

The Case for Reform

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

The 'Isle of Saints'

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

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

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

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

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

factor affecting the social cohesion and sustainability of the community.

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

The ‘Shining Beacon’

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

5 See Butland, G. 1974, *A Long Term Population Study of Norfolk Island*, p. 12; Nimmo, J. 1976, *Report of the Royal Commission into Matters relating to Norfolk Island*, Australian Government Publishing Service, Canberra, pp. 68-9; Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, pp. 25-6.

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

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

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

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

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

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

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

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

The Perils of Speaking Out

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

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

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

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

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

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

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

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

The 'Fear of Reprisal'

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Nimmo concluded that it would be:

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

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

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

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

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

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

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

The Need for Reform

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

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

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

Financial & Administrative Incapacity

- 2.18 The breadth of the issues canvassed during the inquiry gives an indication of the extent of the challenges now confronting the community. A litany of problems was identified by a wide range of witnesses, most importantly, the general lack of administrative and financial capacity of the Territory Government to manage the broad range of responsibilities it has been given and, the increasing, but unacknowledged reliance on the Federal Government for advice and support.³¹ The efforts of those in the Territory Government seeking to address these problems were undermined by out of date practices within the Administration and entrenched resistance to reform.³² Witnesses pointed out the inadequacy of the legal infrastructure and questionable and changing legislative priorities, the lack of legislative drafting resources and in-house legal services, and an excessive reliance on legal staff for everyday administrative matters.³³ A high
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31 Mr Michael King, Transcripts 15 July 2003, p. 5. Griffiths, Submissions, p. 17. These problems have been confirmed by a plethora of independent and ultimately ignored reports, including Butland, G. J. 1974, *Report to the Department of the Capital Territory of the Australian Government on a Long Term Population Study of Norfolk Island*; Nimmo, J. 1976, *Report of the Royal Commission into Matters relating to Norfolk Island*, Australian Government Publishing Service, Canberra; House of Representatives Standing Committee on Legal and Constitutional Affairs, 1991, *Islands in the Sun: The Legal Regimes of Australia's External Territories and the Jervis Bay Territory*, Australian Government Publishing Service, Canberra; Australian Law Reform Commission, 1994, Report No. 69, *Equality before the Law: Women's Equality* (Chapter 14: *Women in Remote Communities: Norfolk Island – a case study*); Joint Standing Committee on the National Capital and External Territories, 1995, *Delivering the Goods*, Australian Government Publishing Service, Canberra; Australian Law Reform Commission, 1995, Report No. 77, *Open Government: a review of the federal Freedom of Information Act 1982* (Chapter 11); Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra; Access Economics, 1997, *Norfolk Island: Recent Economic Performance, Present Situation, and Future Economic Viability. Is there a Case for Change?*; John Howard and Associates, 1998, *Norfolk Island Administration, Strategic Review*, Sydney; Human Rights and Equal Opportunity Commission, 1999, *Territorial Limits: Norfolk Island's Immigration Act and Human Rights*, J. S. McMillan Printing Group, Sydney; Joint Standing Committee on the National Capital and External Territories, 1999, *Island to Islands: Communications with Australia's External Territories*; 2001, *In the Pink or in the Red?: Health Services on Norfolk Island*; and 2002, *Norfolk Island Electoral Matters*, Canprint, Canberra; and *Focus 2002 – Sustainable Norfolk Island*, 10th Legislative Assembly, Norfolk Island.

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

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

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

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

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

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

- 34 In his submission, Mr Bruce Griffiths calls for "a broader based tax system" - Griffiths, Submissions, p. 17.
- 35 In its report *Focus 2002 – Sustainable Norfolk Island*, 10th Legislative Assembly, Norfolk Island, the Norfolk Island Government acknowledges the extent of the financial and administrative problems confronting the Island. The Focus 2002 report is the outcome of a review of "the way we currently do things", initiated by the 10th Legislative Assembly in May 2002. The report notes that "quite obviously, a trend has become evident over past years, namely that expenditure is rising at a rate far greater than income. This situation is not sustainable." (p. 3). See also the Hon. David Buffett MLA, Transcript, 25 July 2003, pp. 45-6; Bennett, Submissions, p. 32; Lozzi-Cuthbertson, Submissions, p. 3.

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

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

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

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

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

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

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

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

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

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

Failures within the Political System

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

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

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

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

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

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

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

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

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

History Repeating

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

Options for Reform

- 2.25 Witnesses have raised a wide range of issues with the Committee and taken the opportunity for constructive dialogue about options for reform. The broad spectrum of ideas falls largely into two main approaches:
- Option A - withdrawal of internal self-government and replacement with an appropriate local government model; or
 - Option B - strengthening the framework for self-government by imposing structural reform of the existing political system.

Option A – Withdrawing Self-Government

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

46 See Footnote 31 for the list of reports.

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

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

47 Friend, Woolley, Submissions.

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

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

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

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

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

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

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

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

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

Option B – Modifying Self-Government

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

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

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

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

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

56 Buffett, Bennett, Submissions.

The Committee's Preference – Option B

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

Recommendation 1

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

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

Implementing Reform

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

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

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

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

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

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

The Territory's Status

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

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

62 Robinson, Submissions, p. 7-8.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Legal Position

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

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

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

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

2.54 The Commonwealth does not share power with the Territories in the same way that it does with the six States. The relationship between the States and the Commonwealth is reflected in Chapter One, Section 51 and Chapters Four and Five of the Constitution.⁸² Chapter Five expressly guarantees the continued existence of the States, and preserves the State constitutions which enable the States to pass laws on any subject matter.⁸³ The subject matter upon which the Commonwealth can legislate is set out in Section 51, subject to the guarantees and limitations found elsewhere in the Constitution. Importantly, a valid Commonwealth law will override an inconsistent State law to the extent of the inconsistency by virtue of Section 109.

2.55 By contrast, the Territories are dealt with separately in Chapter Six of the Constitution and Section 122, the Territories power, is often referred to as the ‘non-federal’ part of the Constitution.⁸⁴ Section 122 states:

The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

2.56 Section 122 is interpreted by the High Court to be a plenary power – that is, a power equivalent to the “peace, order and good government” powers assigned to the States under their own

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The *Norfolk Island Act 1979* (Cth)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Commonwealth's Responsibility

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

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

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

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

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

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

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

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