

Reforming the Structure of Government

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

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

The Existing System

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

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

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

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

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

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

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

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

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

7 There are currently 10 items listed under Schedule 3.

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

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

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

The Administrator

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

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

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

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

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

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

The Legislative Assembly

4.7 The *Norfolk Island Act 1979* (Cth) confers plenary power, subject to the Act, on the Legislative Assembly to "make laws for the peace, order and good governance of the Territory". This power does not extend to the making of laws:

- authorizing the acquisition of property otherwise than on just terms;
- authorizing the raising or maintaining of any naval, military or air force;
- authorizing the coining of money;
- which permit or have the effect of permitting ... the form of intentional killing of another called euthanasia ... or the assisting of a person to terminate his or her life.¹⁷

4.8 The Legislative Assembly consists of nine members, who are elected for a maximum term of three years.¹⁸ The Assembly must meet at least once every two months.¹⁹ In practice, the Assembly meets informally and in private every week and formally each month where more controversial matters are voted on. The average life of an Assembly is 2.5 years.²⁰ Although there are "large changes" in the membership of the Executive Council after each election, there is not a high turnover of Members of the Legislative Assembly at each election.²¹ There are, however, relatively frequent changes of Norfolk Island Ministers during the life of any Assembly. Five of the current sitting Members have served in previous Assemblies.²² Five

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

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

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

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

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

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

21 Norfolk Island Government, Submissions, pp. 253.

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

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

The Speaker and Deputy Speaker

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

The Executive Council and Executive Offices

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

36 Norfolk Island Government, Submissions p. 250.

37 Norfolk Island Government, Submissions p. 250.

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

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

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

40 Ellicott, Submissions, p. 38.

41 Ellicott, Submissions, p. 37.

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

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

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

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

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

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

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

Politics without Parties

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

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

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

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

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

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

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

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

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

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

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

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

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

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

55 Morris, Submissions, p. 202.

56 Woodward, Submissions, p. 537.

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

A Corporate Board?

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

59 Norfolk Island Legislative Assembly, November 1996, *Report of the Committee established by the Legislative Assembly of Norfolk Island to define the Roles and Responsibilities of Members of the Legislative Assembly of Norfolk Island*, pp. 23-39.

60 Norfolk Island Legislative Assembly, November 1996, *Report of the Committee established by the Legislative Assembly of Norfolk Island to define the Roles and Responsibilities of Members of the Legislative Assembly of Norfolk Island*, p. 31.

61 Norfolk Island Legislative Assembly, November 1996, *Report of the Committee established by the Legislative Assembly of Norfolk Island to define the Roles and Responsibilities of Members of the Legislative Assembly of Norfolk Island*, p. 33.

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

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

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

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

62 Norfolk Island Legislative Assembly, November 1996, *Report of the Committee established by the Legislative Assembly of Norfolk Island to define the Roles and Responsibilities of Members of the Legislative Assembly of Norfolk Island*, p. 37.

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

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

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

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

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

4.26 The Howard Review found that:

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

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

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

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

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

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

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

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

A Culture of Direct Democracy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

93 See Footnote 41, Chapter Two.

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

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

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

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

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

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

Proposals for Reform

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Cook Model

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

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

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

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

111 Norfolk Island Government, Submissions, p. 250.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Choosing a Government

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

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

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

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

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

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

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

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

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

The Committee’s View

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

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

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

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

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

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

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

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

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

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

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

130 Morris, Submissions, p. 205.

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

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

133 Morris, Submissions, p. 203.

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

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

Recommendation 17

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

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

Recommendation 18

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

Recommendation 19

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

The Presiding Officer

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Recommendation 20

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

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

The Legislative Assembly

Meetings of the Assembly

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

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

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

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

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

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

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

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

Recommendation 21

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

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

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

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

Committees of the Assembly

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

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

155 See Norfolk Island Seventh Legislative Assembly, October 1995, *Report of the Select Committee on Electoral and Constitutional Matters*; Norfolk Island Legislative Assembly, November 1996, *Report of the Committee established by the Legislative Assembly of Norfolk Island to define the Roles and Responsibilities of Members of the Legislative Assembly of Norfolk Island*; and The Hon. Ron Nobbs MLA, *Is the current parliamentary system appropriate for Norfolk Island?* Working Group Report tabled in the Norfolk Island Legislative Assembly on 21 November 2001.

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

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

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

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

158 Norfolk Island Legislative Assembly, November 1996, *Report of the Committee established by the Legislative Assembly of Norfolk Island to define the Roles and Responsibilities of Members of the Legislative Assembly of Norfolk Island*, p. 50.

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

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

161 Recommendation 15.

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

Recommendation 22

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

The Term of the Legislative Assembly

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

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

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

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

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

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

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

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

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

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

166 Norfolk Island Government, Submissions, p. 253.

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

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

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

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

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

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

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

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

174 Morris, Submissions, p. 202.

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

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

177 Buffett, Morris, Submissions.

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

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

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

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

Recommendation 23

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

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

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

181 See paragraph 4.49 and Recommendations 17 and 18.

The Powers and Functions of the Administrator

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

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

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

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

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

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

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

Recommendation 24

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

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

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

the day of the dissolution; and

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

The Electoral System

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

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

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

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

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

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

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

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

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

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

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

195 Bennett, Submissions, p. 29.

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

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

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

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

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

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

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

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

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

Recommendation 25

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

Recommendation 26

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

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

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

and

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

Eligibility to Vote and Stand for Election

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Recommendation 27

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

Recommendation 28

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

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

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

Federal Parliamentary Representation

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

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

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

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

214 House of Representatives Standing Committee on Legal and Constitutional Affairs, 1991, *Islands in the Sun: The Legal Regimes of Australia’s External Territories and the Jervis Bay Territory*, Australian Government Publishing Service, Canberra.

215 House of Representatives Standing Committee on Legal and Constitutional Affairs, 1991, *Islands in the Sun: The Legal Regimes of Australia’s External Territories and the Jervis Bay Territory*, Australian Government Publishing Service, Canberra, p. 146.

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

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

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

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

216 Recommendation 39, House of Representatives Standing Committee on Legal and Constitutional Affairs, 1991, *Islands in the Sun: The Legal Regimes of Australia’s External Territories and the Jervis Bay Territory*, Australian Government Publishing Service, Canberra, p. 148.

217 House of Representatives Standing Committee on Legal and Constitutional Affairs, 1991, *Islands in the Sun: The Legal Regimes of Australia’s External Territories and the Jervis Bay Territory*, Australian Government Publishing Service, Canberra, p. 148.

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

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

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

ACT	82
NSW	39
QLD	21
VIC	4
SA	2

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

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

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

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

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Figures provided by the Australian Electoral Commission.

221 House of Representatives Standing Committee on Legal and Constitutional Affairs, 1991, *Islands in the Sun: The Legal Regimes of Australia’s External Territories and the Jervis Bay Territory*, Australian Government Publishing Service, Canberra, p. 147.

222 Robinson, McCullough, Bennett, Nobbs, Submissions.

223 Robinson, Submissions, p. 5.

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

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

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

Recommendation 29

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

The Adequacy of the Territory's Laws

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

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

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

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

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

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

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

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

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

230 See, for example, House of Representatives Standing Committee on Legal and Constitutional Affairs, 1991, *Islands in the Sun: The Legal Regimes of Australia's External Territories and the Jervis Bay Territory*, Australian Government Publishing Service, Canberra; Norfolk Island Government, December 1996, *Norfolk Island Proposed Crimes Bill 1996 and Crimes (Offences Against Government) Bill 1996: Exposure Draft*; and Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, pp. 190-91.

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

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

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

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

232 *Companies Act 1985* (NI).

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

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

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

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

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

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

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

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

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

Recommendation 30

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

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

Recommendation 31

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

Recommendation 32

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

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

