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Norfolk Island Amendment Bill 2003

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Norfolk Island Amendment Bill 2003

Rosemary Bell
Law and Bills Digest Group
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Norfolk Island Amendment Bill 2003

Date Introduced: 4 December 2003

House: Senate

Portfolio: Local Government, Territories and Roads

Commencement: On the day after Royal Assent

Purpose

To amend the *Norfolk Island Act 1979* so as to:

- extend the right to vote in elections for the Norfolk Island Legislative Assembly to all Australian citizens ordinarily resident on Norfolk Island for more than six months
- establish Australian citizenship as a qualification for enrolment and for election to the Norfolk Island Legislative Assembly
- preserve the existing enrolment rights of those who would not otherwise be eligible under the new arrangements, and
- remove gender-specific language.

Background

Current Situation

Norfolk Island population and citizenship

At the last census in August 2001, Norfolk Island's total population (excluding visitors or tourists) was 2037. Of these, 1574 people live permanently on Norfolk Island. The remainder are mostly workers from mainland Australia and New Zealand allowed on the Island under short term entry permits issued by the Norfolk Island Government.¹ According to this census, 82 per cent of the Island's permanent population are Australian citizens and 14 per cent hold New Zealand citizenship.² Descendants of the Pitcairn Islanders who settled on Norfolk Island in 1856 comprise approximately 46 per cent of the

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Island's population.³ In December 2003 there were approximately 1100 qualified electors enrolled to elect members of the Norfolk Island Legislative Assembly.⁴

Government⁵

Since 1979 Norfolk Island has been governed under the provisions of the *Norfolk Island Act 1979* which provides the basis for the Island's legislative, administrative and judicial systems. This Act devolved power to Norfolk Island to elect its own government, to have its own administration and to have major responsibility for raising its own revenue. Commonwealth legislation does not extend to Norfolk Island unless it is specifically expressed to do so. If it does apply, it overrides local law.⁶ All proposed legislation passed by the Norfolk Island Government requires the assent of either the Administrator or the Governor-General (section 19 of the Norfolk Island Act).

The government of Norfolk Island consists of a nine member Legislative Assembly, elected for three year terms. The powers of the Norfolk Island Legislative Assembly incorporate the functions of both local and state governments, in a manner similar to the Northern Territory or the Australian Capital Territory. However, they also include a range of functions, such as customs, quarantine, immigration and social security, that are exercised exclusively by the Commonwealth in mainland Australia. With some exceptions, the Norfolk Island Act gives plenary power to the Norfolk Island Legislative Assembly and sets out an assent process depending on whether proposed laws fall within Schedule 2 of the Act (matters not requiring prior consultation between the Federal and Norfolk Island Governments), Schedule 3 (matters requiring the agreement of the Commonwealth) or outside either Schedule. Proposed legislation on matters not listed in either Schedules 2 or 3, like electoral laws, are referred by the Administrator to the Governor-General for assent. The Governor-General acts on the advice of the Commonwealth Government of the day.

Electoral qualifications

The electoral provisions for the Norfolk Island Legislative Assembly are contained in both the *Norfolk Island Act 1979* and in the *Legislative Assembly Act 1979* (an act of the Norfolk Island Legislative Assembly). Section 38 of the *Norfolk Island Act 1979* provides that persons qualified to be candidates for election as members of the Legislative Assembly are those who:

- have attained the age of 18 years
- are entitled, or qualified to become entitled, to vote at elections of members of the Legislative Assembly, and
- have such qualifications relating to residence as are prescribed by enactment for the purposes of this paragraph or, if no such enactment is in force, have been

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ordinarily resident within Norfolk Island for a period of 5 years immediately preceding the date of nomination.

Norfolk Island legislation, the *Legislative Assembly Act 1979* (NI), sets out the enrolment qualifications. Persons entitled to enrolment, and to vote at elections for members of the Legislative Assembly, are those who:

- have attained the age of 18 years, and
- have been present in Norfolk Island for a total of 900 days during the period of 4 years immediately preceding the person's application for enrolment.

The Legislative Assembly is the only Australian State or Territory legislative body where people who are not Australian citizens are entitled to vote and to stand for election. In its original form, as passed in 1979, the Principal Act did require that candidates standing for election were either Australian citizens or otherwise have the status of British subjects. This requirement was removed by the Commonwealth Parliament by amendment in 1985.⁷

All Australian electoral acts include a residence qualification for enrolment.⁸ However the almost two and a half year qualifying period for enrolment on Norfolk Island far exceeds the one month applying to all mainland States and Territories and the six month period in Tasmania.

History of the proposed changes

In April 1999 the Government introduced amendments to the *Norfolk Island Act 1979* that were very similar to those proposed by this Bill.⁹ The electoral measures proposed by the Norfolk Island Amendment Bill 1999 required candidates for future elections to the Norfolk Island Legislative Assembly to hold Australian citizenship, for Australian citizenship to be added to the requirements for future enrolments on the electoral roll, and for the residency qualification for enrolment to be reduced to six months. Following a recommendation by the Selection of Bills Committee,¹⁰ the Senate referred the Norfolk Island Amendment Bill 1999 to the Legal and Constitutional Committee for inquiry. The Committee reported in August 1999.¹¹ While the majority report of the Committee recommended that the Bill be passed without amendment, a dissenting report by Labor Senators Barney Cooney and Jim McKiernan and Democrats Senator Lyn Allison, recommended that the Bill not be proceeded with and that the matter of electoral reform in Norfolk Island be referred to the Joint Standing Committee on the National Capital and External Territories. The dissenting Senators said that, in their view, the matter of electoral reform proposed by the Bill was by far the most contentious issue for the residents of Norfolk Island. They stated that '[i]t is our opinion that the matters of electoral reform contained in this Bill require wider consultation and much more consideration than the Senate Legal and Constitutional Committee was able to give'.¹²

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Concerns about insufficient consultation were also expressed during debate on the Bill in the Senate, where the non-government parties again suggested that the electoral measures should be referred to the Joint Standing Committee on the National Capital and External Territories.¹³ The second reading of the Bill was resolved in the negative in the Senate on 9 March 2000. The then Minister for Regional Services, Territories and Local Government, Senator the Hon Ian MacDonald asked the Joint Standing Committee on the National Capital and External Territories in November 2000 to undertake an inquiry into electoral matters on Norfolk Island. The Committee's report, dated June 2002, details the conduct of the inquiry and the Committee's attempts to ensure that every opportunity was given to Norfolk Island residents to make submissions.¹⁴

The Committee recommended that the *Norfolk Island 1979* be amended to:

- reinstate Australian citizenship 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
- reduce the period for which an Australian citizen must reside on Norfolk Island before being eligible to enrol to vote for the Legislative Assembly to six months, and
- ensure that all elections and referendums on Norfolk Island come under the supervision of the Australian Electoral Commission.

Norfolk Island Government's response

In March 2003, the Norfolk Island Government passed the Legislative Assembly Amendment Bill 2003 (NI) (the Legislative Assembly Bill) in response to the Committee's recommendations. The vote in favour of the Legislative Assembly Bill was 8 to 1. The Bill amends the *Legislative Assembly Act 1979* (NI) by requiring that Norfolk Island residents wishing to enrol to vote in Island elections and referendums must meet the following eligibility criteria:

- be 18 years of age
- 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), and
- have Australian citizenship or citizenship of the United Kingdom of Great Britain and Northern Ireland or New Zealand citizenship.

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The Bill also provides transitional arrangements to validate the enrolment of Legislative 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. Speaking in favour of the changes, the Chief Minister of Norfolk Island, Hon Geoff Gardner, said:

These [new] provisions re-establish in the main ones previously in existence and in my view establishes a reasonable qualifying period for enrolment. It recognises the cultural and historical links with our neighbours, primarily Australia and New Zealand, and with the United Kingdom, and particularly recognises our relationship with the inhabitants of Pitcairn Island, whose residents are primarily United Kingdom citizens. Further, it supports the uniqueness of our social, political and cultural environments, which is supported by the recognition given to those ideals under the Preamble of the Norfolk Island Act.

It also adequately addresses the Joint Standing Committee's concerns and recommendations in their report into electoral issues with words to the effect that it is unlikely that a Norfolk Island Government will address these matters itself. That is exactly this proposal. We are going to address them ourselves, which removes the recommendation of the Joint Standing Committee to the Commonwealth Government to take action to amend our legislation.¹⁵

At least three other members of the Norfolk Island Legislative Assembly expressed concern about the Commonwealth making changes to the Norfolk Island Act and by doing so, effectively removing authority over electoral matters from local control. The three members gave this concern as their primary reason for supporting the amendments.¹⁶ Several members referred to the 'adversarial relationship' which has developed between the Commonwealth and Norfolk Island Governments over this matter and one suggested that Norfolk Island was offering an 'olive branch' to the Commonwealth. He said:

By adopting this method we are demonstrating we are understanding of the Australian Government's views and to some significant extent have walked along the track with it. But we in our turn are asking the Commonwealth to consider this wider parameter of the other two countries' citizenships... I think this is an opportunity for them to equally walk the track in a less adversarial position than has existed to date.¹⁷

A former Chief Minister of Norfolk Island, Hon Ron Nobbs, was the only member to oppose the changes. He referred to two referendums on electoral matters initiated by the Norfolk Island Government in August 1998 and May 1999. Both referendums resulted in a negative vote and were the basis for the Norfolk Island Government's claim in its submission to the Joint Standing Committee that the Norfolk Island community does not want change to its electoral laws.¹⁸

The Norfolk Island Act provides that proposed legislation on matters not specified in either Schedule 2 or 3 of the Act requires the assent of the Governor-General before coming into force.¹⁹ Following the passing of the electoral amendments in the Norfolk Island Legislative Assembly in March 2003, the Chief Minister wrote to the then Minister

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for Regional Services, Territories and Local Government, Hon Wilson Tuckey, advising him of the proposed amendments to the Legislative Assembly Act and the reasons behind the Legislative Assembly's vote.²⁰ The Parliamentary Library was advised by the Department of Local Government, Territories and Roads in February 2004 that the proposed amendments were 'not accepted' by the Commonwealth Government, and that the Department has not drawn up the Executive Council minute seeking the Governor-General's assent to the Norfolk Island legislation.

Section 24 of the Principal Act allows for a mechanism for formal notification of the reasons once a decision has been made by the Governor-General to withhold assent. Because the proposed amendments have not gone to the Governor-General, section 24 does not appear to apply. On 3 May 2003, the then Minister responsible for Territories, Hon Wilson Tuckey, was reported by *The Norfolk Islander* as saying, in relation to the Commonwealth Government's response to the electoral changes proposed by the Legislative Assembly, that:

Well, I don't believe that the Prime Minister will be satisfied...I will be very surprised if the Prime Minister writes to me and says that he will accept that legislation on those grounds in particular, and I expect that while he is about it he will say I want you to go ahead with the legislation as originally proposed.²¹

Main arguments for and against the electoral reforms

The essence of the Norfolk Island Government's argument is that a significant period of continuous residence on the Island is the appropriate threshold requirement, given Norfolk Island's distinctive character, and that Australian citizenship, given the long-term demographics of the Island, its geographical distance from the mainland, its proximity to New Zealand, and its highly developed form of self government, is not the only relevant criterion. It also argues that the pool of eligible candidates for the Assembly, already small, will be significantly reduced. The Norfolk Island Government is also concerned that reducing the residency requirement for enrolment from two and a half out of the last four years, down to 6 months, will permit a number of transient Australian citizens to swamp a small electorate, as a constituency neither well versed in the distinctive ways of the Island nor committed to its long term interests.²²

The essence of the Commonwealth's argument is that it is a fundamental right of Australians to participate in the democratic process at the local level and that being forced to wait almost two and a half years to exercise such a right is neither fair nor reasonable. The six month qualifying period proposed by the Commonwealth represents a compromise, designed to address the concerns of Norfolk Island residents, while taking into account the Island's historical background. According to the Minister's second reading speech, a six month residency period for enrolment on the electoral roll applied on Norfolk Island from 1857 until 1968.²³

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The Commonwealth's main argument for the citizenship requirement is that non-citizens should not be able to decide what laws will apply to Australian citizens in an Australian community. The Minister said in his second reading speech that:

High Court decisions and successive Federal Governments have confirmed that Australian citizenship is the fundamental prerequisite for membership of an Australian legislature. This does not devalue differences in cultural background or country of birth. It simply means that all persons aspiring to Federal, State or Territory Parliaments must demonstrate their commitment to Australia by taking out Australian citizenship before they stand for election.

The Minister, and the Joint Standing Committee have also expressed the concern that the existing electoral qualifications on Norfolk Island do not meet Australia's international obligations under Article 25 of the International Covenant on Civil and Political Rights which provides that all citizens must have reasonable access to vote and be elected and to take part in public affairs.²⁴

Main Provisions

The operative amendments are contained in **Schedule 1** of the Bill. **Part 1** contains the electoral amendments to the *Norfolk Island Act 1979* (the Principal Act) while **Part 2** contains a number of statute law amendments.

Electoral amendments – Schedule 1 Part 1

Citizenship as a requirement of holding office

Section 38 of the Principal Act presently sets out the eligibility requirements which candidates for election to the Norfolk Island Assembly must meet at the time of nomination. **Item 1** will reintroduce a requirement that in future candidates must be Australian citizens. Once elected, a member of the Legislative Assembly is subject to disqualification on a number of grounds, which are set out in section 39 of the Principal Act. Consistent with the policy intent of item 1, **item 3** will see a member's office become vacant if he or she ceases to be an Australian citizen. **Item 4** clarifies that item 3 will not prejudice a member's term of office already underway when item 3 commences, if they are not or cease to be an Australian citizen, but it will operate to disqualify members who are not Australian citizens from the next election onwards.²⁵

Citizenship and residency as requirements of the right to vote

At present the Principal Act does not prescribe the eligibility requirements for a person's name to be entered on the Norfolk Island electoral roll. Local legislation passed by the Norfolk Island Legislative Assembly, the *Legislative Assembly Act 1979*, requires a

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prescribed period of presence on the Island leading up to enrolment (or re-enrolment upon return to the Island after an absence or after serving a term of imprisonment). **Item 5** (consisting of **proposed sections 39A-39D**) sets out the qualifications of electors. The proposed new sections incorporate, but also to some extent, contradict and over-rule, the local Norfolk Island legislation.

Proposed section 39A requires that a person seeking enrolment be at least 18, an Australian citizen and ‘ordinarily resident’ on Norfolk Island in the previous 6 months. Subsection 7(1) of the Legislative Assembly Act will still apply, allowing a person’s name to be removed from the electoral roll if he or she was absent from the Island for approximately 5 out of the 8 months immediately before the electoral roll closed, or if imprisoned for at least one year. Re-enrolment can occur under **proposed subsection 39A(2)** provided that the person is an Australian citizen and was present on the Island for 150 of the last 240 days prior to enrolment. A person under imprisonment for one year or longer for a Commonwealth, State or Territory offence cannot enrol during their period of imprisonment. Students under the age of 25 who are absent from Norfolk Island for full time education or vocational training are deemed to have been resident on the Island for the purpose of calculating the residency period for enrolment. A person who ceases to be an Australian citizen after the commencement of **item 5** must be removed from the roll (**proposed section 39C**).

Enrolment permits a person to vote at Legislative Assembly elections (**proposed section 39B**). The voting rights of those already on the roll (and who for example may not be Australian citizens) are preserved by **item 6** which says the eligibility requirements will only apply to enrolment applications made after the commencement of **item 5**.

Returning officer

At present the electoral roll is maintained by a person appointed Returning Officer by the Administrator.²⁶ The Joint Standing Committee on The National Capital and External Territories has recommended in two recent reports that the AEC take over the creation and maintenance of the Norfolk Island electoral roll. **Item 39D** preserves the situation as it is at present.

Statute law amendments – Schedule 1 Part 2

Items 7-9 replace the masculine pronoun with gender-neutral language. **Item 10** makes a minor grammatical amendment that clarifies the powers of the Legislative Assembly that are contained in section 19 of the Principal Act.

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Concluding Comments

This Bill does not address the recommendation contained in both recent reports by the Joint Standing Committee on the National Capital and External Territories (Joint Standing Committee) that the Australian Electoral Commission (AEC) take over the supervision of Norfolk Island elections and referendums.²⁷ The *Explanatory Memorandum* to this Bill states that ‘this [recommendation] had not previously been considered by the Government and is still being assessed’.²⁸ The Government has not yet made public its response to the Joint Standing Committee’s report on Norfolk Island electoral matters that was tabled on 26 August 2002. The latest advice to the Speaker of the House of Representatives, dated 4 December 2003, is that the Government’s ‘response will be finalised following further consultations and considerations of Norfolk Island electoral reforms’.²⁹

The AEC has no statutory responsibility, under the *Commonwealth Electoral Act 1918*, for Norfolk Island Legislative Assembly elections.³⁰ The Legislative Assembly Act gives the Administrator of Norfolk Island the power to appoint a Returning Officer (section 11) and to maintain the rolls of residents of Norfolk Island (Schedule 2 and section 5). The functions that the AEC is permitted to perform are limited by section 7 of the *Commonwealth Electoral Act 1918* which states that the AEC may not perform functions that ‘a specified person, or body, or the holder of a specified office is expressly permitted or required to perform’.³¹ Both the Norfolk Island *Legislative Assembly Act 1979* and the *Commonwealth Electoral Act 1918* would need to be amended if the AEC were to take over supervision of Legislative Assembly elections. The *Aboriginal and Torres Islander Commission Act 1989* (at section 100) contains provisions that give specific functions to the AEC to conduct elections and might be useful as a model.³²

It is noteworthy that neither the Minister’s second reading speech, nor the *Explanatory Memorandum* to this Bill, mentions the passing in the Norfolk Island Legislative Assembly of a Bill to modify the enrolment qualifications, nor the reasons why the proposed changes have not been accepted by the Commonwealth Government.

Endnotes

- 1 Department of Transport and Regional Services, *Territories of Australia: Norfolk Island* (Population and citizenship) at www.dotars.gov.au/terr/norfolk/general.htm (site visited 12/1/2004).
- 2 Census data from 1996 also found that 2 per cent of the permanent population held UK citizenship and 1.5 per cent had other citizenship. (Government of Norfolk Island Submission no. 15 to the Senate Legal and Constitutional Legislation Committee Inquiry into the Norfolk Island Amendment Bill 1999, p. 23–25.) Norfolk Island is responsible for its own collection of census and statistics data.

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- 3 Joint Standing Committee on the National Capital and External Territories, *Quis custodiet ipsos custodes? inquiry into governance on Norfolk Island*, December 2003, p. 135.
- 4 *ibid.*, p. 138.
- 5 The following sections draw on information found in the recent report on *Norfolk Island electoral matters*, by the Joint Standing Committee on the National Capital and External Territories, dated June 2002. This report, and a subsequent report by the Committee on governance on Norfolk Island dated December 2003, also discuss in detail the constitutional status of the Territory (see endnote 27).
- 6 The Commonwealth also has authority to legislate in relation to eligibility to vote and candidature for the Norfolk Island Legislative Assembly under Section 122 of the Constitution.
- 7 *Statute Law (Miscellaneous Provisions) Act (No. 1) 1985*. The citizenship requirement for membership of the Legislative Assembly was abolished when references to ‘British subjects’ were being removed from various statutes. A similar amendment was made by the Legislative Assembly to the local law governing enrolment.
- 8 *Commonwealth Electoral Act 1918* s 99 (one month); (ACT) *Electoral Act 1922* s 72(1)(b) (one month); (NT) *Northern Territory Electoral Act 1995* s 28 (one month); (NSW) *Parliamentary Electorates and Elections Act 1912* s 20(6), 20(7) (real place of residence); (QLD) *Electoral Act 1992* s. 64(1)(b) (one month); (SA) *Electoral Act 1985* s 29(1)(c) (one month); (TAS) *Constitution Act 1934* ss 28, 29 (six months), (TAS) *Electoral Act 1985* s 22 (residence of one month for Assembly Subdivisions and Council Divisions); (VIC) *Constitution Act Amendment Act 1958* s 103(1) (one month); (WA) *Electoral Act 1907* s 17 (one month).
- 9 Norfolk Island Amendment Bill 1999 was introduced in the Senate on 31 March 1999 by Senator the Hon Ian Campbell. The Bill proposed to amend the *Norfolk Island Act 1979* in three areas: the appointment of Deputy Administrators, Commonwealth oversight of firearm legislation, and electoral matters.
- 10 Senate Selection of Bills Committee, ‘Report No. 6 of 1999’, Senate, *Hansard*, 21 April 1999, p. 749.
- 11 Senate Legal and Constitutional Legislation Committee, *Consideration of legislation referred to the committee: Norfolk Island Amendment Bill 1999*, August 1999.
- 12 *ibid.*, p. 25.
- 13 Senator Sue Mackay, ‘Second reading speech’, Norfolk Island Amendment Bill 1999, Senate, *Hansard*, 9 March 2000, p. 12491.
- 14 Joint Standing Committee on the National Capital and External Territories, *Norfolk Island electoral matters*, June 2002, p. 2–3.
- 15 Hon Geoff Gardner, Chief Minister of Norfolk Island, reported in *The Norfolk Islander*, vol 38, no. 17, 22 March 2003, ‘Assembly decides on electoral matters’.
- 16 ‘Assembly decides on electoral matters’, *The Norfolk Islander*, vol 38, no. 17, 22 March 2003.

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- 17 Hon David Buffett, reported in *The Norfolk Islander*, vol 38, no. 17, 22 March 2003, ‘Assembly decides on electoral matters’.
- 18 Hon Ron Nobbs, reported in *The Norfolk Islander*, vol 38, no. 17, 22 March 2003, ‘Assembly decides on electoral matters’.
- 19 Norfolk Island legislation may require the assent of the Administrator on the advice of the Norfolk Island Executive Council (Schedule 2 items), the Administrator on the advice of the Norfolk Island Executive Council with potential for Commonwealth Ministerial override (Schedule 3 items), or the Governor-General on the advice of the Commonwealth Government of the day (unscheduled items).
- 20 ‘Assembly decides on electoral matters’, *The Norfolk Islander*, vol 38, no. 17, 22 March 2003.
- 21 ‘Visit of Minister Wilson Tuckey’, *The Norfolk Islander*, vol 38, no. 23, 3 May 2003.
- 22 See Joint Standing Committee on the National Capital and External Territories, *Norfolk Island electoral matters*, June 2002, p. 22–29 and 38–43.
- 23 Senator the Hon Ian Campbell, ‘Second Reading speech’, Norfolk Island Amendment Bill 2003, Senate, *Hansard*, 4 December 2003, p. 18573.
- 24 Joint Standing Committee on the National Capital and External Territories, *Norfolk Island electoral matters*, June 2002, p. 37-38; Senator the Hon Ian Campbell, ‘Second Reading speech’, Norfolk Island Amendment Bill 2003, Senate, *Hansard*, 4 December 2003, p. 18573-4.
- 25 Elections for the Legislative Assembly must be held every three years. The last election was held on 29 November 2001.
- 26 Section 11 of the *Legislative Assembly Act 1979* (Norfolk Island).
- 27 See Recommendation no. 2 of the Joint Standing Committee’s report on *Norfolk Island electoral matters* (June 2002) and Recommendation no. 26 of their report on Norfolk Island governance entitled [*Quis custodiet ipsos custodes? Inquiry into Governance on Norfolk Island*](#) (December 2003)
- 28 *Explanatory Memorandum*, Norfolk Island Amendment Bill 2003, p. 3.
- 29 ‘The Speaker’s Schedule of Outstanding Government responses to Reports of House of Representatives and Joint Committees’, House of Representatives, *Hansard*, 4 December 2003, p. 23846. This report was tabled in the House of Representatives on 4 December 2003, the same day as this Bill, the Norfolk Island Amendment Bill 2003, was introduced in the Senate.
- 30 However, the AEC does have responsibility for those Norfolk Islanders who choose to enrol for federal elections under sections 95AA, 95AB and 95AC of the *Commonwealth Electoral Act 1918*. Once enrolled, voting in federal elections is compulsory, as for all other Australian citizens. The relevant provisions were enacted by Parliament in 1992 after consideration of AEC submissions by the Joint Standing Committee on Electoral Matters.
- 31 *Commonwealth Electoral Act 1918*, subparagraph 7(1)(a)(i).

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- 32 The *Workplace Relations Act 1996* also gives specific functions to the AEC to conduct elections.

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