



## Territories Law Reform Bill 2010

This is a new edition of a Bills Digest previously prepared for the 42<sup>nd</sup> Parliament

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## Territories Law Reform Bill 2010

**Date introduced:** 29 September 2010

**House:** House of Representatives

**Portfolio:** Regional Australia, Regional Development & Local Government

**Commencement:** Various dates. Sections 1 to 3 of the Bill commence on Royal Assent. Schedule 1, Parts 1 and 3 and Schedules 2 and 3 commence the day after the Act receives the Royal Assent. Schedule 1, Part 2 (electoral system changes) commencement is tied to the meeting of the Legislative Assembly after the first general election after Royal Assent. Schedule 1, Parts 4 (Administrative Appeals Tribunal changes) and 7 (privacy changes) and items 155 to 175 and 183 to 239 (freedom of information changes) commence on 1 January 2011. Schedule 1, items 176 to 182 (freedom of information changes) are dependent on the commencement of amendments under the *Freedom of Information Amendment (Reform) Act 2010*. Schedule 1, Part 6 (Ombudsman provisions) commences six months after Royal Assent if not earlier by proclamation.

**Links:** The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bills home page, or through <http://www.aph.gov.au/bills/>. When bills have been passed they can be found at the ComLaw website, which is at <http://www.comlaw.gov.au/>.

**This Bill lapsed on the proroguing of Parliament in July 2010. It has been re-introduced without significant changes.**

### Purpose

The main purpose of the Territories Law Reform Bill 2010 (the Bill) is to amend the *Norfolk Island Act 1979* to implement major changes to the governance, electoral and financial mechanisms for Norfolk Island.

The Bill in Schedules 2 and 3 also revises a vesting section of the *Christmas Island Act 1958* and the *Cocos (Keeling) Islands Act 1955*.

## Background

As a previous Bills Digest on Norfolk Island reform noted, the constitutional status and history of the Island is complex and unusual.<sup>1</sup>

In brief, the Island was unoccupied when mapped by Captain Cook in 1774, although evidence apparently exists of earlier Polynesian occupation. It was twice occupied by the British and used as a penal colony, in the periods 1788-1814 and 1825-1855. In 1856, descendants of Bounty mutineers who had intermarried with Polynesian islanders agreed with the British Government to move from Pitcairn Island to Norfolk Island. Between 1856 and 1897, Norfolk Island was a separate British colony with its own Governor, who was also the Governor of New South Wales. In 1897 the British Crown transferred administrative responsibility for Norfolk Island to the Governor of the colony of New South Wales, an arrangement continued in 1900 with the Governor of the new State of New South Wales. By combined British and Australian action in 1913 and 1914 the Island became a Territory under the authority of the Commonwealth of Australia.

## Partial Self Government since 1979

In the mid-1970s the Commonwealth held a Royal Commission into the future status of Norfolk Island, chaired by Sir John Nimmo. The Fraser Government responded by committing itself to a form of self government for the Island and in 1979 the Norfolk Island Act (NI Act) was passed by the Commonwealth Parliament. The NI Act functions as a quasi-constitutional document, setting out the institutions of legislative, executive and judicial power for the Island.

The Territory is administered by the Administrator, appointed by the Governor-General (effectively the Commonwealth Government). In forming certain opinions required under the Act, the Administrator must rely on his or her own judgement. In all other respects, the Administrator acts on advice. That advice comes from a variety of sources depending on the category of matter involved. In some instances, the Administrator is the senior representative of the Commonwealth on the Island, acting on the advice of the Minister for Territories. In other situations, the Administrator fills a role akin to the vice-regal function of a State Governor, acting on the advice of the Norfolk Island Executive Council or Legislative Assembly (both discussed immediately below). Finally, in some situations the Administrator refers matters to the Governor-General, who in turn acts on the advice of the Commonwealth Government.

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1. The following background paragraphs are extracted from S Brennan, *Norfolk Island Amendment Bill 1999*, Bills Digest, no. 11, 1999–2000, Parliamentary Library, Canberra, viewed 13 October 2010. <http://www.aph.gov.au/library/pubs/bd/1999-2000/2000bd011.htm>. That Bills Digest noted that the section was drawn mostly on historical summaries found in Commonwealth Grants Commission, *Report on Norfolk Island*, AGPS, 1997, pp. 14-16 and House of Representatives Standing Committee on Legal and Constitutional Affairs, *Islands in the sun: the legal regimes of Australia's external territories and the Jervis Bay Territory*, AGPS, 1991, section 7.3.

The NI Act creates an Executive Council 'to advise the Administrator on all matters relating to the government of the Territory'. Members of the executive (that is, Ministers) are appointed from the Legislative Assembly by members of the Assembly, and have authority over matters listed in Schedules 2 and 3 of the NI Act. There are currently 4 Ministers of the NI Government.

The NI Act also invests the Legislative Assembly of Norfolk Island with the power 'to make laws for the peace, order and good government of the Territory', subject to assent by the Administrator or the Governor-General as the case may be. There are 9 members of the Norfolk Island Legislative Assembly, elected from the Island voting as a single electorate numbering between 950 and 1200 people.

The legislative power of the Assembly is plenary (with four defined exceptions),<sup>2</sup> but the conditions attaching to assent as well as other forms of overriding legislative authority mean that the Commonwealth retains a significant influence over the laws enacted to apply in Norfolk Island. Laws about matters listed in Schedule 2 are at the heart of Norfolk Island self-government, because the Administrator assents or not to such laws on the advice of the Executive Council (the NI Government). Schedule 3 to the NI Act lists a smaller range of topics which in 1979 the Commonwealth Minister described as 'matters of particular sensitivity or national importance'.<sup>3</sup> Regarding assent to Schedule 3 laws, the Administrator appears again to act on the advice of the Executive Council, but importantly is subject to over-riding instructions from the Commonwealth Minister. Where a law relates to a matter in neither Schedule 2 nor 3, the Administrator reserves the law for the attention of the Governor-General (who will act on the advice of the Commonwealth Government). The Governor-General also has the power to make ordinances for the Island and to introduce legislation into the Assembly, although apparently this power has not been exercised since 1979. Finally the Commonwealth Parliament has the power to make laws which apply in Norfolk Island, but only if a Commonwealth Act expressly says so.<sup>4</sup>

## Basis of policy commitment

In recent years, the governance and financial framework of Norfolk Island has been the subject of a number of Commonwealth Parliamentary and other reports. One of the more comprehensive (and most relied on in the current Bill) was the 2003 report of the Joint Standing Committee on the National Capital and External Territories (Joint Standing Committee) entitled *Quis custodiet ipsos custodes? Inquiry into Governance on Norfolk Island* (the *Quis custodiet ipsos custodes* report).<sup>5</sup> This

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2. Subsection 19(2) of the Norfolk Island Act states that the power of the Legislative Assembly does not extend to the making of laws authorising the acquisition of property on other than just terms, euthanasia, the coining of money or the raising of a defence force.
  3. R Ellicott, 'Second reading speech: Norfolk Island Bill 1978', House of Representatives, *Debates*, 23 November 1978, p. 3312.
  4. Section 18, Norfolk Island Act.
  5. Other reports include: Commonwealth Grants Commission, *Report on Norfolk Island*, AGPS, 1997; House of Representatives Standing Committee on Legal and Constitutional Affairs, *Islands in the sun: the legal regimes of Australia's external territories and the Jervis Bay Territory*, AGPS, 1991; and Joint Standing Committee on the National

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report made extensive recommendations regarding improvements in governance and accountability for Norfolk Island including:

- reforms to the Norfolk Island electoral system
- incorporation of designations of Chief Minister and Ministers, and additional powers of dismissal
- adoption of a comprehensive financial accountability framework, including auditing and reporting requirements, and
- the extension to Norfolk Island of a comprehensive system of administrative law.

In September 2007 the Howard Government issued its final response to the *Quis custodiet ipsos custodes* report stating that while it had previously considered a reform program implementing recommendations from this report it had decided to defer such a program given assurances from the NI Government that it would continue its own program of economic and financial reform that would seek to improve the transparency and accountability for governance on the island.<sup>6</sup>

Norfolk Island reform was again on the political agenda in 2008 with the newly elected Labor Government, when the then Minister for Home Affairs, the Hon Bob Debus in a Ministerial statement to the House of Representatives, announced the Government's intention to reconsider the findings of the various Norfolk Island reports since 2003. The Minister stated:

In the coming months I will take a long-term strategic policy to the cabinet which will have the aim of securing the future of Norfolk Island as a sustainable, just and equal part of Australia into the 21<sup>st</sup> century.<sup>7</sup>

On 28 May 2009 the Minister made a further announcement stating that the Australian Government would introduce significant reforms to improve the governance of Norfolk Island and strengthen the accountability of the NI Government. The Minister noted that the Australian Government would continue to consult with the Norfolk Island community as part of this important process.<sup>8</sup>

The then Norfolk Island Chief Minister, Mr Andre Nobbs in response, stated that the NI Government welcomed the decision by the Commonwealth:

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Capital and External Territories, *The challenge: sink or swim*, Commonwealth of Australia, 2005. This 2005 report examined ways of achieving financial sustainability.

6. Australian Government, Government response to the Joint Standing Committee on the National Capital and External Territories' report: *Quis custodiet ipsos custodes? Inquiry into governance on Norfolk Island*, 2007, viewed 13 October 2010, <http://www.aph.gov.au/house/committee/ncet/norfolkgov/govresp.pdf>
7. B Debus (Minister for Home Affairs), 'Ministerial statements: Norfolk Island', House of Representatives, *Debates*, 23 October 2008, pp. 53–55, viewed 13 October 2010 [http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2008-10-23/0125/hansard\\_frag.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2008-10-23/0125/hansard_frag.pdf;fileType=application%2Fpdf)
8. B Debus (Minister for Home Affairs), *Open letter to the Norfolk Island community*, media release, 28 May 2009.

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[...] to share in our moves toward greater transparency and accountability and to work together for structural change which will strengthen our administrative and financial systems and lay the foundations for long term stability in our mutual relationship.<sup>9</sup>

Mr Nobbs indicated that the major areas of progress would be in establishment of an ombudsman service and a robust external audit function and design of a more modern and effective financial management framework.<sup>10</sup>

On 12 February 2010 the Commonwealth Government provided an Exposure Draft of the Territories Law Reform Bill to the NI Government and on 17 March 2010, the Bill was introduced into the 42nd Parliament.<sup>11</sup>

In introducing the Bill into the 43<sup>rd</sup> Parliament, the Minister for Regional Australia, Regional Development and Local Government and Minister for the Arts, Simon Crean concluded his second reading speech summarising the purpose of the Bill in this way:

The Norfolk Island reforms included in the Territories Law Reform Bill are a first step towards improving transparency and accountability in Norfolk Island governance and financial frameworks, and in administrative decision making.<sup>12</sup>

and that:

This Bill will provide Norfolk Island with the tools necessary to ensure ongoing stability and to sustain strong and effective self-government under the Norfolk Island Act.<sup>13</sup>

## Outline of the Bill

The Bill makes significant changes to the governance, electoral and financial mechanisms for Norfolk Island. Specifically these changes would:

- allow the Governor-General and the responsible Commonwealth Minister to take a more active role in the introduction and passage of Norfolk Island legislation including provision for:

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9. A Nobbs, *Norfolk Island self government achieves greater maturity and transparency*, media release, 29 May 2009.

10. Ibid.

11. Submissions on the exposure draft were initially required to be lodged with the Attorney-General's Department 9 days later on 25 February 2010, although this date was later extended to 16 April 2010. The Bill was introduced into the House of Representatives on 17 March 2010, the same day as the Norfolk Island general elections.

12. S Crean (Minister for Regional Australia, Regional Development and Local Government and Minister for the Arts), 'Second reading speech: Territories Law Reform Bill 2010', House of Representatives, *Debates*, 29 September 2010, pp. 84–87, viewed 12 October 2010.

[http://parlinfo.aph.gov.au/parlInfo/search/summary/summary.w3p;query=BillId\\_Phrase%3A%22r4461%22%20DataSet%3Ahansardr\\_hansards%20Title%3A%22second%20reading%22;rec=0](http://parlinfo.aph.gov.au/parlInfo/search/summary/summary.w3p;query=BillId_Phrase%3A%22r4461%22%20DataSet%3Ahansardr_hansards%20Title%3A%22second%20reading%22;rec=0)

13. Ibid.

- the Commonwealth Minister to give directions in Schedule 2 matters and to reserve Schedule 2 matters for the Governor-General’s consideration
- provide for the selection of, and prescribe the roles of Chief Minister and other Ministers including by:
  - limiting the number of Ministers that might be appointed
  - allowing removal of the Chief Minister by the Administrator in ‘exceptional circumstances’
  - limiting the power to allocate Ministerial portfolios to the Chief Minister
- enable regulations to be made for a code of conduct for members of the Norfolk Island Public Service
- provide that regulations can be made for changes to the process for the election of the Legislative Assembly
- provide for minimum and maximum fixed terms of the Legislative Assembly
- implement a contemporary financial management framework including provision for contemporary guidelines for financial reporting and budgeting and auditing of the Administration’s financial statements by the Commonwealth Auditor-General
- allow the Commonwealth Ombudsman and the Administrative Appeals Tribunal to operate on Norfolk Island and provide for merits review of decisions made by the Norfolk Island Administration, and
- apply the provisions of the *Freedom of Information Act 1982* and the *Privacy Act 1988* to information held by the NI Government and its administration.

## Committee consideration

The Bill was referred in the 42<sup>nd</sup> Parliament to the Joint Standing Committee on the National Capital and External Territories for inquiry and report by 11 May 2010 (the Senate Committee inquiry). The Committee in its report recommended that the Bill be passed. Other recommendations included:

- that amendments relating to elections, be removed from the Bill and deferred until 2011
- that the Attorney-General’s Department continue to consult with the NI Government, Administration and community on the content and time-frame of the various regulations
- that a review be undertaken of items under Schedules 2 and 3 of the NI Act
- improving the timeframe for Commonwealth scrutiny of Norfolk Island legislation.<sup>14</sup>

Details of the inquiry and report are at:

<http://www.aph.gov.au/house/committee/ncet/lawreformbill2010/index.htm>

The Bills Digest draws on submissions to the Senate Committee inquiry and on the Committee report.

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14. Joint Standing Committee on the National Capital and External Territories, *An advisory report on the Territories*



## Position of major interest groups

The Senate Committee inquiry received 16 submissions on the Bill. By far the most detailed and also most critical came from the NI Government.

**The NI Government** submission states that it recognises in principle the need for changes but that the Bill largely does not address the changes required and essentially does not improve the situation on Norfolk Island and that it is an inappropriate way to move forward. The submission recommends that further passage of the Bill should be deferred and there be further discussions between the Commonwealth and NI Governments about approaches and time frames regarding possible self-government reform.<sup>15</sup>

The submission lists seven areas of major concern with the Bill. Further detail of these concerns can be found under the various comment headings in the Main Provisions section of this Digest.

**Robin Adams**, former Clerk to the Norfolk Island Legislative Assembly and now Speaker of the Assembly is also critical of the Bill. She believes that the Bill undermines the Island's style of democracy and points to several changes in this regard including the proposed ability for the Commonwealth Minister to give directions in Schedule 2 matters and to reserve Schedule 2 matters for the Governor-General, and the proposal to fix the term of the Assembly to be no less than three years. Ms Adams states:

Our Westminster model of government has been tailored to work for us— a small community of around 1800 people, with 1100 voters at last count, and a small parliament of only 9 members. This combination means that our hybrid model of representative government, which is a mix of Westminster, consensus and Direct Democracy, can work. The Isle of Man and the Canadian Northwest Territories parliaments have a similar mix.<sup>16</sup>

**Ric Robinson, President of the Society of Pitcairn Descendants** supports the NI Government's submission arguing the Bill effectively removes self-government and that it is aimed not in the best interests of Norfolk Island but 'to create more control over us by Canberra bureaucrats and politicians'.<sup>17</sup>

However, not all submissions were critical of the Bill with some being more critical of the NI Government.

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*Law Reform Bill 2010*, Canberra, May 2010, pp. xv–xvi.

15. Government of Norfolk Island, *Submission to the Joint Standing Committee on the National Capital and External Territories: Inquiry into the Territories Law Reform Bill 2010*, April 2010, p. 4.

16. R Adams, Submission to the Joint Standing Committee on the National Capital and External Territories, *Inquiry into the Territories Law Reform Bill 2010*, p. 4.

17. R Robinson, Submission to the Joint Standing Committee on the National Capital and External Territories, *Inquiry into the Territories Law Reform Bill 2010*.

**Mike King**, Member of the Legislative Assembly and also the Norfolk Island Labor Party's only MLA, supports federal government intervention and is critical of the NI Government's opposition to it. He argues:

[...] the focus of local debate seems to have narrowed to the preservation of self-government in its existing form. There appears to be little recognition that the issues addressed in the Bill were canvassed extensively within the island community over many years leading to various JSCNCET (Joint Standing Committee on the National Capital and External Territories) reports; they are not new and they remain issues of concern. Whilst I am mindful that the Federal (Coalition) Government rejected many of the JSCNCET recommendations in 2006 in favour of assurances from the Norfolk Island Government, I accept both the Federal Labor Government's right to revisit the recommendations and the view adopted by Minister Bob Debus (and apparently by Mr Brendan O'Connor) that further formal examinations are largely unnecessary. If the Norfolk Island Government was able to demonstrate through its achievements since 2006 that it had delivered on its assurance to provide a sustainable future then it could rightfully claim ascendancy in the debate on the Bill. It cannot.<sup>18</sup>

Mr King, in his submission and evidence was highly critical of the current budgetary position of the NI Government since 2006 when the Government had undertaken to reform its financial management practices. He stated:

Measures to improve the budgetary position have failed in the extreme. Since 2006 the Government's general reserves have been steadily depleted; its quick ratio of liquidity (current realisable assets to current liabilities) falling from 1.2:1 to 0.4:1 clearly evidencing an inability to pay debts as they fall due. [...] The 'current cash balance' of the consolidated public account diminished by some \$9m in 2008/2009. A lay appreciation of this fall is that some \$3m can be attributed to the GFC (Global Financial Crisis) or the resultant decline in visitor numbers. The remainder of this fall can be sheeted home to excessive, improperly planned and managed and unbudgeted expenditure by the Government. There is ample evidence available to support claims that projects were not properly costed, that public procurement processes were not followed and that some expenditure was not warranted. These features reflect a distinct departure from any reform path and an abandonment of any concept of financial planning.<sup>19</sup>

**Malcolm Snell, vice-president of Norfolk Labor** was also critical of the financial management capacity of the NI Government and highlighted various issues in regard to financial management.<sup>20</sup>

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18. M King, Submission to the Joint Standing Committee on the National Capital and External Territories, *Inquiry into the Territories Law Reform Bill 2010*, p. 1.

19. Ibid, pp. 2–3.

20. Norfolk Labor, Submission to the Joint Standing Committee on the National Capital and External Territories, *Inquiry into the Territories Law Reform Bill 2010*, p. 1.

**EcoNorfolk** an environmental group, also agreed with the need for a new financial framework and electoral system stating:

We agree with Minister O'Connor that the amendments to the Norfolk Island Act 1979 to reform the electoral system and establish a contemporary financial management framework will assist the Norfolk Island Government in meeting the needs and expectations of our community and to plan for our future.<sup>21</sup>

## Financial implications

The Explanatory Memorandum states that the amendments in this Bill will have minimal financial impact but that there will be resource implications for Commonwealth agencies, such as providing training and information for Norfolk Island Administration and Government to ensure effective implementation of the Bill.<sup>22</sup>

## Key provisions

### Schedule 1 – Amendments relating to Norfolk Island

#### Part 1—Amendments to the Norfolk Island Act relating to governance arrangements

##### Administrator powers and functions

**Items 13, 14 and 17** amend **section 7**, the provision that deals with the Administrator's exercise of powers. The effect is to increase the Commonwealth Minister's power in providing advice to the Administrator. Under existing section 7, the Administrator must only act on Schedule 3 matters with the advice of the Executive Council and on any advice given by the Commonwealth Minister, (with the Minister's advice prevailing to the extent of any inconsistency). In relation to Schedule 2 matters, currently the Administrator must act on advice of the Executive Council (if such advice is given), but there is no provision for the Commonwealth Minister to provide advice. The effect of the amendments in **items 13, 14 and 17** is to provide that the Commonwealth Minister may also give advice to the Administrator on Schedule 2 matters and the Commonwealth advice must be taken over inconsistent advice from the Executive Council.

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21. EcoNorfolk Foundation Inc, Submission to the Joint Standing Committee on the National Capital and External Territories, *Inquiry into the Territories Law Reform Bill 2010*, p. 2.

22. Explanatory Memorandum, Norfolk Island Reform Bill 2010, p. 2.

## Comment

The Explanatory Memorandum states that these amendments will allow the Administrator to access a greater range of advice when presented with bills for assent dealing with Schedule 2 matters.<sup>23</sup> The NI Government on the other hand sees these amendments as intending to extend greater control to the Federal Minister at the expense of the NI Government noting also that no rationale is provided nor is there any evidence supporting the need for such a change.<sup>24</sup>

**Item 19** repeals and replaces **section 9** the effect being that the Commonwealth Minister can appoint one or more people jointly or severally to be the deputy or deputies of the Administrator. The deputy or deputies exercise powers and functions of the Administrator as assigned to them by the responsible Commonwealth Minister and are exercised during his or her pleasure. Currently there is scope for appointment of only one deputy. The Explanatory Memorandum states that this amendment will provide the Commonwealth with more options for a ‘replacement’ Administrator when the Administrator is unable to perform his or her duties.<sup>25</sup>

## Executive Council

**Item 21** repeals subsection 11(2) and substitutes a **new subsection 11(2)**. The **new subsection 11(2)** defines the Executive Council as consisting of the Chief Minister and such other Ministers as are appointed by the Administrator under section 13. This is effectively a change in terminology using the term Minister rather than Executive Member.

**Item 22 repeals subsection 11(8)**, the effect of repeal would be that Legislative Assembly members who do not hold executive office would no longer be able to attend all Executive Council meetings. The rationale for this repeal is that the current arrangement blurs the distinction between the executive and legislative arms of government.<sup>26</sup>

## Chief Minister and other Ministers—Appointment, termination and dismissal

**Item 23** repeals existing sections 12, 13 and 14 and substitutes **proposed sections 12, 12A, 13, 14 and 14A**. The provisions deal with the appointment, termination and dismissal of the Chief Minister and other Ministers.

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23. Explanatory Memorandum, p. 7.

24. Government of Norfolk Island, op. cit., p.21.

25. Explanatory Memorandum, p. 8.

26. Explanatory Memorandum, p. 8.

## Appointment

**Proposed section 12** provides that there is to be a Chief Minister and at least one, but not more than three Ministers and that the Ministers have executive authority for the matters specified in Schedules 2 and 3 of the NI Act. The amendments use the term ‘Minister’ rather than the current terminology which is ‘executive member’.

**Proposed section 12A** provides the process of nomination and appointment of the Chief Minister. The Legislative Assembly must, at the first meeting after a general election, nominate one of the Members to be the Chief Minister. The nomination of Chief Minister must occur after the election of the Speaker and Deputy Speaker, but before any other business. This provision essentially codifies the current practice.<sup>27</sup> **Proposed section 12A** also provides a process for filling vacancies in the office of Chief Minister

The Chief Minister is then appointed by the Administrator on advice of the Legislative Assembly (**proposed subsection 13(1)**). Other Ministers are to be appointed by the Administrator on the advice of the Chief Minister (**proposed subsection 13(2)**). This process is different to the existing section 13 in that the Administrator currently appoints all executive members on the advice of the Assembly.

**Item 26** inserts **proposed section 15A** and provides that the Chief Minister allocates ministerial portfolios. These administrative arrangements must then be published in the NI Government Gazette.

## Comment on appointment provisions

The Explanatory Memorandum states that these changes relating to appointment of Ministers were recommended by the *Quis custodiet ipsos custodes* report and that they correspond with the ‘process for appointing Ministers within the Westminster system of government.’<sup>28</sup> The limit on the ministerial numbers is intended to ensure effective backbench scrutiny of the Assembly’s business – four Ministers and four backbenchers, with the Speaker being the ninth member.<sup>29</sup>

The NI Government is not in favour of prescribing in legislation the maximum number of Ministers and notes that no other Australian jurisdiction places such limits on the sovereignty of the parliament and the need for flexibility in allocation of portfolios.<sup>30</sup> In regard to allocation of portfolios their submission states:

The Norfolk Island Government remains unconvinced as to the need for codifying or prescribing the operation of a Chief Minister and appointment of the Ministry. The

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27. Ibid., p. 9.

28. Ibid., p. 9.

29. Ibid., p. 9.

30. Government of Norfolk Island, op. cit., p. 29.

current system of executive members clearly establishes ‘responsible government’ in Norfolk Island in the true parliamentary sense of that term.<sup>31</sup>

### Tenure of executive office

**Proposed section 14** sets out the restrictions on the tenure of executive office. The Chief Minister and Ministers cease to hold office when:

- they resign, are disqualified, or are dismissed
- a notice about a general election is published under subsection 39AB(1)<sup>32</sup>
- the Legislative Assembly is dissolved by the Governor-General under section 39AC<sup>33</sup>
- the Legislative Assembly first meets after a general election that occurred after their most recent appointment to the office of either Minister or Chief Minister;

whichever happens first.

In addition, the Chief Minister ceases to hold office when the Legislative Assembly passes a resolution of no confidence in him or her (**proposed paragraph 14(1)(d)**).

**Proposed subsection 14A(1)** provides that the Administrator may dismiss the Chief Minister from office if, in the Administrator’s opinion, there are exceptional circumstances for doing so. Those exceptional circumstances are not defined in either the Bill or Explanatory Memorandum. The Administrator may dismiss a Minister (other than the Chief Minister) from office on the advice of the Chief Minister (**proposed subsection 14A(2)**). The Explanatory Memorandum rationalises subsection 14A(1) on the basis that the power is based on existing subsection 13(2) which provides that the Administrator can terminate any executive appointment on the basis of exceptional circumstances.<sup>34</sup>

**Item 39** inserts **proposed sections 39AA, 39AB** and **39AC** and deal with dismissal and dissolution of the Legislative Assembly and the bringing of a no-confidence motion in the Chief Minister.

**Proposed section 39AA** provides that the Administrator may dismiss a member of the Legislative Assembly from office if they have engaged in, or are engaging in, seriously unlawful or grossly improper conduct. This provision would work in addition to the current section 39, which provides that a member of the Legislative Assembly vacates their office if they become an undischarged bankrupt or are convicted of an offence and sentenced to imprisonment for one year or longer.

**Section 39AB** provides the process for holding a general election if there is a successful no-confidence motion in the Chief Minister, the Legislative Assembly does not appoint a new Chief

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31. Government of Norfolk Island, op. cit.: supplementary submission, p. 6.

32. **Proposed subsection 39AB(1)** deals with elections after a successful no-confidence motion in the Chief Minister.

33. **Proposed section 39AC** provides that the Governor-General may dissolve the Legislative Assembly if it is incapable of effectively performing its functions or is conducting its affairs in a grossly improper manner.

34. Explanatory Memorandum, p. 11.

Minister within a period of 10 days, and the Governor-General does not dissolve the Legislative Assembly within that period of 10 days. The section also provides that the Administrator exercises all the powers of the Administration, the Executive Council and Ministers in accordance with any directions from the Governor-General during the period between dissolution of the Legislative Assembly and the first meeting of the Legislative Assembly after the election.

**Proposed section 39AC** provides that the Governor-General can dissolve the Legislative Assembly if it is incapable of effectively performing its functions or is conducting its affairs in a grossly improper manner. The responsible Minister must publish a statement of reasons for the dissolution in the Commonwealth Gazette and the Norfolk Island Gazette as soon as practicable. The statement must also be tabled in both Commonwealth Houses of Parliament.

**Item 41** inserts **proposed section 42A** and establishes a non-confidence motion process for the Chief Minister.

### Comment on tenure of office provisions

Several of these provisions have been criticised by the NI Government and are worthy of scrutiny.

In relation to **proposed section 39AA** the NI Government states:

We are of the view that “unlawful conduct” or grossly improper conduct, should be determined by the courts, not the Administrator. Section 39 [...] already contains strong provisions in relation to disqualification of individuals from standing for election and from remaining in office in a range of circumstances, including conviction for unlawful behaviour. We see no reason for providing an unelected official with the ability to dismiss from the Assembly a member lawfully and democratically elected, other than those already provided in the Norfolk Island Act. This is especially so in light of the lack of definition of ‘grossly improper conduct’ and we suggest that this provision be removed from the Bill.<sup>35</sup>

The Senate Scrutiny of Bills Committee in its Alert Digest also questions this provision noting that it confers a broad discretionary power on the Administrator. It states:

The explanatory memorandum does not explain the need for this power, nor why it is not possible to specify with more precision the nature of the unlawful or improper conduct which may lead to its exercise.<sup>36</sup>

Another section that warrants scrutiny is **proposed section 39AC**. Currently there is no such mechanism for removing an unworkable Assembly. The Explanatory Memorandum does not explain

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35. Government of Norfolk Island, op. cit., p. 33.

36. Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, 5/2010, 12 May 2010, p. 44, <http://www.aph.gov.au/senate/committee/scrutiny/alerts/2010/d05.pdf>

the rationale for this new section. However, the *Quis custodiet ipsos custodes* report recommended giving the Administrator,<sup>37</sup> at his or her own discretion or on the advice of the Commonwealth Minister, the power to dissolve the Legislative Assembly where satisfied that the Assembly 'is incapable of effectively performing its functions, or is conducting its affairs in a grossly improper manner'.<sup>38</sup> In making this recommendation, the committee considered section 16 of the *Australian Capital Territory (Self-Government) Act 1988* to provide a useful model.<sup>39</sup>

## Law making powers

**Items 27, 28, 29, 32 and 35** make significant changes to the provisions in Part IV of the NI Act dealing with law making.

Schedules 2 and 3 of the NI Act list those items for which the Legislative Assembly may legislate. Section 21 of the Act requires the Administrator to give assent to bills dealing with Schedule 2 and 3 items following two processes, either on the advice of the Executive Council (for Schedule 2 matters) or on the advice of the Executive Council and the Commonwealth Minister with the Minister's instructions prevailing in matters of inconsistency (for Schedule 3 matters).

**Item 29** makes an amendment to the assent process for proposed laws dealing with Schedule 2 matters. It would amend **subsection 21(5)** to require the Administrator to assent to laws dealing with Schedule 2 matters acting on both the advice of the Executive Council *and* any instructions from the responsible Commonwealth Minister. In the event of inconsistency the Minister's instructions would prevail.

**Items 27, 28 and 35** make amendments relating to the Governor-General's authority. **Item 28** amends the assent process to also allow the Administrator to reserve a proposed law for the Governor-General's consideration (**proposed subparagraph 21(2)(a)(iii)**) subject to subsections 21(5) and 21(6). The stated purpose of this amendment is to allow the Administrator to refer laws to the Governor-General that may be controversial or represent a conflict of interest.<sup>40</sup>

**Item 27** inserts **proposed subsection 21(1A)** and provides that the Administrator must reserve a proposed law introduced by the Governor-General<sup>41</sup> for the Governor-General's attention. The purpose of this amendment is to allow the Governor-General to consider whether or not he or she agrees to any amendments made by the Legislative Assembly during passage.<sup>42</sup>

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37. **Proposed section 39Ac** confers this power on the Governor-General.

38. Joint Standing Committee on the National Capital and External Territories, *Quis custodiet ipsos custodes, An Inquiry into Governance on Norfolk Island*, December 2003, Recommendation 24, p. 133.

39. *Ibid.*

40. Explanatory Memorandum, p. 12.

41. Under existing section 26 of the NI Act the Governor-General has the power to introduce a proposed law.

42. Explanatory Memorandum, p. 12.



**Item 35** repeals **paragraph 27(1)(c)**. The effect of this repeal is to increase the Commonwealth's legislative powers and will allow the Governor-General to introduce a proposed law (and pass an Ordinance in the same terms as the proposed law if necessary) on any topic. Currently this power is restricted to Schedule 2 or 3 matters.

**Item 32** inserts **proposed section 26A** and provides that the responsible Commonwealth Minister may introduce a proposed law for the peace, order and good government of the Territory into the Legislative Assembly. The Explanatory Memorandum states that this change will increase the Commonwealth's legislative powers and could for example, be used to implement national policy objectives (such as those agreed at the Council of Australian Governments) and to ensure that Norfolk Island legislation is consistent with the national interest or Australia's international obligations.<sup>43</sup>

Existing subsection 67(2) provides that the Governor-General may make regulations to repeal, alter, or add a new item to Schedule 2 or 3 of the NI Act, but regulations repealing or altering an item in Schedule 2 may not be made unless a copy of the proposed regulations has been laid before the Legislative Assembly and receive Assembly approval. **Item 53** amends **subsection 67(2)** with the effect of removing the requirement for the Assembly to approve the repeal or amendment of items in Schedule 2. This effectively gives the Commonwealth control over the items listed in Schedule 2.<sup>44</sup>

### Comment on law making provisions

In its submissions to the Attorney-General's Department the NI Government made the following comments regarding these provisions as they appeared in the Exposure Draft:

We note that the Bill proposes to reduce the legislative powers of the Legislative Assembly and to give new powers to legislate to the Governor-General and the Commonwealth Minister. No rationale or explanation is given for these measures, which would reduce the ability of Norfolk Government to govern itself and erode the democratic right of Norfolk Islanders to elect representatives who can govern in the interests of the peace, order and good government of the Island.<sup>45</sup>

In further comment on the changes to the assent procedures, the NI Government noted that it remained concerned that the wholesale conversion of Schedule 2 matters to the assent procedures of Schedule 3 has the potential to impose systemic delays in the legislative process that will make self government unworkable. Nevertheless the NI Government notes the Commonwealth's concerns

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43. Ibid., p. 13.

44. Schedule 3 matters do not require Assembly approval. However the Explanatory Memorandum at p. 18 states that in practice the NI Government is consulted prior to the tabling of proposed regulations repealing, altering, or adding a new Item to Schedules 2 or 3.

45. Government of Norfolk Island, op. cit., p. 21.

that Norfolk Island legislation should be consistent with the national interest or comply with Australia's international interests.<sup>46</sup>

The Attorney-General's Department advised the Senate Committee inquiry that the changes relating to assent procedures respect self government and that the authority of the Commonwealth to provide advice on Schedule 2 matters under the Bill is a permissive not a mandatory provision.<sup>47</sup> The Department also noted that the amendments to the assent process for bills dealing with Schedule 2 items do not restrict the powers of the NI Government to pass proposed laws:

The Schedules simply indicate how the assent process provided for by section 21 of the Act is to operate.<sup>48</sup>

The Senate Committee inquiry report agreed with the Commonwealth Government in believing that Commonwealth Government oversight of Norfolk Island legislation is necessary in ensuring that Norfolk Island legislation is consistent with Government policy, the national interest and complying with Australia's international obligations.<sup>49</sup>

## Public Service rules and values

**Item 50** inserts **proposed sections 61A** and will allow the Commonwealth to prescribe by regulation, rules to be known as the Norfolk Island Public Service Values.

## Consequential amendments to other Acts

**Items 62 to 77** amend a number of other Commonwealth Acts. They are a consequence of the amendments relating to Norfolk Island governance arrangements described above.

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46. Government of Norfolk Island, op. cit.: supplementary submission, p. 5. Their evidence also noted that there is usually a period of six months or more for assent on Schedule 3 matters and was concerned that even in the circumstances where there is no conflict of views between the Assembly and the Commonwealth Minister' the proposed changes 'could make government nearly unworkable in Norfolk Island.' Government of Norfolk Island, op. cit., p. 20.
47. Attorney-General's Department, Submission to the Joint Standing Committee on the National Capital and External Territories, *Inquiry into the Territories Law Reform Bill 2010: Submission 7.1*, p. 19.
48. Ibid.
49. Joint Standing Committee on the National Capital and External Territories, *An advisory report on the Territories Law Reform Bill 2010*, May 2010, p. 29.

**Warning:** All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.

## Part 2—Amendments to the Norfolk Island Act relating to elections

### Term of Legislative Assembly

**Item 78** amends **subsection 35(2)** of the NI Act and stipulates the term of the Legislative Assembly to be a minimum term of three years and a maximum term of four years.<sup>50</sup> Currently there is no minimum term and the maximum term is three years. The minimum time of three years does not apply where the Commonwealth Minister or the Governor-General dissolves the Assembly according to **new sections 39AB** and **39AC (item 79, proposed subsection 35(3))**.

### Counting and casting votes for elections

**Item 81** inserts **proposed subsections 31(4)** and **(5)** to allow for the making of regulations prescribing the electoral system to be used in Norfolk Island Legislative Assembly elections and the filling of casual vacancies. It is of note that these would be Commonwealth regulations made under the Norfolk Island Act. These regulations would be subject to the usual scrutiny and disallowance procedures in the federal Parliament but not in the Norfolk Island Legislative Assembly.

**Proposed subsection 31(3)** enables the making of regulations prescribing the electoral system to be used in Norfolk Island Legislative Assembly elections as well as filling of casual vacancies to be determined via regulations.

**Item 83** inserts **proposed section 37A** and would enable the Chief Minister on behalf of the Norfolk Island Administration to make arrangements with the Australian Electoral Commission to conduct general elections on their behalf, as well as the filling of casual vacancies.

### Comment

The Explanatory Memorandum states that these reforms will give effect to the need for electoral reform identified by the *Quis custodiet ipsos custodes* report and that the use of regulations will allow flexibility in the choice and the timing of an electoral system suited to the community of Norfolk Island.<sup>51</sup>

The NI Government on the other hand, 'strongly opposes' change to voting and vote counting methods to be prescribed by Commonwealth regulations arguing that voting methods should be specified in the Legislative Assembly Act.<sup>52</sup>

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50. The amendment gives effect to recommendation 23 of the 2003 Norfolk Island report.

51. Explanatory Memorandum, p. 23.

52. Government of Norfolk Island, op. cit., p. 3.

In its consideration of the Territories Law Reform Bill introduced in the 42<sup>nd</sup> Parliament, the Senate Scrutiny of Bills Committee also raised concerns with these provisions stating:

Given the importance of the electoral laws to the integrity of any system of government, the Committee is concerned that these are matters more appropriately dealt with in primary legislation. The Committee seeks the Minister's advice about the justification for the proposed approach.<sup>53</sup>

The Senate Committee inquiry report also agreed that issues of a suitable electoral system are not insignificant and that there would be merit in delaying consideration of this part of the Bill to allow time for the Commonwealth Government to consult with the NI Government and community about the future electoral framework.<sup>54</sup> The Minister for Regional Australia, Regional Development and Local Government and Minister for Arts, Simon Crean, has said in his second reading speech that the regulations are to be 'developed in consultation with Norfolk Island'.<sup>55</sup>

### Part 3—Amendments to the Norfolk Island Act relating to finance

**Part VI** of the NI Act deals with finance. **Item 117** is a key amendment as it inserts a **new Division 2** entitled 'Financial Management and Accountability' into Part VI. The provisions in this new Division (**proposed sections 48A to 48T**) are aimed at providing a new financial framework for Norfolk Island.

**Proposed section 48A** requires the Norfolk Island Minister for Finance to prepare annual budgets for the Administration and Territory authorities. These annual budgets must be:

- prepared in accordance with regulations and Orders made under the NI Act or the Commonwealth Finance Minister's Orders
- tabled in the Legislative Assembly, and
- provided to the Administrator who must send them to the responsible Commonwealth Minister.

**Proposed section 48B** requires the Norfolk Island Minister for Finance to prepare annual financial statements for the Administration and Territory authorities as soon as practicable after the end of the financial year and then provide these statements to the Commonwealth Auditor-General for audit. The Commonwealth Auditor-General must prepare an audit report on these annual financial statements which must be provided to the Norfolk Island Minister for Finance, the Administrator

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53. Senate Standing Committee for the Scrutiny of Bills, op. cit., p. 44.

54. Joint Standing Committee on the National Capital and External Territories, *An advisory report on the Territories Law Reform Bill 2010*, May 2010, p. 68.

55. S Crean (Minister for Regional Australia, Regional Development and Local Government and Minister for the Arts), 'Second reading speech: Territories Law Reform Bill 2010', House of Representatives, *Debates*, 29 September 2010, pp. 84–87, viewed 12 October 2010.

[http://parlinfo.aph.gov.au/parlInfo/search/summary/summary.w3p;query=BillId\\_Phrase%3A%22r4461%22%20DataSet%3Ahansardr,hansards%20Title%3A%22second%20reading%22;rec=0](http://parlinfo.aph.gov.au/parlInfo/search/summary/summary.w3p;query=BillId_Phrase%3A%22r4461%22%20DataSet%3Ahansardr,hansards%20Title%3A%22second%20reading%22;rec=0)

and the responsible Commonwealth Minister (**proposed section 48C**). The audit report and financial statements must be tabled in both the Legislative Assembly and the federal Parliament by the relevant Ministers.

**Proposed section 48E** allows the Commonwealth Auditor-General to conduct performance audits of the Administration and Territory authorities. Copies of these performance audit reports are to be provided to the Norfolk Island Minister for Finance, the Administrator and the responsible Commonwealth Minister and are to be tabled in the Commonwealth Parliament and the Legislative Assembly. A copy of each report must also be supplied to those being audited—either the Chief Executive Officer (CEO)<sup>56</sup> or the relevant Territory authority manager/s.

**Proposed section 48F** requires the Commonwealth Auditor-General to seek comments on proposed performance audit reports required under section 48E. Comments are to be sought from those being audited and may also be sought from those with a special interest in the report (including a Norfolk Island or Commonwealth Minister). Comments are required within 28 days.

**Proposed section 48G** provides that the *Auditor-General Act 1997* (Cth) applies to audits by the Auditor-General under the NI Act, the effect being that the Auditor-General has all of the powers and functions necessary to undertake his or her obligations under the NI Act.<sup>57</sup>

**Proposed section 48H** requires the Norfolk Island Finance Minister to prepare periodic financial statements in relation to the Administration and each Territory authority. The statements must be prepared in accordance with regulations or the Commonwealth Finance Minister's Orders and must be tabled in the Legislative Assembly; and a copy provided to the Administrator who must send it to the responsible Commonwealth Minister.

**Proposed section 48J** requires the CEO to prepare annual reports as soon as practicable after the end of each financial year. The annual report must be prepared in accordance with regulations and the Commonwealth Finance Minister's Orders, and must report on the operations of the Administration and Territory authorities in that financial year. A copy of the annual report must be given to the Norfolk Island Chief Minister, who must table it in the Legislative Assembly, and provide a copy to the Administrator. The Administrator must then send it to the responsible Commonwealth Minister.

**Proposed sections 48K and 48L** provide for the Minister for Finance and/or the CEO to request, by written notice, a Territory authority to provide information in order to prepare the reports and statements required to be produced by them under the NI Act.

**Proposed section 48M** places an obligation on the CEO to ensure that he or she manages the affairs of the Administration in a way that promotes the proper use<sup>58</sup> of Administration resources.

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56. The Chief Executive Officer is appointed under the *Public Sector Management Act 2000* and is responsible for management of the public service.

57. Explanatory Memorandum, p. 31.

**Proposed section 48N** places a similar obligation on the responsible managers of a Territory authority to manage the affairs of the Authority in a way that promotes the proper use of resources.

**Proposed section 48P** requires the Norfolk Island Minister for Finance to ensure that the accounts and records of the Administration properly record and explain the transactions and financial position of the Administration. **Proposed section 48Q** is the equivalent provision relating to managers of a Territory authority. Both provisions require accounts and records to be kept for a period of time proscribed by regulation or the Commonwealth Finance Minister's Orders.

**Proposed sections 48R** and **48S** provide that regulations can be made in relation to:

- public money and public property of the Territory<sup>59</sup>
- money and property of Territory authorities<sup>60</sup> and
- other resources of both the Administration and Territory authorities.

**Proposed section 48T** allows the Commonwealth Finance Minister to make Orders in order to supplement and provide further detail of the financial framework provisions in Part VI of the NI Act. Significantly, if an enactment (i.e. any Norfolk Island law) is inconsistent with the Orders, the enactment has no effect to the extent of the inconsistency (**proposed subsection 48T(3)**).

**Item 119** repeals **sections 51, 51A, 51B, 51C, 51D, 51E, 51F** and **51G**. These sections are the existing audit provisions and are to be replaced by the amendments at **item 110** above.

**Item 119** also inserts **new Divisions 4, 5, and 6** which are summarised below.

**New Division 4** entitled 'Commonwealth Ministers to be kept informed' contains **new sections 51 to 51C**. **New sections 51 and 51A** require the Norfolk Island Finance Minister to provide the responsible Commonwealth Minister and Finance Minister with reports, documents and information relating to the operations of the Administration. **New sections 51B** and **51C** place similar obligations on the responsible manager/s of a Territory authority. The reports, documents or information provided to the Commonwealth Minister under these sections must be relevant to Part VI of the NI Act, related regulations, or the Commonwealth Finance Minister's Orders.

**New Division 5** entitled 'Commonwealth Financial Officer for Norfolk Island' contains **new section 51D** and enables the appointment of a Commonwealth Financial Officer at the discretion of the Governor-General.

**New Division 6** entitled 'Injunctions' contains **new section 51E** and provides a power for the responsible Commonwealth Minister to apply for a court injunction to enforce compliance with the financial management and accountability provisions.

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58. 'Proper use', is defined as 'efficient, effective and ethical use that is not inconsistent with the policies of the Administration (**proposed subsection 48M(3)**).

59. Defined in subsection 4(1) (**items 96 and 98**).

60. Defined in subsection 4(1) (**items 92 and 94**).

## Comment

The NI Government agrees in principle that a new financial framework is desirable, but that it should be established under Norfolk Island legislation and regulations.

In principle, we agree that a new financial framework is desirable but believe that wherever practicable this should be established under Norfolk Island legislation and regulations, not Commonwealth legislation. The Norfolk Island Government is prepared to cooperate in making the necessary changes in consultation with the Commonwealth.<sup>61</sup>

The Attorney-General's Department in their submission note that the details of the financial framework will be included in regulations and/or Commonwealth Finance Minister's Orders and that this is reflective of the current Commonwealth financial framework.<sup>62</sup> The Department also notes that a joint working group involving key players has been established to develop regulations relating to the new financial framework and that the NI Government and Administration 'will be given the opportunity to comment on draft regulations before they are registered'.<sup>63</sup>

The NI Government also has specific concerns about some of the provisions in Part 3 of the Bill. For example it considers it 'extremely inappropriate' that the Commonwealth proposes to use the threat and application of Federal Court injunctions as a means of enforcing financial management and accountability provisions and notes that no such provision exists in the ACT and the Northern Territory.<sup>64</sup> It also raised concerns about the intent and purpose of the position of Commonwealth Financial Officer stating 'this effectively again returns Australian rule prior to 1979'.<sup>65</sup>

Against this however, are findings in relation to governance on Norfolk Island Government such as those in the *Quis custodiet ipsos custodes* report of:

Inadequate auditing and public reporting falling short of even the most very basic of parliamentary and corporate governance standards.<sup>66</sup>

The Explanatory Memorandum states that the Commonwealth Financial Officer is intended to be an optional appointment, made in the event that the Governor-General is of the view that Norfolk

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61. Government of Norfolk Island, *op cit.*, p. 38.

62. Attorney-General's Department, *op. cit.*: submission 7.1, Question No. 7, p. 34.

63. Attorney-General's Department, *op. cit.*: submission 7.1, Question No. A, Attachment A, p. 1.

64. Government of Norfolk Island, *op. cit.*, p. 39.

65. Chief Minister David Buffett in evidence to the Senate Committee inquiry. Quoted in: Joint Standing Committee on the National Capital and External Territories, *An advisory report on the Territories Law Reform Bill 2010*, May 2010, p. 86.

66. Joint Standing Committee on the National Capital and External Territories, *Quis custodiet ipsos custodes, An Inquiry into governance on Norfolk Island*, December 2003, p. 17.

Island would benefit from Commonwealth assistance, for example in the implementation of the financial framework obligations under this Part of the NI Act.<sup>67</sup>

## Part 4—Amendments relating to the Administrative Appeals Tribunal

The *Administrative Appeals Tribunal Act 1975* (AAT Act) established a general administrative tribunal, the Commonwealth Administrative Appeals Tribunal (AAT), with power to review on the merits a wide range of administrative decisions.

**Schedule 1, Part 4** of the Bill (**items 126 – 154**) amends the AAT Act, the purpose being to confer on the AAT, merits review jurisdiction for specified decisions under Norfolk Island legislation.

**Item 132** is the central amendment in this Part.

Section 25 of the AAT Act establishes the authority of the AAT to review certain decisions. The Bill does not specify which Norfolk Island laws may be subject to AAT merits review. Consistent with its jurisdiction in relation to Commonwealth decision-making, the AAT will not automatically have jurisdiction to review all decisions under Norfolk Island legislation. Rather, **item 132** inserts **proposed subsection 25(2)** which provides authority to make regulations which confer jurisdiction on the AAT to review decisions made under a Norfolk Island enactment. See further comments below.

Other amendments in Part 4 of the Bill flow from **item 130** and **new subsection 25(2)**.

## Part 5—Amendments relating to freedom of information

Amongst other things, the Commonwealth *Freedom of Information Act 1982* (FOI Act) gives every person a legal right to obtain access to information in documentary form, which is in the possession of ministers or government agencies, subject to the operation of specific exemptions and exclusions.

**Part 5** of **Schedule 1** of the Bill (**items 155 to 239**) makes amendments to the FOI Act to extend the application of that Act to information held by the NI Government and Administration. The amendments are numerous and a few of them are described below.

Section 3 of the FOI Act sets out the objectives of that Act, including to ‘extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth...’. **Item 155** amends **subsection 3(1)** to extend this primary objective to also include community access to information in the possession of the Government of Norfolk Island.

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67. Explanatory Memorandum, p. 37.



**Item 156** amends the definition of **agency** in section 4(1) of the FOI Act to include ‘a Norfolk Island authority’ and a **Norfolk Island authority** is defined in **item 162** of the Bill. These are central amendments as their effect is to bring Norfolk Island authorities within the ambit of the FOI Act.

**Item 169** inserts **proposed section 4B**, explicitly confirming that the FOI Act extends to Norfolk Island. This provision is necessary to satisfy the requirements of section 18 of the NI Act.<sup>68</sup>

**Item 182** inserts **proposed section 10B**, its effect is to defer the application of the Part II agency publication scheme on Norfolk Island until 2 years after commencement of this section. The Part II agency publication scheme in the FOI Act places obligations on government to publish information about its activities in general, and about whether it holds certain kinds of documents.

**Item 185** inserts **proposed subsection 12(2)**, its effect is that the FOI Act right of access scheme will only apply to documents of a Norfolk Island authority and official documents of a Norfolk Island Minister that are 5 years old or less at time of commencement.<sup>69</sup>

As noted above, the FOI Act is subject to the operation of specific exemptions and exclusions. **Items 193–207** amend a number of the exemption provisions. The effect is generally to ensure that existing exemptions will apply equally to Norfolk Island.

**Items 208–224** also make amendments to ensure consistency so that provisions dealing with the various review processes have the same application on Norfolk Island as they do under federal law.

**Items 230–239** have a similar effect on the civil and criminal liability provisions (**sections 90, 91 and 92**).

## Part 6—Amendments relating to the Ombudsman

**Part 6 of Schedule 1** of the Bill makes only three amendments, the effect being to enable the Commonwealth Ombudsman to assume the function of the Norfolk Island Ombudsman under Norfolk Island legislation.<sup>70</sup>

**Item 240** inserts **proposed section 66A** into the NI Act. It provides that where the Commonwealth Ombudsman is required by enactment to give a report to a Norfolk Island Minister and table that report in the Assembly, the Norfolk Island Minister will also be required to give the report to the responsible Commonwealth Minister who must then table it in the Commonwealth Parliament.

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68. Section 18 of the Norfolk Island Act provides that for a Commonwealth Act to apply to Norfolk Island the Act must state that it extends to the Territory.

69. Subsection 12(2) does contain some exceptions to this 5 year rule.

70. The Attorney-General’s Department Submission at p. 8 states that the NI Government tabled the Norfolk Island Ombudsman Bill in the Assembly last year.

**Items 241** and **242** amend section 4 of the *Ombudsman Act 1976*. The effect of **item 241** is to extend the Commonwealth Ombudsman's authority to also include functions conferred on the office by a Norfolk Island enactment. **Item 242** inserts **proposed subsection 4(6)** which provides that the Commonwealth Ombudsman, in performing his or her functions under a Norfolk Island enactment, may be called the Norfolk Island Ombudsman.

## Part 7—Amendments relating to privacy

The Commonwealth *Privacy Act 1988* regulates the handling of personal information by the Australian Government, the ACT Government and the private sector. The Act contains a set of 11 Information Privacy Principles (IPPs) that apply to Australian Government and ACT Government agencies, and 10 National Privacy Principles (NPPs) that apply in the private sector.

**Items 244** to **296** amend the Privacy Act, the purpose being to extend the application of that Act to information held by the NI Government and Administration.<sup>71</sup> The amendments are numerous and some of the more significant are summarised below.

As already noted, IPPs include the principles for the collection, use and disclosure of personal information and regulate the activities of Australian Government public sector agencies. A key term is 'agency'. 'Agency' is defined in subsection 6(1) to include ministers, departments, federal courts and other bodies established for a public purpose. **Items 244** and **248** are key amendments. **Item 244** amends the term 'agency' in subsection 6(1) to include a Norfolk Island agency. A Norfolk Island Agency is further defined by **item 248**.<sup>72</sup>

The effect of these new definitions is to ensure that IPPs which apply to an agency under the Privacy Act will expressly apply to the NI Government and Administration.

**Items 267** and **268** make amendments relating to the IPPs. **Item 267** inserts a **new subsection 15(1A)** which provides that in relation to a Norfolk Island authority, the IPPs 1, 2, 3, 10 and 11 apply only in relation to information collected by an agency after commencement.

Other amendments have a similar effect of bringing Norfolk Island agencies within the ambit of the Privacy Act and ensuring consistency in treatment. For example there are:

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71. As the Explanatory Memorandum states, the provisions of the Privacy Act dealing with handling of personal information by the private sector already apply to Norfolk Island.

72. A Norfolk Island agency includes amongst others: a Norfolk Island Minister; a public sector agency, a body (incorporated or not), certain tribunals, established or appointed for a public purpose by a Norfolk Island enactment; a body established or appointed by the Administrator or a Norfolk Island Minister other than under a Norfolk Island enactment; a person holding or performing the duties of an office established by or under, or an appointment made under, a Norfolk Island enactment; a person holding or performing the duties of an appointment made by the Administrator of Norfolk Island, or a Norfolk Island Minister, other than under a Norfolk Island enactment; or a court of Norfolk Island.

- amendments of various definitions to include references to Norfolk Island<sup>73</sup>
- numerous amendments to insert references to ‘Norfolk Island Minister’ alongside references to ‘Commonwealth Minister’ to provide equal treatment and equal responsibilities for Norfolk Island Ministers under the Act (for example **item 269**).

### **Comment on administrative law reform (Schedule 1 Parts 4–7)**

In its supplementary submission to the Senate Committee inquiry, the NI Government commends the initiatives in the Bill which relate to personal rights and the ability of the community to access the services which relate to administrative appeals, freedom of information, the Ombudsman and privacy legislation. However the NI Government preference is that the development of this package should be implemented along the lines used to extend the powers of the Commonwealth Ombudsman to Norfolk Island. To this end it proposed that a working group be established to determine how to implement this program.<sup>74</sup>

The Attorney-General’s Department, in evidence argued against the establishment of working groups, noting that administrative law schemes are already well established at the Commonwealth level and that it is therefore efficient for the NI Government and community to access this expert knowledge, experience and resources.<sup>75</sup>

In its report, the Senate Committee inquiry into the Bill agreed with this advice noting that the idea of further working groups would only delay further the introduction of an effective administrative law package.<sup>76</sup>

### **No merits review of administrative decisions made under the Norfolk Island Act**

A further question of interest relates to the proposed reforms regarding AAT review.

Under the AAT Act, the AAT does not have a general power to review decisions made under Commonwealth legislation. Rather, the Tribunal can only review a decision if an Act or other legislative instrument provides specifically that the decision is subject to review by the Tribunal.<sup>77</sup> Neither the Norfolk Island Act nor regulations made under that Act provide for AAT review of administrative decisions made under the Act.<sup>78</sup>

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73. For example the definition of ‘Commonwealth contract’ under the Act would also include contracts to which the NI Government (or agency) is a party (**item 244**).

74. Government of Norfolk Island, op. cit.: supplementary submission, p. 1.

75. Quoted in: Joint Standing Committee on the National Capital and External Territories, *An advisory report on the Territories Law Reform Bill 2010*, May 2010, p. 107.

76. Ibid., p. 108.

77. AAT Act, section 25.

78. Although note that the AAT Act does extend to all external Territories (section 4).

The Bill in **Schedule 1 Part 4** provides authority to make regulations which confer jurisdiction on the AAT to review decisions made under a Norfolk Island enactment. There is no corresponding amendment that would enable merits review of administrative decisions made under the Norfolk Island Act and its delegated legislation (that is, decisions made under the Commonwealth laws). A question that might be asked is does the Bill go far enough? Merits review of administrative decisions by the AAT is seen as an important part of open and accountable government. Therefore, should the Bill extend merits review to certain administrative decisions made under the Norfolk Island Act and regulations by, for example, the Commonwealth Minister, by the Norfolk Island Administrator(s) or by the proposed Commonwealth Financial Officer?

## **Schedule 2 and 3—Amendments relating to Christmas Island and Cocos (Keeling) Islands**

**Schedules 2 and 3** of the Bill make identical amendments to the *Christmas Island Act 1958* and the *Cocos (Keeling) Islands Act 1955* respectively. The changes relate to section 8G of both Acts. **Item 1** in both **Schedules 2 and 3** repeal sections 8G and substitute **new sections 8G**.

Existing section 8G forms part of a set of provisions that apply Western Australian laws to Christmas Island and the Cocos (Keeling) Islands. Section 8G provides that, once Western Australian laws are applied to these Territories, the powers and functions under those laws are vested in the Commonwealth Minister. Section 8G also establishes a mechanism for the Commonwealth Minister to vest or delegate powers and functions under Western Australian law to Commonwealth officers, Western Australian Government officers and authorities, administration staff in the Territories, local government authorities and other qualified people.

The Attorney-General's Department submission notes that the **proposed new section 8G** achieves substantially the same outcome as the current version, but with several important changes. 'Most importantly the new provision will include an automatic vesting mechanism of certain powers.'<sup>79</sup>

## **Concluding comments**

Reaction to the Bill by the Norfolk Island Government and community has been strong, much of it adverse and consistent with the Island's 'rich history of civilised disputation with faraway rulers'.<sup>80</sup> While the Commonwealth has depicted the Bill as necessary to ensure ongoing stability and to sustain strong and effective self government, opponents on Norfolk Island have treated it as paternalistic and a threat to self-government. Much of the controversy over the Bill thus reflects the contested nature of Norfolk Island's relationship to the Commonwealth of Australia.

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79. Attorney-General's Department, op. cit, p. 9.

80. An article published in *The Norfolk Islander* of 24 April 1999 attributed this quote to 'a United Nations document more than 20 years ago'. This Digest draws on the phrase as used in S Brennan, op. cit.

This underlying tension may have been compounded by the short period between release of the Exposure Draft and introduction of the Bill into the 42nd Parliament. Against that, there is argument that the Bill comes as no surprise—numerous reports dating back to the 1990s have recommended change to improve the accountability of the Island’s Government and administration. In fact previous legislative reform proposed in 2006 had been set aside on an assurance that the Island would implement its own program of economic and financial reform and that it would seek to improve the transparency and accountability of governance on the Island. The Senate Committee inquiry received evidence that Norfolk Island is suffering serious economic and financial difficulties which would justify more legislative measures to improve the accountability and transparency of its financial framework.

The Bill includes quite significant governance reform proposals, some of which were recommendations of the *Quis custodiet ipsos custodes* report<sup>81</sup> and some of which are justified on the basis of providing a stronger Westminster styled democracy. However other powers arguably give the responsible Commonwealth Minister, the Governor-General and the Administrator significantly increased powers over law making and dismissal of elected representatives. Parliament may wish to ask for further explanation of why these provisions would enhance the transparency and accountability of the Norfolk Island Government.

A further source of tension over the Bill is its extensive reliance on the use of Commonwealth regulations to implement major reform. The Bill provides for Commonwealth regulations to be made to effect major changes to Norfolk Island’s financial framework, the electoral system, the Public Service Values and in introduction of merits review by the AAT. Draft regulations are yet to be released so it is therefore not possible to comment on the full impact of the Bill. The Commonwealth Government argues that use of regulations will provide greater flexibility and it has given assurances that regulations will be developed in consultation with the Norfolk Island Government. It is of note that these are *Commonwealth* regulations and while the federal Parliament could scrutinise them under the normal tabling and disallowance procedures, the Norfolk Island Assembly would not have such an opportunity. In relation to the regulations required for implementation of a new electoral system, two parliamentary Committees see difficulties with this process. One recommendation is that these provisions be removed from the Bill and considered at another time.

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81. The report considered that ‘the absence of formal and effective mechanisms of accountability and transparency, seriously undermine the quality of governance on the Island’: Joint Standing Committee on the National Capital and External Territories, *Quis custodiet ipsos custodes, An inquiry into governance on Norfolk Island*, December 2003, p. 50.

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