **Appendix A - List of submissions**

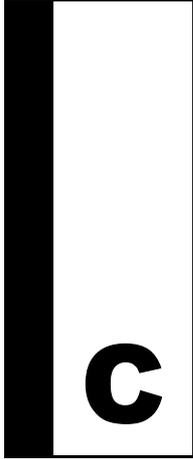
1. The Society of Pitcairn Descendants
2. Ms Merval Hoare
3. Australian Electoral Commission
4. Mr Geoff Bennet
5. Department of Transport and Regional Services
6. Government of Norfolk Island
7. Human Rights and Equal Opportunity Commission
8. Mr Greg Quintal
9. Department of Immigration and Multicultural Affairs
10. Ms Merval Hoare et al
11. CONFIDENTIAL
12. Mr Howard Timbury
13. Ms Denise Quintal
14. Department of Transport and Regional Development  
(Supplementary Submission)
15. The Society of Pitcairn Descendants  
(Supplementary Submission)
16. Mr Greg Quintal  
(Supplementary Submission)
17. Department of Transport and Regional Development  
(Supplementary Submission)

18. Human Rights and Equal Opportunity Commission  
(Supplementary submission)
19. Mr Greg Quintal  
(Supplementary submission)
20. CONFIDENTIAL
21. Department of Immigration and Multicultural and Indigenous Affairs
22. The Government of Norfolk Island



## **Appendix B - List of Exhibits**

1. Opinion, Constitutional Status of Norfolk Island, 18 October 1999. Henry Burmester, QC, Australian Government Solicitor,
2. Letter from E.B. Reed, MLA then Minister for Community Services of Norfolk Island to the Air Vice Marshall R.E. Trebilco Administrator of Norfolk Island, 11 December 1984,
3. Letter from the Hon David Simmons, MP then Minister for the Arts, Tourism and Territories to the Hon D Buffett, MLA then President of the Norfolk Island Legislative Assembly, 24 October 1990, and
4. Correspondence, Mr Owen Walsh, Department of Transport and Regional Services to the Committee Secretary, Joint Standing Committee on the National Capital and External Territories, 15 March 2002, re status of Legislative Assembly Act 1979 review.



## **Appendix C - Witnesses appearing at public hearings**

**Norfolk Island  
Thursday, 22 March 2001**

### **Individuals**

Ms Robyn Adams

Mr Geoffrey Bennett

The Hon Adrian Cook

Mr Edward Howard

Mr Alan McCoy

Mr Timothy Pearson

Mr Gregory Quintal

### **Norfolk Island Government**

Mr David Buffet, MLA, Minister for Immigration and Community

Mr Ronald Nobbs, MLA, Chief Minister

**Society of Pitcairn Descendants**

Mr Kenneth Nobbs

Mr Lisle Snell

**ECO Norfolk**

Ms Denise Quintal

**Canberra  
Monday, 2 April 2001**

**Department of Transport and Regional Division**

Mrs Maureen Ellis, Director, Self- Governing Territories Section, Territories and Regional Support Division

Ms Dianne Gayler, Assistant Secretary, Regional Support and Self-Governing Territories Branch

Ms Mary O'Brien, Assistant Director, Self-Governing Territories Section

Mrs Susan Strickland, Assistant Director, Self-Governing Territories Section, Territories and Regional Support Division