

## 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

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20 Mr Michael King, Transcript p 26.

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.

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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*.**