

Public Inquiry into the Norfolk Island Regional Council – 2021

Submission by Chris Nobbs, Ph.D.

7 May 2021

Part II: Attachments

- A. Nobbs, C., 2020a. "Legislative Changes on Norfolk Island since 2015: A Primer", 2 October.
- B. Nobbs, C., 2017. "Norfolk Island Regional Council process is flawed and must be fixed", letter in *The Norfolk Islander* and *Norfolk Online News*, 23 September 2017.
- C. Nobbs, C., 2020d. "The 2020 case for Controlled Immigration to Norfolk Island", *The Norfolk Islander* and *Norfolk Online News*, October.

Items previously provided to the Public Inquiry and not included here:

Sinnewe, E., Kortt, M.A., Dollery, B. and Hayward, P., 2015. "Three of a kind? The special case of Australia's island councils", *Economic Papers*, 34 (3), 150-64.

Nobbs, C., 2020b. "The Capacity of Norfolk Island to Raise Revenue - Description of and Commentary on the Commonwealth Grants Commission 2019 Norfolk Island Inquiry", 23 May.

Nobbs, C., 2017. *Australia's Assault on Norfolk Island 2015-16: Despatches from the Front Line*. Amazon. Book.

Nobbs, C., 2019. *Australia's Assault on Norfolk Island 2017-18: Fateful Choices*. Amazon. Book.

Attachment A

Legislative Changes on Norfolk Island since 2015: A Primer

1. In Olden Days: The Commonwealth's *Norfolk Island Act 1979*

The Commonwealth's *Norfolk Island Act 1979* established the Norfolk Island Legislative Assembly (consisting of nine members, elected by island-suffrage every three years), a Norfolk Island Government to be drawn from the elected members and with certain powers, and a parallel public service. The Act set out three categories of powers:

- (i) Powers transferred to Norfolk Island as listed in Schedule 2 to the Act. Any matter under this head, having been debated and passed in the Legislative Assembly, could be approved by the Executive Council consisting of the Norfolk Island Government Ministers and including the Administrator as Chair. In this body the Administrator could tender advice but had no vote. The Administrator was required to recommend to the Governor General that the proposed legislation be agreed, although provision was also made for the Administrator, as the delegate of the Governor General, to give or withhold consent to the legislation. (With the passage of the Commonwealth's *Territory Law Reform Act 2010* the Commonwealth granted itself as *government* the authority to veto laws made by the Legislative Assembly);
- (ii) A short list of items, listed in Schedule 3 to the Act, and associated with the Commonwealth tier of government. In such matters the Legislative Assembly could pass laws, but with final assent at the discretion of the Commonwealth Minister. In its initial form the Act specified four items in Schedule 3, namely: fishing, customs (other than the imposition of duties), immigration, and education; and
- (iii) The balance of items, referred to as the 'retained function', were unlisted and retained in the authority of the Commonwealth. The Legislative Assembly had the capacity to initiate laws in this category, but these could only receive Assent via the Commonwealth Minister and the Governor-General.

The initial form of the Act and its Schedules, can be found at the Federal Register of Legislation.¹

2. The Commonwealth's *Norfolk Island Legislation Amendment Act 2015*

The passage of the *Norfolk Island Legislation Amendment Act 2015* (NILAA) in the Australian Parliament ushered in the most far-reaching changes in Norfolk Island in over a third of a century. The NILAA gutted most of the content of the pre-existing *Norfolk Island Act 1979* and the limited self-government that this Act had given to Norfolk Island, and replaced its content with the description of a form of government directed by Canberra and with a manner of local government for Norfolk Island constructed along NSW local government lines. The Amendment Bill was described in its Explanatory Memorandum thus:

The Bill abolishes the NI Legislative Assembly and Executive Council and replaces them with a NI Advisory Council appointed to support the transition to an elected NI Regional Council. The Regional Council is to commence on 1 July 2016. New South Wales (NSW) laws will apply on NI from 1 July 2016 and that State will deliver services and administer laws following agreement between NSW and the Commonwealth.

And further:

The Bill provides for consequential amendments to numerous Acts, including omitting references to the territory of NI, extending legislation to NI and amending or repealing relevant definitions.²

The NILAA was the Act that removed the Preamble to the *Norfolk Island Act 1979* which reflected the importance of the Pitcairn heritage to Norfolk Island. No explanation was offered for the necessity this removal, which was felt keenly and painfully by many on Norfolk Island. All that the Explanatory Memorandum to the Bill could offer was the statement: 'the preamble no longer reflects the Parliament's intention for the governance of Norfolk Island' (p. 15). Schedules 2 and 3 of the original Norfolk Island Act 1979 were, of course, deleted in their entirety.

To these purposes, and as a consequence of the passage of the *Territories Legislation Amendment Act 2016*, the 6 July 2016 compilation (No. 16) of the *Norfolk Island Act 1979* added the following amendments into Section 18 of that Act for the first time:

(i) identifying that all Commonwealth Acts extend to Norfolk Island except as provided otherwise. This reversed the earlier provision that Commonwealth Acts extended to Norfolk Island only if declared to do so. Thus:

Section 18 Application of Commonwealth Acts

(1) An Act or a provision of an Act extends to the Territory of its own force except so far as the Act or another Act expressly provides otherwise.

(ii) identifying that all NSW laws in force extend to Norfolk Island (see further below). These laws would however need to be applied as Commonwealth laws: Norfolk Island being an external territory dependent from the Commonwealth.

Section 18A Application of New South Wales laws

(1) Subject to this section and section 18B, the provisions of the law of New South Wales (whether made before or after the final transition time), as in force in New South Wales from time to time, are in force in the Territory.³
(section 18B relates to vesting and delegation)

Many of the laws passed by the Norfolk Island Government between 1979 and 2015 remain in effect. However as a consequence of the two declarations just detailed, where any Norfolk Island law is in conflict with Commonwealth law the latter prevails, and where in conflict with applied NSW law the former prevails. In addition, the fact that Norfolk Island laws remain in effect does not preclude the Commonwealth from changing them howsoever they may wish.

In parallel with these Commonwealth developments, the New South Wales Parliament in June 2016 passed the *Norfolk Island Administration Act 2016 (NSW)* which authorised the NSW government to enter into arrangements with the Commonwealth to provide services and exercise functions in connection with the administration of Norfolk Island.

(Note: To follow good legal practice, the names of laws are succeeded by an indication – in brackets – of the jurisdiction in which they exist. Thus Commonwealth laws (*Cth*), NSW laws (*NSW*), Norfolk Island laws (*NI*). This convention will be followed from here on.)

3. Commonwealth Ordinances

As a general rule Commonwealth legislation considered relatively minor does not come onto the floor of the Australian Parliament for debate in the way in which major bills do. Rather it is handled as "delegated legislation" i.e. legislative power is delegated by the Parliament to the Executive – the Prime Minister and Cabinet – under a specific Act. Delegated legislation includes the making of regulations, statutory rules, ordinances, standards etc. Under this approach the proposed legislation must be tabled

for a period in each House to allow parliamentary scrutiny, and can be disallowed by a motion agreed to by either House.

Commonwealth legislative change in relation to Norfolk Island is commonly made by ordinance, the legitimacy of which is established in Clause 19(A) of the original *Norfolk Island Act 1979 (Cth)* and which has been retained to this day.

Prior to 2015 the Norfolk Island Government under the *Immigration Act 1980 (NI)* maintained control of migration to Norfolk Island and provided a path to permanent residency on the island for those desiring it. This enabled the Government to keep some balance between employment supply and demand on the island, and to try to ensure that newcomers would fit into the island community. In 2015 the *Norfolk Island Continued Laws Ordinance 2015 (Cth)* (Schedule 2) repealed in total the ability of Norfolk Island to control migration to the island i.e. the *Immigration Act 1980 (NI)* was cancelled. No controls now exist in difference from those of Australia. This has serious repercussions for the island, particularly in regard to management of the island, its environment, and its resources. (See further Chapter 7).

It is the *Norfolk Island Land Transfer Ordinance 2016 (Cth)* (Section 4) which allowed the Commonwealth Minister to transfer Norfolk Island interests in land to the Commonwealth (and *vice versa*) by "writing signed by the Minister", and in parallel the *NILAA 2015 (Cth)* (Sections 358 and 362) allowed the vesting of other Norfolk Island assets in the Commonwealth. These were the two instruments by which the Commonwealth took possession of the land and assets of the Norfolk Island Hospital, Norfolk Island Central School, and Police Station – all paid for by the Norfolk Island community itself, and cherished symbols of their values and commitments – and of most of the land comprising the KAVHA area, without other acknowledgement or compensation, and which caused significant distress on the island.

Another contentious legislative change was the removal of the right of non-Australian Norfolk Island residents to vote in local elections on Norfolk Island. In olden days, permanent residents of the island from whatever country (and in particular New Zealand and the UK) were welcomed as part of the community to cast their ballots in local elections. Since 2016 this has not been permitted under applied NSW law, which requires as a prerequisite that individuals not only reside on Norfolk Island but in addition be on the Commonwealth electoral roll (which requires Australian citizenship or a *laissez-passer* for British subjects based on their 1984 status). The residency qualification for the right to vote on the island is now one month. Non-residents of Norfolk Island who own or lease rateable property on the island can also vote provided they are registered on a supplementary roll maintained by the local authority's general manager (GM). This NSW applied law requirement however is merely that state's choice: it is not an inevitability. In South Australia the law provides for a local authority's GM to maintain in the supplementary local authority roll, the names of those residents who have applied to vote but are not enrolled as electors for state elections.⁴ That perspective would be much more sympathetic to Norfolk Island's traditionally welcoming and open approach to community representation.

Following the passage of the NILAA, the Commonwealth under the *Norfolk Island Applied Laws Ordinance 2016 (Cth)* (Composition No. 1, registered 26/7/2016) temporarily suspended the application of all NSW laws to Norfolk Island for six months (from 1 July 2016 until 1 January 2017) – with the exception of four such laws: the *Local Government Act 1993(NSW)* (as the *Local Government Act 1993(NSW)(NI)*), and the *Health Services Act 1997(NSW)*, together with the *Interpretation Act 1987(NSW)* and the *Long Service Leave Act 1955(NSW)*. The explanation given for the suspension was that it was 'intended to allow further negotiations with the NSW government for its officers and employees to perform functions and to provide services in relation to Norfolk Island'.⁵ In a further move under this Ordinance registered on 29 November 2016, the Commonwealth extended the suspension of the unnamed NSW laws until 1 July 2018. In a further change registered on 4 April 2018, some NSW industrial relations laws were extended to Norfolk Island to apply to NSW officials and service

providers on Norfolk Island; and on 4 June 2018 the status quo at that date was extended until 1 July 2021.

The reasons for these actions taken by the Commonwealth are unclear. Perhaps the plan all along was to implement only selected NSW laws? Or perhaps the Commonwealth had recognised that the application of NSW laws across the board would be grossly inappropriate, as well as being too complex and too costly for a small isolated island e.g. *Government Railways Act 1912 (NSW)*? (The NSW Government lists over 950 Acts currently in force in NSW, the wholesale imposition of which would likely provide a feast for lawyers, increased costs to Norfolk Island, and little or no benefit to the island.) The application of all NSW laws to Norfolk Island on 1 July 2021 – as presently envisaged – is a recipe for chaos.

4. Provision of services on Norfolk Island

With regard to responsibility for the provision of services on the island, the logic of the foregoing legal changes determined that:

- o the Commonwealth would in future determine what manner of Commonwealth-type services would be provided to Norfolk Island, and provide them through the Department of Infrastructure, Transport, Regional Development and Communications (DITRDC) as the coordinating department;
- o the Commonwealth would in future determine what manner of state-type services would be provided to Norfolk Island (through NSW legislation applied by the Commonwealth to Norfolk Island), and provide them through NSW departments answerable to DITRDC as the coordinating body;
- o Norfolk Island Regional Council (NIRC) would in future provide local-government-type services, together with some Commonwealth- and state-type services under Service Delivery Agreements (SDAs) with the Commonwealth.

The allocation of responsibility for services provision to Norfolk Island is set out diagrammatically on DITRDC webpage 'Government Services on Norfolk Island' and is reproduced here as Annex I. This tabulation can be compared with the Schedules 2 and 3 of the original *Norfolk Island Act 1979 (Cth)*. (q.v.) The wholesale removal of the Norfolk Island community's abilities to control decisions about its own future is breathtaking.

5. NSW government withdrawal from services provision

The NSW Government, following its adoption of the *Norfolk Island Administration Act 2016 (NSW)*, announced that it would enter into a five-year Agreement with the Commonwealth to provide a limited range of services to Norfolk Island, including health and education, from July 2016 to June 2021. However in mid-2018 the NSW Government advised the Commonwealth that NSW would not renew this Agreement beyond June 2021. This appears to have set off a flurry of activity within DITRDC, of which little is known publicly. However it is known that they approached the ACT Government amongst others to find out whether they would be prepared to take over these responsibilities from the Government of NSW.⁶ All such overtures have so far been rejected, it is understood.

On 4 September 2020 the Minister for Regional Development and Territories issued a media release announcing that the NSW Government had agreed to extend school services on Norfolk Island to the end of 2021. To the great concern of families on Norfolk Island over the uncertainties and disruptions caused to students' education and staff careers over the past two years – let alone the future – the Minister could only offer: 'The Australian Government continues to develop arrangements for future service delivery'.

It is not known publicly why the NSW government has chosen to withdraw from service provision to Norfolk Island. However we might glean some possibilities from a consideration of the debates in the NSW legislature that accompanied the passage of the *Norfolk Island Administration Act 2016 (NSW)*. The Bill was introduced in the NSW Legislative Council on 4 May 2016 by Hon. Sarah Mitchell from the government (Liberal) benches. The government believed that the NSW Government provided 'a strong track record of high-quality service delivery in health and education' and that it 'welcomed the opportunity to continue to work with the community of Norfolk Island'. Government caveats were expressed however with regard to any service provision arrangement being 'reviewed regularly' and that any activity undertaken 'will be on a cost-recovery basis'. Mr Michael Daley, primary spokesperson for the opposition Labor Party in the Legislative Assembly did not support the Bill, particularly as it was short on detail in such matters as regarding 'the responsibility for Norfolk Island remaining with the Commonwealth Government' and the 'no net cost for New South Wales' requirement. He recalled 'the continuing disagreement between the States and the Commonwealth governments about funding for health and education on mainland Australia' and stated his primary concern thus: 'It may be that the remuneration offered by the Commonwealth Government is, in its view, adequate to undertake those tasks, but not in the view of the New South Wales Government'.⁷

Following debate the Bill was passed by the NSW Parliament. If in fact Mr Daley's primary concern latterly became that of the NSW Liberal government as well, it may be that the highly successful and mutually beneficial 123-year partnership between the NSW Education Department and the Norfolk Island Central School has been wrecked upon the rocks of Commonwealth folly.

Furthermore it needs to be noted that there is no evidence currently available from the Commonwealth that would indicate that the provision of medical services on Norfolk Island beyond 2021 will not descend into a similar mess.

6. Legal distribution of power on Norfolk Island

Another Norfolk Island Act that has been eviscerated as part of the new regime and put to new purposes is the *Interpretation Act 1979 (NI)*. Amongst other things this Act now identifies that:

- (i) all powers previously held by Norfolk Island Ministers (in the Norfolk Island Legislative Assembly) and the Norfolk Island Administrator, have passed to the Commonwealth Minister responsible for Territories; and
- (ii) in making any decision, the Commonwealth Minister is not obliged to consult with anyone on Norfolk Island viz.:

*(2) The Commonwealth Minister may exercise the power or perform the function or duty without receiving or following the authority's recommendation about the matter or approval of the matter.*⁸

Under the Norfolk Island Delegation Instrument 2019 (legitimised under the *Interpretation Act 1979 (NI)*) the Commonwealth Minister can delegate many of that position's responsibilities under Commonwealth Acts. The instrument signed 9 December 2019 by the current Minister is a document of nine pages in length which sets out to whom the Minister can delegate functions under 87 different Commonwealth Acts extant on Norfolk. In the vast majority of these cases, the Minister's primary delegate is the Norfolk Island Administrator, followed by the Deputy Secretary of the Territories Branch in DITRDC, and followed by the Director of the Territories Branch of the Department.⁹

At this point it is salutary to remind ourselves of the fact that these persons are Commonwealth bureaucrats, and with the conceivable exception of the Administrator, behind desks in Canberra 1,900km away, with little or no experience of life on Norfolk Island, and to whom Norfolk Islanders have little or no recourse. It also highlights the extraordinary powers held by the Minister, and the Administrator, over Norfolk Island (of which more below).

7. The Regional Council under the current regime

Given the fact that Norfolk Island residents are represented in the Australian Parliament by the member for Bean, a southern suburb of Canberra, and are not represented at all in the NSW Parliament whose laws they are subject to, the only real representative body that now exists on Norfolk Island is the Regional Council of five councillors. This in itself is shocking in both efficiency and democratic terms. All power with regard to anything but minor functions on Norfolk Island has been re-routed to Canberra. Key Acts under which the NIRC operates on a daily basis are the *Local Government Act 1993 (NSW)(NI)* and the *Planning Act 2002 (NI)*. The *Local Government Act 1993 (NSW)(NI)* came into operation on 1 July 2016. In its present form it is a grossly inappropriate Act for Norfolk Island. This is because, amongst other reasons, the sharp distinction made in the Act between policy matters (which are supposedly the preserve of the elected councillors) and operational matters (which are supposedly the preserve of the administration management). Such a sharp separation is absurd, inefficient and dangerous, as policy and practice commonly overlap. Particularly is this so in the case of Norfolk Island where the NIRC has such a wide range of responsibilities, relating to telecommunications, electricity supply, harbours and so on. The Act has also established a barrier between councillors and council staff, and community and council staff, and decreased the public accountability of the latter.¹⁰

In January 2017 the Commonwealth amended the *Local Government Act (NSW)(NI)* to require that Norfolk Island raise a minimum revenue from land rates for the year ending 30 June 2017 of \$500,000 and for any later year of \$1,000,000. Despite the concerns expressed by many traditional land owners on Norfolk Island – for whom land is more than a mere fungible asset – it is not known that any alternative revenue-raising methods were examined before this edict was made.

The *Planning Act 2002 (NI)* is another of those Acts gutted by the Commonwealth and reconstituted to reflect the altered governance regime. It is a key Act for the NIRC and for Norfolk Island as it controls all development on the island.

In olden days the Norfolk Island Government was in charge of planning decisions, being advised by a Planning and Environment Board established by the relevant Minister, and which had the power to engage in public consultation on any matter referred to it. (*Norfolk Island Planning and Environment Board Act 2002 (NI)*). The Commonwealth Minister was however the final arbiter in such decisions.

Under the Planning Act as it currently exists:

- o The Norfolk Island Plan is prepared by the Minister (or his/her delegate), and approved by him/her after public consultation [Act, Part 2];
- o Development control plans under the Norfolk Island Plan are prepared by the Minister (or his/her delegate); and approved by him/her after public consultation [Act, Part 3];
- o The process of consideration of development applications is the responsibility of the GM, however all applications must go to the NIRC for approval and be signed off by the Minister (or his/her delegate) [Act, Part 5, Division 2];
- o Infrastructure projects deemed to be "significant developments" must be referred by the GM (with a report) to the NIRC which, following consideration and preparation of its own report, must refer it to the Minister (or his/her delegate) for decision [Act, Part 3A], which is not appealable or reviewable further on-island;
- o The Administrator has the authority to make regulations prescribing a wide range of issues relevant to the Act [Act, Section 100].

- o The Minister can delegate any of his/her powers under the Act to any specified person, or holder of a specified office or position [Act, Section 92].

Quite apart from powers on Norfolk Island under Commonwealth law (as identified above in Section 6 above), the Minister and Administrator have almost unlimited powers under the local government laws as well. The NIRC's independence of thought and action has been almost extinguished. Furthermore with the removal of Vice-Regal powers in relation to Norfolk Island (by the NILAA), it is unclear whether or not the Norfolk Island Administrator merely exercises functions at the behest of DITRDC (as well as the Minister). In addition the independent presence of DITRDC's own staff on the island continues to augment, with answerability to no one on the island apart from, possibly, the Administrator.

Since 2015 there have also been important changes in other laws impinging on sectoral matters, including biosecurity and KAVHA.

Biosecurity. Over the period 1979 to 2016 the control of biosecurity was exercised under three Norfolk Island Acts: the *Plant and Fruit Diseases Act 1959 (NI)*, *Animals (Importation) Act 1983 (NI)*, and *Stock Diseases Act 1936 (NI)*. The very high phytosanitary and animal health standards maintained on the island over these years – and in earlier years – was identified by the Norfolk Island Quarantine Survey 2012-14, carried out by the then Commonwealth Department of Agriculture.¹¹ The Commonwealth Government recently acknowledged Norfolk Island's 'unique biosecurity status'.¹²

Following the change of regime, these laws were scrapped and Norfolk Island came under the Commonwealth's *Biosecurity Act 2015* (in force on Norfolk from 1 July 2016). It is not apparent that those charged with developing this Act ever consulted with Norfolk Island representatives about the island's needs, either in the formulation of the Bill or in the subsequent phase of explanation and consultation with clients and stakeholders. The effect of this Act has been to divorce biosecurity decisions from those who have had to live by the decisions taken, and installed in its place a regime to the Commonwealth's convenience. There has been an overall decline in the level of biosecurity protection on the island, as exemplified by issues arising in relation to: increased permissible import of fresh fruit and vegetables, relaxation of honey and bee product import standards (particularly serious in view of the proposal for a Norfolk Island bee sanctuary), abolition of ruminant imports (except for high-cost artificial insemination), decreased level of ship freight inspections, the winding back of the fruit fly monitoring programme, and the withdrawal of airport detection dog. What Norfolk Island needs as a fundamental requirement is its own biosecurity zone, determined on the basis of island's economic, environmental and risk needs. This case has been argued elsewhere.¹³

KAVHA. As a World Heritage Area, it is the Commonwealth Department of the Environment and Energy that is the Australian government organisation with responsibility to UNESCO, for the conservation, preservation and management of the Kingston and Arthur's Vale Historic Area (KAVHA) under the *Environmental Protection and Biodiversity Conservation Act 1999* (EPBC Act). As the Commonwealth owns most of the land and buildings in the KAVHA area, DITRDC is the current responsible department. The DITRDC Minister's delegate with regard to Norfolk Island is the Administrator, who thereby has overall responsibility for Commonwealth properties in the KAVHA area. Whereas previously the Commonwealth and Norfolk Island shared the costs and the management of KAVHA, now the Island is devoid of any management role. The KAVHA Advisory Committee of five includes two Norfolk Island residents as members chosen by the Administrator following a public call for expressions of interest.

Overall, and regrettably, the NIRC has virtually no power to relieve the island's asphyxiation. Norfolk Island continues to try to live under the increasing weight of Commonwealth and applied NSW legislation, appropriate or not, efficient or not. Under the regime introduced in 2016 the only power that the NIRC has for changing a law – for example a minor change in the Planning Act – is to go cap in hand to the Administrator's office or to DITRDC, requesting it. This limitation has led to immensely frustrating situations, well-aired by councillors in NIRC monthly meetings. The record over recent years

of the Commonwealth's response to Norfolk Island requests of this and similar nature gives no confidence for the future.

In 2017, increasingly cognisant of many inadequacies in the applied law regime on Norfolk Island, and of the fact that Norfolk Islanders have no vote in the NSW parliament whose laws they were being subjected to, the NIRC at its meeting of 15 February resolved to write to the Minister: 'requesting the Commonwealth prioritise the establishment of a task force of Commonwealth and Norfolk Island officers to consider the merits of modernising current Norfolk Island legislation with amendments modelled where appropriate on current NSW legislation, or of another jurisdiction if thought more appropriate, in preference to the wholesale application of NSW legislation to Norfolk Island as is currently proposed to take place on 1 July 2018.' (The resolution is given in its entirety in Annex II.)

The then-Minister responsible for Norfolk Island rejected the entreaty. Alternatively, the Minister proposed a Legislation Consultation Framework which would guide the Australian Government's consultation on any legislative changes. Unfortunately from a Norfolk Island viewpoint it is the Minister who decides what scale of effects a proposed change would have on the island and consequently the level of consultation deemed appropriate.

As a result of the continued frustration of councillors and their felt inability to respond adequately to their stifling situation, at the Regional Council meeting of September 2020 the NIRC made a further appeal to the Minister, this time in a resolution requesting the Minister advocate for a Royal Commission to seek 'Options to provide for the most appropriate form of government for the non-self-governing territory of Norfolk Island that can achieve the majority support of the Norfolk Island People; and build a pathway to peace' (see Annex II). The Norfolk Island Chamber of Commerce has also raised its voice in declaring that the current governance model for Norfolk Island is not working.¹⁴

8. Conclusions

In the foregoing an attempt has been made to record the changes in law that have been experienced on Norfolk Island since 2015 and to point to some of the consequences of these changes: particularly in the abilities of Norfolk Island residents to adequately manage their own affairs.

Some of the changes noted have been very hurtful to many on the island. Also significant is the current distribution of powers and responsibilities and their consequences for the future well-being of the island. On the basis of the foregoing evidence it appears that:

- (i) Norfolk Island is now being suffocated by laws not of its own choosing, many of which are inappropriate to a small isolated island. The NIRC – the only representative body on the island, and responsible for a much smaller portfolio of issues than the former Legislative Assembly – has virtually no power in its own right to alter its situation;
- (ii) The Norfolk Island Administrator is, de facto and de jure, the government of Norfolk Island. Little moves without the Administrator's (or indeed the Minister's) authority. This is a more problematic situation for Norfolk Island than in the years prior to 1979, because of the scale and nature of the changes now being made to the island;
- (iii) All major decisions about Norfolk Island not taken by the Administrator are determined in a bureaucracy 1,900km away, which has over time shown itself unresponsive to many of the Norfolk Island community's needs (except in accordance with the bureaucracy's own dogmata), and which has had little or no experience of life on isolated islands. It is a prescription for policy inefficiency and even incoherence;
- (iv) The legal changes introduced in 2016 have laid bare a considerable diminution of the democracy previously enjoyed on the island, and undermined the pride and self-

esteem felt by Norfolk Island residents in the island's own history, culture and achievements.

It will of course be up to each individual reader to determine his or her moral and political stance in relation to the facts presented here. Based on the evidence, my own view is that in these matters at least, the Australian Government takes us Norfolk Island residents either as fools, or as sheep, and neither is acceptable. There is an urgent need for the reassessment of, and change to, the governance arrangements currently enforced on this island.

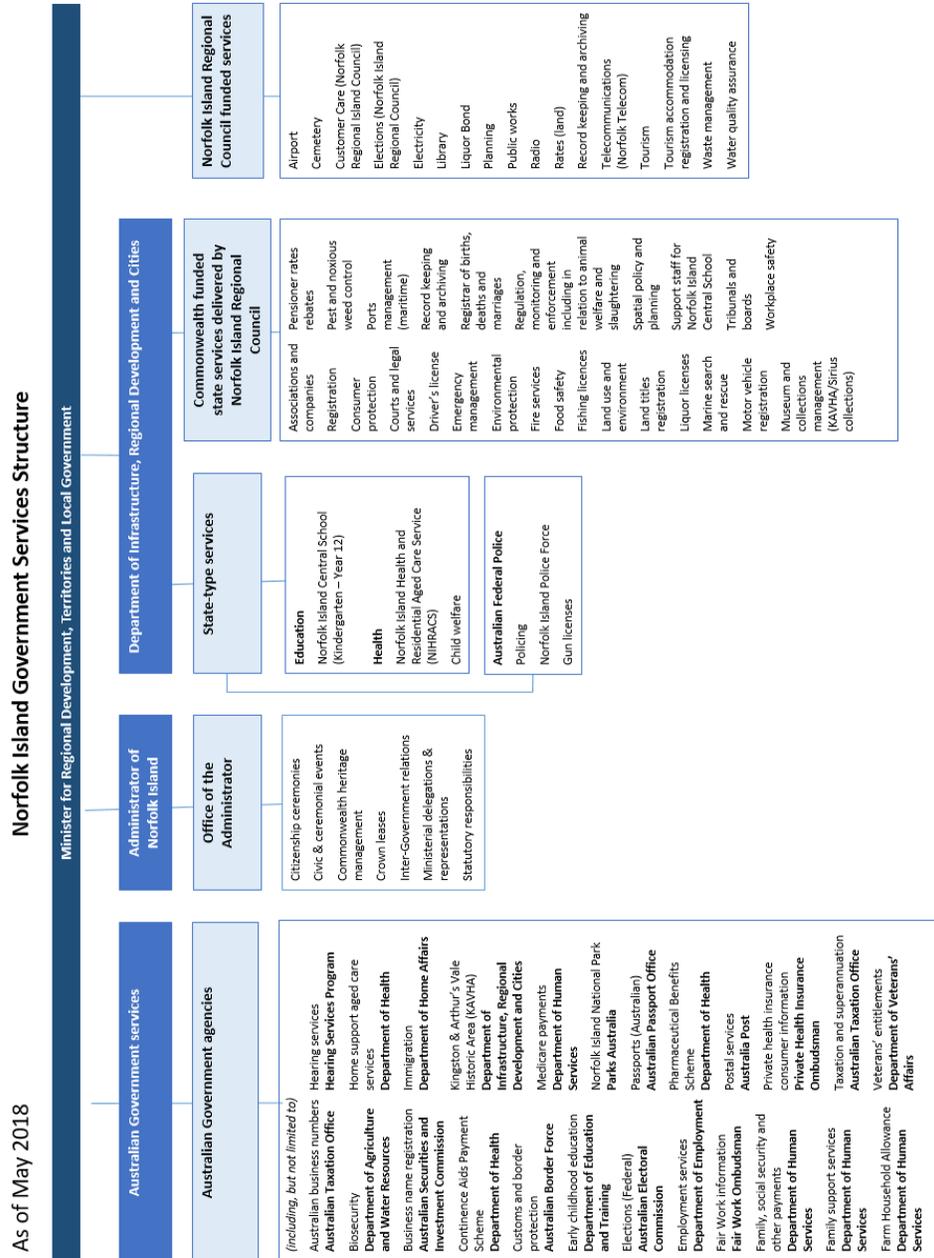
[2 October 2020]

1. Federal Register: <https://www.legislation.gov.au/Details/C2004A02035/> (accessed 9/08/2020)
2. Parliamentary Library, 2015. Explanatory Memorandum: Norfolk Island Legislation Amendment Bill 2015: Bills Digest No. 102, 2014-15. 12 May.
3. Federal Register, *Norfolk Island Act 1979*, Compilation 16, 6 July 2016: <https://www.legislation.gov.au/Details/C2016C00736>
4. *Local Government (Elections) Act 1999 (SA)*, Clause 14, Part 4.
5. Commonwealth of Australia, 2016. Norfolk Island Applied Laws Ordinance 2016. Explanatory statement, Ordinance No. 9, 2016. <https://www.legislation.gov.au/Details/F2016L00729/Explanatory%20Statement/Text>
6. Whyte, S., 2018. 'The ACT government could deliver Norfolk Island services', *Sydney Morning Herald*, 29 September; Whyte, S., 2018. 'Barr: ACT "highly unlikely" to deliver Norfolk Island services', *Canberra Times*, 6 November.
7. Parliament of New South Wales, 2016. Hansard for Norfolk Island Administration Bill 2016. <https://www.parliament.nsw.gov.au/hansard/Pages/hansard-by-bill.aspx?bill=Norfolk%20Island%20Administration%20Bill%202016>
8. *Interpretation Act 1979 (NI)* Schedule Part II, Clauses 5 and 6.
9. See: www.norfolkisland.gov.nf/sites/default/files/docs/NIRC/Policy_and_Governance/Norfolk_Island_Legislation/Ministers%20Norfolk%20Island%20Delegation%20Instrument%202019.pdf
10. Nobbs, C., 2017. 'Norfolk Island Regional Council process is flawed and must be fixed', *The Norfolk Islander* and *Norfolk Online News*, 23 September.
11. Maynard, G.V., Lepschi, B.J. and Malfroy, S.F., 2018. 'Norfolk Island Quarantine Survey 2012-2014 – a Comprehensive Assessment of an Isolated Subtropical Island', *Proceedings of the Linnean Society of New South Wales* 140, 7-243. Summary report published as: Department of Agriculture, undated. 'Norfolk Island Quarantine Survey 2012-2014. Technical Report'.
12. Commonwealth Government, 'Protecting Norfolk Island's Biosecurity', 21 February 2018.
13. Nobbs, C., 2019. 'A biosecurity zone for Norfolk Island', *The Norfolk Islander* and *Norfolk Online News*, 7 September. (c.f. Chapter 3, this book)
14. Norfolk Island Chamber of Commerce, 2020. 'Fix the governance model that you broke!', *The Norfolk Islander*, 12 September.

Annex I

Norfolk Island Government Services Structure (2018)

https://www.regional.gov.au/territories/norfolk_island/governance/government-services.aspx



Annex II

Norfolk Island Regional Council Ordinary Meeting of Council, Wednesday 15 February 2017

Resolution 2017/6: Applied Law Regime – A Better Way forward for Norfolk Island

In acknowledgement that –

- 1) The proposal to apply NSW legislation to Norfolk Island from 1 July 2018 is democratically deficient as the people of Norfolk Island do not have a vote in the NSW Parliament that makes those laws;
- 2) The customs and traditions of the Norfolk Island people and the legislation applied to the Norfolk Island people from 1856 to 2015 evolved independently of the customs and laws of the people of New South Wales; and
- 3) The current system of laws for Norfolk Island being made by the Commonwealth without the sanction of the Federal Parliament is also democratically deficient:

Council requests the Mayor to write formally to the Commonwealth requesting the Commonwealth prioritise the establishment of a task force of Commonwealth and Norfolk Island officers to consider the merits of modernising current Norfolk Island legislation with amendments modelled where appropriate on current NSW legislation, or of another jurisdiction if thought more appropriate, in preference to the wholesale application of NSW legislation to Norfolk Island as is currently proposed to take place on 1 July 2018.

The resolution was carried

Norfolk Island Regional Council Extraordinary Meeting of Council, Wednesday 3 September 2020

Resolution 2020/143: Mayoral Minute: Royal Commission – Norfolk Island and the Commonwealth bridging the Divide

That Recognising the need to ensure absolute independence and to maximise community confidence and trust in the outcomes of the process –

Council calls on the Assistant Minister for Regional Development and Territories the Hon Nola Marino MP, to advocate to the Australian Government that a Royal Commission funded by the Commonwealth be formally established by the Governor-General to inquire into and to report and make recommendations on:

Options to provide for the most appropriate form of government for the non-self-governing territory of Norfolk Island that can achieve the majority support of the Norfolk Island People; and build a pathway to peace.

[There follows a list of reports and matters that the Inquiry and Recommendations is invited to consider: see original for details.]

The resolution was carried.

Attachment B

Norfolk Island Regional Council process is flawed and must be fixed

[This letter appeared in *The Norfolk Islander* and on *Norfolk Online News*, 23 September 2017]

Dear Editor,

The issue. As a member of the public I have attended a number of monthly council meetings. In response to a question posed by a councillor to council's senior management, I have heard the response given along the lines of: "I'm sorry, I can't answer that, it's an operational matter." This seems to be a fairly regular response by senior managers both in and out of council meetings, as others have noted. I contend that this sort of response is in many circumstances a load of nonsense, and to that extent - and to mix the metaphors - it is a practice that should be eradicated.

The dangers of any such an approach are several: first, it deprives councillors of knowledge that could be useful in their decision-making - the veritable oxygen of wise conduct on behalf of Norfolk's citizens; second, and either by design or accident, it allows senior managers to hide behind a veil of secrecy that is the opposite of the "communication" and "accountability" under which council claims to operate; and third, it can disguise the fact that important decisions are being taken by the management but for which, in the longer run, it is the councillors who will be held to account. It is an approach that has the potential for establishing a separate management fiefdom unresponsive to the wishes of the community.

In Norfolk Island's case the key element which seems to justify the quoted management response is to be found in the NIRC's "Policy on Councillor Access to Information and Interaction with Staff", passed at the first ordinary Council meeting of 20 July 2016, and available on the NIRC website. The relevant section is S4.2.4: *Councillors requiring a detailed report on a matter must submit a Notice of Motion to Council. The Notice of Motion must be in line with Council's Community Strategic Plan and not an Operational matter.*

Now what a "detailed report" is, we are not told. But the main point here seems to be a distinction that is being made between matters "in line with council's Community Strategic Plan" and "Operational matters". The section appears to suggest that the former are matters open for councillors' attention, whereas the latter are not. The phrase "in line with the Council's Community Strategic Plan", carries the implication that what is being referred to here are matters of policy. Let's suppose this to be so, and we refer to such matters as "policy matters", as distinguished from "operational matters". There are a number of reasons, both of logic and of practice, why the distinction as drawn in S4.2.4 is a nonsense.

The first reason why the distinction cannot be so simply drawn is that there is no sharp dividing line between the two categories: much of the time, particularly in relation to major matters, they overlap. And this is doubly so in Norfolk's case where the NIRC is responsible for services such a power generation, lighterage, liquor sales and so on. (See below.) Again, consider the idea of an "operational matter" as set out in S4.2.4. Councillors can have their queries answered if it does not require a "detailed report", and there are plenty of illustrations of this from Council meetings. (There are also illustrations where even simple queries have failed to elicit answers - see below.) However if a "detailed report" is required, and the matter is deemed to be "operational", then as a councillor you can't have any response at all. This suggests that any "detailed report" in its content is likely to go beyond the retailing of the factual, and from what has already been said, this is likely to involve matters of analysis and policy.

A third reason why the crude separation of categories is dangerous is that under the current regime it appears that it is senior managers who determine what is "operational" and what is not. (And does that mean that anything not specified in the strategic plan is thereby "operational"?)

Some examples. At the Council meeting of 21 December 2016, in discussion of a report on the Queen Elizabeth and Taylor's Roads roading project being carried out at the time, Cllr McCoy, in seeking to get an idea of the costs of different elements of roading works for future information, expressed his disappointment that the figures in the report were not disaggregated to the level that would enable him to do this. To this the general manager replied by berated the Cllr McCoy for criticising the work of council staff, and did not – and never has, as far as I know - provided an answer to the question. (1)

Again, at the Council meeting of 19 July 2017, during a consideration of the report from the group manager services on the electricity budget 2017-18, Councillor Buffett said:

Cllr Buffett: It is not with pleasure that I make the following comments but I feel there is need. I thank Operations for their reply to my request for information re the 68c per kilowatt detailed breakdown in fees and charges I'm more interested in other costs and allocated overheads, and I have not been provided with this information, and why I don't know. I asked for a detailed breakdown. I also note that the same breakdown method has been used in the budget summary expenses, and again, where are the final details? (2)

Again, in the Council meeting of 28 June 2017, the following information restriction approach took place during the discussion of the possible lighterage contract, in which the general manager interrupted speaking councillors four times in the space of less than two minutes. Part of that exchange was as follows:

Cllr Porter: Madame Mayor, that raises the point that I would assume that all of these matters would be workshopped with sufficient information for us to avoid having those extended discussions that we've had today. These are matters that are of great importance to those in the community that deal with it and I would like to think we will have every opportunity to fully discuss them prior to.....

G/M Jackson: Through you Madame Mayor, they will be under confidential, therefore they will be discussed under confidential. They cannot be held in workshops because they are public. (3)

It is not clear why all information about such an important subject should be considered confidential. And a little later:

Cllr McCoy: But I'm not debating who should have the contract or who should not. What I'm suggesting is that Council should maintain lighterage, and see it as an essential service. I'm not talking about who or where it should go.....

G/M Jackson: Through you Madame Mayor, this is a State type service that council is contracted to provide to on behalf of the Commonwealth. (3)

Again, at a meeting of the Chamber of Commerce on 17 August 2017, the CEO of Norfolk Island Airlines in his address to the meeting, referred to a meeting he had had with the Council's acting general manager to explain the airline's concerns about the Council's proposed doubling of the passenger service charge, and his belief that it could render the operation of his airline's route to New Zealand unviable. To which, as we understand it, the AGM replied that that was a commercial matter and not of his concern. Or to give a paraphrase: "our charges are an 'operational matter'". No responsibility on management to check the sums, suggest alternatives, or inform councillors - despite the critical importance of transportation for the island's tourism industry? Really?

So what has gone wrong? First we need to note that what is an "operational matter" is not defined in the NIRC policy document, nor in the *NSW Local Government Act 1993* (except in relation to land that is not reserved for community use), nor in the version of this Act as extended to Norfolk Island. The *NSW Councillor Handbook* published by the NSW Office of Local Government (4) and which provides

guidance to councillors, discusses a council's "operational plan" in some detail, but nowhere is it suggested that this is the exclusive preserve of management, or that councillors' concerns are limited to the "strategic plan". The wording of section 4.2.4 of the Norfolk Island policy appears to be the invention of whoever it was who drafted the document which was put in front of the councillors at their first business meeting.

Let's take a look at how NSW local authorities' policies on the interaction between councillors and management are expressed. Take Ballina Shire in northern NSW (pop. 42,000), a shire that might be considered in some ways comparable to Norfolk Island. Their "Policy on Interaction between Councillors and Staff "(5) starts out:

The objectives of this policy are to: Provide direction on interaction between Councillors and council officers, to ensure both parties receive advice to help them in the performance of their civic duties in an orderly and regulated manner;

(Compare this with the start of the equivalent NIRC policy statement:

Councillors need to have access to information and staff in order to ensure the smooth functioning of the Council. This policy establishes the protocols to be followed so that access to information and staff is facilitated through appropriate internal channels or legally available channels.

Quite apart from content, this rather Prussian line of approach pervades this document and is in my view at least, quite unhelpful to the agreeable working of any local authority.)

In relation to councillors' access to information specifically, the Ballina policy goes like this (in part):

Access to information

Councillors have a right to inspect any record of the Council provided that it is relevant to the exercising of their Councillor responsibilities in civic office and is not subject to privacy, confidentiality or legal restraint.

.....

When dealing with a request by a councillor for information, the general manager must act reasonably. Given that a councillor may need information to perform their public duty, if a request is to be denied, reasons for the refusal must be provided.

The foundational issue is the quality of the relationship that exists between councillors and senior management, and in particular how this is reflected in communication policy and in practice. A council can only function well where there is a shared attitude of openness, trust, and mutual support. Some reasons why this may be lacking here have been suggested. Another part of the issue for Norfolk Island may well be that the general manager was not appointed by the councillors, but by the Australian Government in the interregnum following the dissolution of the Legislative Assembly. In the interests of transparency and good government it is essential that councillors be able to sight the contents of the contract of employment that the general manager signed with the Australian Government.

Notwithstanding such considerations however, it must be made clear to all that it is the elected councillors who are the employers and the senior management who are employees and it is their job to carry out the just expectations of the elected members on behalf of the community.

So what needs to be done? First, the NIRC "Policy on Councillor Access to Information and Interaction with Staff" should immediately be scrapped and rewritten in the light of experience, and perhaps with assistance from Local Government NSW or other skilled advisor;

Second, councillors need to have access to the contract of the general manager to be reassured as to the obligations each party has undertaken;

Third, if the future relationship between councillors and senior management over informational matters does not accord to the legitimate needs and understandings of councillors, then the general manager should be replaced.

And while the councillors are engaged in that policy rewrite, they should also review their Media Policy which also includes some bizarre requirements. (Ballina Shire doesn't even feel the need for a media policy – apart from one in relation to the use of social media.)

- Chris Nobbs

References

- (1) NIRC, 2016. Council meeting 21 December 2016, cf. Soundcloud recording: [http://www.norfolkisland.gov.nf/council/meetings: Meeting 21 December 2016, at \[2:14:50 & on\]](http://www.norfolkisland.gov.nf/council/meetings: Meeting 21 December 2016, at [2:14:50 & on])
- (2) NIRC, 2017. Council meeting 19 July 2017, cf. Soundcloud recording: [http://www.norfolkisland.gov.nf/council/meetings: Meeting 19 July 2017, at \[0:52:50\]](http://www.norfolkisland.gov.nf/council/meetings: Meeting 19 July 2017, at [0:52:50])
- (3) NIRC, 2017. Council meeting 28 June 2017, cf. Soundcloud recording: [http://www.norfolkisland.gov.nf/council/meetings: Meeting 28 June 2017, at \[2:57:50\]\]](http://www.norfolkisland.gov.nf/council/meetings: Meeting 28 June 2017, at [2:57:50]])
- (4) Office of Local Government and Local Government NSW, 2016. *Councillor Handbook*, Nowra, NSW: OLG.
- (5) Ballina Shire Council, 2017. "Policy 102: Interaction between Councillors and Staff".

The text of this letter is available for download at: <http://www.norfolkonlinenews.com/chris-nobbs.html>

Attachment C

The 2020 Case for Controlled Immigration to Norfolk Island

1. Introduction

The subject of immigration to Norfolk Island can be a difficult one to discuss because of the strongly emotional overtones related in particular to the matter of Pitcairn-derived identity. However in any democracy worthy of the name such subjects need to be open for examination with informed discussion and consequent sensible decision-making. I propose to open such a discussion by saying that all people who are currently living on Norfolk Island constitute the 'community of Norfolk Island', and to ask: What do we – the whole community – think about re-introducing control on the flow of immigrants to Norfolk Island? Here I will put the case in support of this proposal.

In June 2016 the *Norfolk Island Legislation (Migration) Transitional Rule 2016*, made under item 357 of Schedule 2 of the Commonwealth's *Norfolk Island Legislation Amendment Act 2015*, the Australian Government declared:

From 1 July 2016, Norfolk Island will be integrated into the Australian migration zone and the Immigration Act 1980 (Norfolk Island) will no longer apply. Therefore, anyone living on Norfolk Island will need to be an Australian citizen or hold a visa under the Migration Act (Cth)

Although little discussed in public, this abandonment of immigration controls (and the enforcement of visa requirements on New Zealanders), were perhaps the most significant of all the changes imposed on Norfolk Island in the 2016 takeover by the Australian Government.

2. Control of immigration to Norfolk Island (1979 – 2016)

Let us see what exactly Norfolk Island's *Immigration Act 1980 (NI)* provided for. Under this Act all people coming to the island needed to be in possession of a valid passport or identity document. Foreign nationals (excepting New Zealanders) were also required to have a current Australian visa. Visitors wishing to remain on the island for more than 30 days needed to obtain an entry permit issued by the Norfolk Island Government; and visitor permits could also be issued to bona fide holiday makers for up to 120 days in a year. Temporary entry permits (TEPs) available for people coming to the island for employment or other activities, were issued for up to 12 months, and could be renewed. These TEPs were limited to allowed stays not exceeding three years in a continuous period of four years. Private employers could sponsor TEPs to the island if no local person was available to fill the position; the Administration and the Norfolk Island Hospital commonly advertised off-island for specialised staff. General entry permits (GEPs) were determined on application, for a period of five years and six months, and commonly on the understanding that the incoming person would be purchasing a business on the island. Applicants were subject to checks on finance, health and character. The number of GEPs was subject to an annual quota established by resolution by the Norfolk Island Legislative Assembly. The grant of a GEP to a citizen of a country other than Australia or New Zealand was subject to Australian Government approval. The holder of a GEP could after five years apply to be declared a Norfolk Island (permanent) resident.

As an example, in 1986-87, 821 TEPs and 39 GEPs (28 of which GEPs were on the basis of a 'special relationship' with Norfolk Island) were granted, and 33 persons were declared to be residents during that year.¹

Thus, in general terms we can characterise the structure of policy and process for arrivals into Norfolk Island over 1979-2016 as involving: (a) a visitor stream; (b) a short-term resident stream, mainly work-

related; (c) a longer-term residence stream: including a staged process providing transition from temporary to permanent residence based upon: (i) an economic requisite both for the island and for the immigrant; (ii) a confirmation to health and good character; and (possibly) (iii) a familial, cultural or other previous attachment to the island. Each stage in this process required a greater commitment from the would-be migrant, and more stringent conditions as to health, finance and good character. This is summarised for reference in the following Box.

Box. Immigration to Norfolk Island (1979 - 2016):
policy and process structure

- o very short-term visitor stream – for tourism, family visits etc.
- o short-term residence stream – mainly employment-related
- o longer-term residence stream – including a staged process providing transition from temporary to permanent residence based upon:
 - (i) an economic requisite both for the island and for the immigrant;
 - (ii) a confirmation as to health and good character; and (possibly)
 - (iii) a familial, cultural or other previous attachment to the island.

One observation that is worth making here is that over the years under this scheme Norfolk Islanders maintained a tradition of welcoming migrants from Australia and beyond to come and share their life on the island. Long-time residents of the island can currently, and to my knowledge, write down the names of over 30 different countries which, over the years, have provided immigrants to Norfolk Island (and some of whom later became Members of the Legislative Assembly).

How is it that this reasoned process was wiped out by the Australian Government on 1 July 2016, to be replaced with a system under which anyone can live on Norfolk Island howsoever they may wish, provided only that they are Australian citizens (or appropriate Australian visa holders)? Let us first examine the reasons for Norfolk Island's pre-2016 policy.

3. Norfolk Island's pre-1 July 2016 immigration policy had good reason

There are very good reasons, many of which have been expressed in various documents over the years, for Norfolk Island to have in place a staged immigration control process. Here are some of these reasons.

Small isolated island economies in particular are exposed to swings of fortune as a result of regional and global fluctuations which can be almost completely outside their control. There is a need therefore for islands to take whatever steps they can to control their economies as best they can. Economic need on the island may be short term (e.g. for seasonal tourist work, or in response to the multi-year economic cycle), or more long term (such as in terms of the island's long-term requirement for basic and advanced skills). A staged process of immigration control provides a flexible means of response to these changing needs. It also tries to ensure that those coming to the island have the means of supporting themselves after their arrival so that they do not become a burden on the community. It also recognises the difficulties of resettlement if jobs in the island were to dry up. Stable long-term residency also tends to keep profits on the island for reinvestment.

And there is a second set of reasons for immigration control – that is to say island population control – namely that physical resources on the island are limited. Rainfall patterns on Norfolk Island have been changing over the last half-century with declining total rainfall and changed seasonal patterns becoming established in the wake of climate change, which have already led to water shortages. More broadly it

is important to keep a viable agricultural industry on the island in order to provide a modicum of food security, keep the cost of food down (and local employment up), and to maintain environmental quality in order to provide an attractive destination for tourism.

A third set of reasons relate to the criterion of 'special relationship' to Norfolk Island (referring to above in the pre-2016 immigration process) which might also be weighed in the balance by the Norfolk Island Minister in deciding on residence for an applicant. This relationship could be an attachment to the island by heritage or birth, by family association, or by cultural identity, for example. It provides a means of ensuring continuity and stability for a small island population, and helps to maintain the glue for its community life, an element of major importance in a situation of isolation and fewer conveniences. It also provides a check on potential criminality.

So immigration control has not only an economic function, but also environmental and social functions as well, in maintaining the integrity of the community and what is 'special and unique' about the island as the basis for its life and its tourism industry. Control makes a substantial contribution to the island's collective well-being.

4. What do other isolated islands do regarding immigration control?

Let us look at the immigration control exercised on some other small isolated islands to which Norfolk Island might reasonably be compared.

The Falkland Islands is a self-governing British Overseas Territory in the South Atlantic Ocean, with a vigorous and prospering economy based on fishing, wool exports and tourism. The population is mainly British, with some migrants from elsewhere. All Falklanders are British citizens. Its form of government has similarities to that enjoyed by Norfolk Island prior to 2016, with a broad variety of powers, but with matters of foreign affairs and defence retained by the Governor. Elections for a Legislative Assembly of eight members are held every four years, chaired by the Speaker (chosen from the community by the Assembly members) and including two ex officio members, the Chief Executive Officer and the Financial Secretary. An Executive Council consists of three members of the Legislative Assembly elected annually, the two ex officio members of the Assembly, and is chaired by the Governor. The Falklands has its own taxation regime.

Non-exempt people wishing to enter the Falkland Islands can do so by means of: a visitor's permit (issued for one month, with extension to 12 months); or a work permit (for a maximum of four years, after which the holder must apply for an extension or permanent residence permit); or a residence permit (maximum of three years but renewable, and not permitting work). The annual number of permanent residence permits is controlled by the Falkland Island's Government under a quota system. The quota for 2018 stood at 44 persons. Immigration to the Falklands is 'controlled rather than encouraged' it is said.²

St Helena. The island of St Helena in the mid-Atlantic Ocean is a British Overseas Territory, in population and in area about three times the size of Norfolk Island. Public sector employment is important in the economy, and with the recent construction of an airport, tourism is set to expand. Islanders have full British citizenship. The government consists of a Legislative Council of 15 members, 12 being elected every four years, with three ex officio (non-voting) members, and an Executive Council consisting of five members of the Legislative Council and three ex officio officers (one non-voting), presided over by the Governor. There is no elected Chief Minister, and the Governor acts as the head of government. The governance system appears to have similarities to that on Norfolk Island pre-1979.

Short-term entry permits are issued for stays up to six months (for tourist visits or work), and long-term entry permits for periods in excess of that (but for a period not exceeding five years). A work permit is required for work on a self-employed basis for any period exceeding six months i.e. a work permit requires in addition a long-term entry permit. Long termers must show adequate means to provide for themselves and their dependents while on the island. St Helenian Immigration Policy includes in its

objectives: to attract persons of 'St Helenian status' to return to St Helena to live and work (St Helenian status can be acquired by right or by grant); to attract investors and residents who would contribute positively to the island's future development; and to address local labour market shortages (for which the Government maintains a shortage occupation list).³

Niue. The island of Niue in the South Pacific Ocean has a population of around 1,600 and a land area of about 261km². It is a self-governing state in free association with New Zealand. Niue is not a member state of United Nations, but can attend some of its meetings. All Niueans are New Zealand citizens. Niue is fully responsible for its own internal affairs, with external affairs exercised mainly by the Governor General of New Zealand (as the British Sovereign's representative in New Zealand and titular head of New Zealand). Niue is a bilingual country with around 30 per cent of the population speaking both English and Niuean. The Legislative Assembly consists of 20 members, 14 elected by electors of each village constituency, and six by all registered voters combined. In April 2019 the Governments of New Zealand and Niue signed a Statement of Partnership setting out the principles and priorities under which they will cooperate, coordinate and partner into the future. The focus of New Zealand's engagement prioritises the empowerment of the Government of Niue. Currently Niue receives annual aid from New Zealand of around \$11m, and around \$3m from Australia.

Unalloyed rights to residence in Niue are for those born in Niue, or have a parent who is a New Zealand citizen born in Niue, or who is declared a permanent resident of – or is ordinarily resident in – Niue. Others arriving into Niue must hold a visa: tourist visa, work visa, student visa, or transit visa. Temporary permits entitle the holder to remain lawfully in Niue for the period stated on the permit. These are issued as work permits or student permits and all applicants must be of good character and good health. Temporary permits can be renewed. Temporary permit holders may be required to have a sponsor, responsible as required for the holder's accommodation, maintenance and costs of deportation (if required). Permanent residence certificates may be granted by the Niuean Cabinet in accordance with Residence Criteria published from time to time, provided the applicant has held a temporary permit for a period of not less than 10 years.⁴

What the foregoing demonstrates is that the policy and process used by Norfolk Island for immigration control under the pre-1 July 2016 arrangements is structurally the same as those currently in use across other small isolated islands; and furthermore these policies and processes are the same in principle, irrespective of the island's governance method. (Compare Box)

5. What does Australia do regarding immigration control?

Australia is a large and complex country, and has over 70 different classes of visas for people wishing to enter Australia. These are organised under six general categories: Visitor, Studying and training, Family and partner, Working and skilled, Refugee and humanitarian, and Other (transit, medical treatment etc.). Almost all require a valid passport, adequate health status and lack of serious criminality on the part of the applicant.⁵ The main threads in the pattern of visa issuance include:

Visitor visas. The Visitor visa program is divided into two streams - Tourism and Business - and does not permit visa holders to engage in work in Australia. The Tourism visa stream allows holiday or recreation, or visiting family and friends, and are issued for up to 12 months; the Business stream allows business people to carry out activities such as attending meetings, conferences, site visits and exploring business opportunities, and are issued for up to three months. (There is also the Working Holiday visa program which fosters links between Australia and partner countries, with particular emphasis on young adults. Holders can stay in Australia for up to one year, with possible renewals after that time.)

Working and skilled visas. A number of classes of visa allow skilled people to work and live in Australia, under the General Skilled Migration program. The Department of Home Affairs (DoHA) maintains a list of professions and occupations eligible for skilled migration visas. The program is points-based, and there are a number of categories:

(a) *short stay work visa* e.g. Working Holiday Maker visa, Pacific and Seasonal Work visa.

(b) *temporary work visa* e.g. the Temporary Skills Shortage visa allows an employer to sponsor a suitably skilled worker to fill a position they can't find a suitably skilled Australian to fill; the visa is granted for up to two years, or four in some circumstances. A Business Innovation and Investment (Provisional) visa allows holders to manage a business or conduct entrepreneurial activity in Australia, for a period of up to four years and three months.

(c) *permanent work visa*. Under the SkillSelect visa pathway, skilled workers of select occupations and professions can apply for an Australian permanent work visa provided they have the requisite qualifications, work experience and language ability. The Regional Sponsored Migration Scheme visa emphasises nomination of migrants by employers in regional Australia. The holding of a permanent work visa means that holders are permanent residents and can remain in Australia indefinitely.

Permanent residence and citizenship. The holding of a permanent work visa goes with it permanent resident status in Australia. The most commonly issued permanent visas include skilled work visas, and family visas:

(a) *skilled work visa*. Some permanent visas are issued directly, although there are other pathways to achieve permanence on the basis of an initial temporary work visa. Holders of a 485 Graduate visa can become resident if sponsored by an employer, or if they accumulate a sufficient number of points independently.

(b) *family and partner visa*. Australian citizens and permanent residents (and eligible NZ citizens) can sponsor family members to live in Australia, arriving as temporary residents and after meeting certain criteria may be granted permanent residency. Coverage extends to partners, parents, dependent children, orphan relatives, aged dependent relatives and carers. There is no skills test or language requirement for family migration as there is for skilled migrants, however applicants must meet the necessary health and character requirements.

These cover the main categories of exercised Australian visas (i.e. arrivals) apart from higher education and student visas.⁶

In summary we may say that despite the complexities and different terminology, Australia follows very similar structural characteristics in controlling immigration as do the Falkland Islands, St Helena, and Niue – and as did Norfolk Island prior to 1 July 2016. (Compare Box)

6. Australia's immigration policy for Norfolk Island: An Assessment

We recall the quotation from Commonwealth legislation with which we opened this article, that specified that any Australian can come and live on Norfolk Island howsoever they may wish (and that anyone else must have an appropriate visa). This stands in stark contrast to the immigration controls exercised by all the other islands surveyed here: the Falkland Islands, St Helena Island, and Niue, and indeed by Australia itself. If it is reasonable to assume that their policies are rational and securely based on the objectives of economic and social wellbeing, we must conclude that the Australian Government's immigration policy currently enforced on Norfolk Island is uniquely bad. It is antithetical to good reason, as has been laid out in the foregoing.

Unrestrained immigration from Australia:

- o Is damaging economically because it increases the island's incapacity to adjust to its economic needs;

- o Is damaging environmentally because of effects of population increase on the island's environmental quality, and on natural resources such as water and rural land, with consequent damage to the island's agriculture and long-term food security, and tourism;
- o Is damaging socially and culturally because of the unrestrained pressure being put on what is unique about the island in terms of culture, language and tradition. And this within the context of the Norfolk language having been identified by UNESCO as one of the world's endangered languages.⁷ It is not just a matter of 'being a Pitcairner' or not, but of participating in a certain gentle view of human nature which is island-based, often remarked upon, and which draws many visitors to return regularly and gladly to the island over the years.

In recognising these three aspects of economy, environment, and culture, it needs to be recognised in addition that Norfolk Island – being an isolated island – is an ecological system, involving systemically humans and the natural environment as an integral whole, and that to ensure its future integrity and success it must be conceived of and planned for as a unit and as a whole: an approach strongly emphasised globally by Pope Francis in his 2015 encyclical letter *Laudato Si'*.⁸

Two further things should also be emphasised immediately. First, the argument presented here is not an argument against all immigration to Norfolk Island, but in favour of a policy of common-sense controlled immigration in relation to the needs and limitations of a small isolated island community. And it goes without saying that that community itself needs to have substantive input into any such policy. Second, the issue of immigration control is unrelated to the funding that the Australian Government may or may not at any time deem appropriate to Norfolk Island: they are conceptually separate matters.

In brief, the immigration policy currently enforced on Norfolk Island by the Australian Government (if no control can be considered a policy) is, from the perspective of the needs of those living on the island, without visible merit. It appears as the worst of all worlds (it is certainly the worst of those islands surveyed here, including Australia). The Australian Government's 'let 'er rip' approach is ugly and potentially brutal economically, and gives little or no consideration to the integrity of the island's community, culture, or environment.

There is an urgent need to review and change this imposed immigration policy to one more tailored to the specific needs of the small isolated island that Norfolk Island is. One such first step would be the return of Norfolk Island to its status as being outside Australia's migration zone (the territory to which Australia's visa policy applies), as it was deemed to be prior to 1 July 2016. This is not difficult to accomplish. We may recall the 'Tampa' affair of 2001 which concerned the potential arrival in Australia of shipwrecked asylum-seekers on board the Norwegian cargo ship that had rescued them. In the wake of these events the Australian Government overnight passed legislation excising several islands around Australia from its migration zone, including Christmas Island, Ashmore and Cartier Islands and Cocos (Keeling) Islands. (*Migration Amendment (Excision from Migration Zone) Act 2001*). The Australian Government could do the same for Norfolk Island as a first step to developing, with Norfolk Island representatives, an acceptable immigration policy for the island.

[26 October 2020]

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2. Falkland Islands Tourist Board, 2019. *The Falkland Islands Accommodation Investment Guide*, FI: Stanley. See also: Falkland Islands Development Corporation, 'Life in the Falkland Islands': <https://www.fidc.co.fk/about-us/life-in-the-falkland-islands> (accessed 16/09/2020)
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