

# **The Dependency Studies Project**

*Study and Analysis on Dependency Governance*

**Assessment of self-governance sufficiency in conformity  
with internationally-recognised standards**

**Country: Norfolk Island**

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## The Territory of Norfolk Island

Norfolk Island is located in the South Pacific Ocean at Latitude 29 degrees 02 minutes South and Longitude 167 degrees 56 minutes East. Norfolk Island is 1600 km north-east of Sydney, 1500 kms south-east of Brisbane, Australia and 1000 km north-west of Auckland, New Zealand. The closest Pacific country is the French special collectivity of New Caledonia which is 700kms to the north.



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## **Executive Summary**

The sequence of events concerning the initial governance of Norfolk Island originating with the settlement in 1856, and the Order declaring that Norfolk Island be kept as a "separate and distinct" territory from Australia's politically integrated states, served to establish the initial differentiation between the British colony of Australia and Norfolk Island as an individual territory.

As the initial use of Norfolk by the British was for the establishment of two successive penal colonies (1788-1814 and 1824-1856) - comprising "involuntary" settlement - the first voluntary "settlement" of Norfolk in 1856 by those who migrated from Pitcairn constituted the first native inhabitants of the territory. Accordingly, the application of relevant international instruments including the United Nations Declaration on the Rights of Indigenous Peoples (UN-DRIP) is determined to be in good order, particularly in relation to issues of the right to individual and collective self-determination, collective land ownership, right to cultural expression, et al.

The successive transfers of governance of Norfolk Island constituted an historical record of treatment of the territory as a separate entity under the unilateral authority and sovereignty of the United Kingdom (1897) preceding the transfer to Australian jurisdiction (1913-14). The maintenance of Norfolk Island as a British territory for over a decade following Australian independence in 1901 is further evidence of Norfolk Island being regarded as a separate political entity. It is further noted that the 1913 transfer to Australia via the Norfolk Island Act 1913 "to sever Norfolk Island from the Government of New South Wales and to annex it" to Australia constituted an action which was undertaken without the formal consent of the inhabitants. This unilateral act came prior to the accession by Australia to the 1919 adoption of the Covenant of the League of Nations, with particular reference to the relevant Covenant provisions related to the "well-being and development of such peoples (that) form a sacred trust of civilisation."

With the adoption of the United Nations (U.N.) Charter in 1945, Norfolk Island was not voluntarily inscribed by Australia on the original U.N. list of Non Self-Governing Territories (1946) with only Papua so listed as a dependency administered by Australia. Relevant U.N. resolutions and decisions taken between 1946 and 1960 did not precipitate the inscription of the territory by Australia on the U.N. list, nor did the adoption (1960) of the landmark Resolution 1514 XV (Decolonisation Declaration) and Resolution 1541 XV (defining the minimum self-government standards). This was in the apparent perception/projection of Norfolk Island as an integrated part of Australia because of the consideration of the territory under Section 122 of the Australian Constitution.

The review of governance under the Norfolk Island Act of 1979 revealed a significant degree of delegated - rather than devolved - authority exercised by the elected government with the objective reality of a retained unilateral power of the cosmopole. This rendered the territory below the threshold of full internal self-government, but yet not under the formal U.N. review process as a listed Non Self-Governing Territory (NSGT). Accordingly, Norfolk Island was categorised as a Peripheral Dependency (PD).

Pursuant to the relevance of Section 122 of the Australian Constitution and the historically delegated autonomy which characterised the political status of the territory, the present Assessment of the former governance arrangement under the Norfolk Island Act of 1979 applied the applicable combination of self-governance indicators concerning political autonomy with selected characteristic indicators of political integration.

The subsequent sequence of actions taken by the cosmopole in the run-up to the suspension of delegated governance in the territory is indicative of the unilateral authority exercised by Australia as the de facto 'administering power,' and emblematic of a distinct and inherent democratic deficit in the political status arrangement under the 1979 Act that permitted such a draconian, unilateral intervention as occurred with the adoption of the Norfolk Island Legislation Amendment Bill in 2015 and its entrance into force.

The subsequent administrative governance procedures put in place pursuant to the Norfolk Island Administration Act 2016 have significantly compromised the level of self-government as previously exercised under the delegation of authority from the cosmopole. The resultant appointed dependency governance (APD) currently in effect represents a significant lowering of the minimum standard for democratic governance when assessed through the relevant Self-Governance Indicators (SGIs).

## **Glossary of Acronyms, Abbreviations and Definitions \***

AC	Autonomous Country
ADG	Appointed Dependency Governance
Commonwealth	Commonwealth of Australia
Cosmopole	A country which administers an NSGT
EDG	Elected Dependency Governance
<i>"ex injuria jus non oritur"</i>	"unjust acts cannot create law"
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social & Cultural Rights
IUA	Instrument of Unilateral Authority
NIC(s)	Non-Independent Country/Countries
NIJ(s)	Non Independent Jurisdiction(s)
NI	Norfolk Island
NIP	Non-Independent Pacific
NSGT(s)	Non Self-Governing Territory/Territories
PD(s)	Peripheral Dependency/Dependencies
State	Independent Country and U.N. member State
state	An integrated polity of an independent state
SUA	Source of Unilateral Authority
<i>ultra vires</i>	Beyond the scope or in excess of legal power or authority
U.N.	United Nations
UN-DRIP	U.N. Declaration on the Rights of Indigenous Peoples

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\* **The Dependency Studies Project, 2018**

## **I. Settlement, Colonialism, and Genesis of Dependency Governance**

As the era of democratic governance continues to evolve with all deliberate speed in the Non-Independent Pacific (NIP) it has been observed that "political and constitutional modernisation (of this political component of the region) through a genuine process of self-determination continues to represent a formidable challenge... to the contemporary international self-determination mandate and its logical conclusion of full and complete decolonisation in accordance with the minimum standards for self-governance consistent with international principles." <sup>1</sup>

Australian Scholar Nic Maclellan has analysed centuries of colonisation and annexation in the region as a reflection of "global conflict between imperial nations (that) often ended with the transfer of colonial rule in the Pacific, as shown with the withdrawal of Spain (after the 1898 Spanish-American War), Germany (after World War One) and Japan (after World War Two)." He points to "the exploitation of natural resources (as) a central part of the relationship between the islands and their colonial powers." <sup>2</sup>

It is to be noted that the colonial maneuverings had its genesis in the historical progression of 'discovery' and conquest in the Pacific by several European naval powers dating from at least the 15th Century. In a 2013 study on decolonisation of the Pacific conducted for the U.N. Permanent Forum on Indigenous Issues, Toki recalled that such activity had evolved by the 1800s as a "competition among countries to seize Pacific island(s) for political, military and financial interests (with) that problem... (having) lingered until the current day." <sup>3</sup>

### **Norfolk Island**

In this context, European claims to uninhabited islands in the region, as in the case of Norfolk Island, were corollary to the establishment of colonies earlier inhabited but not permanently settled by indigenous peoples. Accordingly, the first temporary Polynesian in Norfolk Island was described in Australian Government historical records:

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<sup>1</sup> Carlyle Corbin, *Comparative Political Development in the United States-administered Pacific Dependencies*, Micronesia Educator, School of Education, University of Guam, (2015) 3.

<sup>2</sup> Nic Maclellan, *Colonial History* <http://www.abc.net.au/ra/carvingout/issues/colonial.htm> (2012) accessed 7 July 2018.

<sup>3</sup> Valmaine Toki, *Study on decolonization of the Pacific region*, Permanent Forum on Indigenous Issues, Twelfth Session, Economic and Social Council, United Nations, 20 February 2013.

“Polynesians occupied Norfolk Island prior to the arrival of Europeans in 1788. Archaeological remains suggest a single phase of occupation in the period between c.1150 and c.1450 AD, with settlers probably arriving from East Polynesia by way of the Kermadec Islands.”<sup>4</sup>

This was followed by two ‘involuntary colonial settlements’ of successive penal colonies (1788-1814 and 1824-1856) - in turn, leading to the voluntary and first sustainable settlement in 1856 by those who migrated from Pitcairn Island who presently constitute some “47.6 per cent of the permanent population.”<sup>5</sup> This settlement was facilitated as a the result of a decision by the people of Pitcairn with the concurrence of the United Kingdom (U.K.) which governed Australia and Norfolk Island. As the Australian scholar Irving wrote:

“In 1852, following several years of negotiation, the British Home Office decided to relocate the people of Pitcairn Island to Norfolk Island. The people of Pitcairn Island, a community of descendants of mutineers from the HMS *Bounty* and Tahitians, had outgrown Pitcairn Island. With the penal settlement closure imminent, Norfolk Island was deemed to be a suitable place for resettlement.

“The people of Pitcairn Island voted to make the transfer. They sailed on the *Morayshire* and landed at Kingston on 8 June 1856. The Pitcairn Islanders first stayed in ‘barracks’, and by 1857 they were in possession of the Kingston buildings that were left vacant when the penal settlement ended. Around 1858, each household head was allocated a fifty-acre lot, away from Kingston.”<sup>6</sup>

At a 22 March 2001 hearing of the Joint Committee On The National Capital and External Territories, the Norfolk Island Chief Minister Ronald Nobbs provided the territorial government's perspective on the evolution of governance of the island. In this connection, the Chief Minister recalled that "the governor of New South Wales was the person representing the British Crown from 1856 onward (and) it appear(ed), apart from his role at the arrival of the Pitcairners, when there was an obvious misinterpretation of the British government's wishes and certain land was retained, the New South Wales government had little to do with Norfolk Island until towards the end of the century."

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<sup>4</sup> Australian Government, Kingston and Arthur's Vale, Historic Area, Norfolk Island <http://kavha.gov.au/explore-the-layers-of-history/polynesian-settlement-1788.aspx#> accessed 15 July 2018.

<sup>5</sup> Helen Irving, *Autonomies of Scale: Precarious Self-Government on Norfolk Island*, Sydney Law School, Legal Studies Research Paper No. 13/83, November 2013, p.1.

<sup>6</sup> 4 op. cit.



The Chief Minister indicated that in 1895 "New South Wales, then a British colony, decided that Norfolk Island would come under its influence and claims of being its savior, et cetera, are really not borne out by facts." He further noted that "from 1896 onwards the descendants of the Pitcairn community came under the influence of Australia in what was really a bloodless coup, although it is argued by our side that there was and continues to be, a lot of blood, sweat and tears and money expended by this community in attempting to rectify what has resulted..."

The Chief Minister pointed to 1914 as seminal point in Norfolk Islands history when the island was made a territory of Australia, coinciding with World War I, without real consultation with the Norfolk Island people. In further elaboration on the historical record, the Chief Minister recounted that "the period between the (two world) wars saw an administrator appointed by the Commonwealth and what were described as fairly horrendous controls." He noted, nevertheless, that Norfolk Island retained its own laws during the period, including those which governed immigration and the electoral mandate.

He also alluded to the role of Norfolk Islanders in the Australian and New Zealand armed forces during World War II, the economic challenges in the post war period, the growth in the agriculture and whaling sectors in the 1950s, and the beginnings of a tourism industry in the 1960s before the advent of a form of self-government in 1979. He emphasised that whilst the Australian and New Zealand societies commenced about the same time, their evolution was quite different from Norfolk which he termed a distinct and different community which should be recognised and respected.

## **II. Evolution of Dependency Governance**

Contemporary political evolution in the Pacific, and in other regions of the world, has been influenced to varying degrees by the adoption of minimum standards of self-government with the 1960 approval of the U.N. General Assembly Resolution 1514 XV, known as the Decolonisation Declaration, and its companion Resolution 1541 XV which defined the options of full self-government with absolute political equality. These international instruments emerged from the adoption of the 1945 U.N. Charter with specific reference to Articles 1 and 55 which focused on the "principle of equal rights and the self-determination of peoples", Article 73 of Chapter XI on Non Self-Governing Territories whose peoples have not yet attained the full measure of self-government", and Chapter XII on the International Trusteeship System, respectively.

In the absence of a recognised global self-determination mandate before 1945, however, the political evolution of territories under dependency governance was uneven as the global self-determination mandate was only in the earliest stages in terms of the

rights and powers of the native inhabitants of territories existing under various forms and gradations of colonial administration.

For Norfolk, this was reflected in successive transfers of administrative governance from the earliest period of the first sustainable settlement in 1856. The jurisdiction of the island had predated the permanent settlement of 1856 as the island was previously incorporated into New South Wales in 1788, and then annexed to the Government and British Colony of Van Dieman's Land (subsequently Tasmania) in 1844 - some 12 years before the settlement. In 1855, the legal basis for British Appointed Dependency Governance (ADG) was set forth in an Act of the British Parliament (Australian Waste Lands Act 1855) "that it shall be lawful for Her Majesty at any time by Order in Council to separate Norfolk Island from the Colony of Van Diemen's Land and to make such provision for the Government of Norfolk Island as may seem expedient."<sup>7</sup>

This parliamentary act was the genesis of the ADG, and was made in exercise of unilateral authority over the island. This represented the initial Source of Unilateral Authority (SUA) under British dependency governance. A year later, in 1856, the Governor-General of the colonies issued a proclamation, as the initial Instrument of Unilateral Authority (IUA) giving effect to the SUA, and declaring that:

"...the said Island, (called Norfolk Island) should be a distinct and separate Settlement, the affairs of which should; until further order in that behalf by Her Majesty, be administered by a Governor for that purpose appointed by Her Majesty, with the advice and consent of Her Privy Council; and it was thereby further ordered and declared that the Governor and Commander-in-Chief for the time being in and over the Colony of New South Wales should be, and he was thereby constituted and appointed Governor of the said Island, called Norfolk Island"<sup>8</sup> (emphasis added).

The same proclamation granted to the British Governor:

"...full power and authority to constitute and appoint Judges, Justices of the Peace, and other necessary Officers and Magistrates in the said Island for the

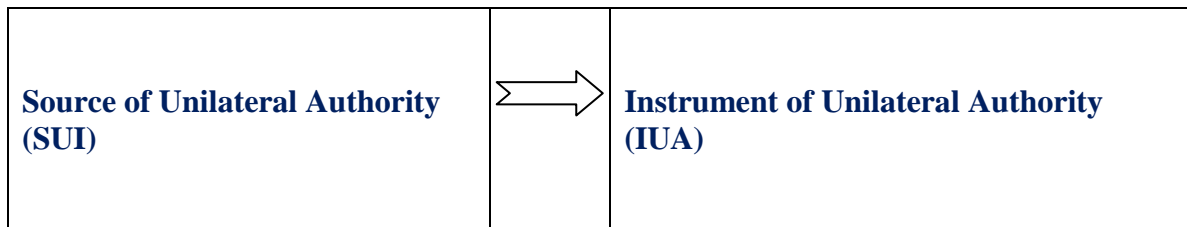
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<sup>7</sup> See "An Act to repeal the Acts of Parliament now in force respecting the Disposal of the Waste Lands of the Crown in Her Majesty's Australian Colonies and to make other provision in lieu thereof, 16th July, 1855."

<sup>8</sup> See "Proclamation by His Excellency Sir William Thomas Denison, Knight Commander of the Most Honorable Order of the Bath, Governor General in and over all Her Majesty's Colonies of New South Wales, Tasmania, Victoria, South Australia, and Western Australia, and Captain-General and Governor-in-Chief of the Territory of New South Wales and its Dependencies 24th June 1856."

administration of justice...(and) full power and authority to make Laws for the order, peace, and good government of the said Island, subject nevertheless to such Rules and Regulations as Her Majesty at any time by any instruction or instructions with the advice of Her Privy Council...(and) should have full power and authority in Her Majesty's name." <sup>9</sup>

**Figure 1. Dependency Governance and Unilateral Authority**



The 1856 Proclamation constituted the beginning of Appointed Dependency Governance (ADG) in the territory, and represented the first formal recognition of Norfolk Island as a separate polity, albeit under the overall unilateral authority and sovereignty of the U.K. This was consistent with the overall governance of British territories during the period, and is reflective of aspects of British dependency governance through to present day.

Following an extensive period of negotiation between the political leaders on the island and colonial authorities, Norfolk Island was given a measure of delegated authority by Order in Council in 1897 whilst the territory was retained under the authority of the Governor of the Colony of New South Wales. In this connection, a 12-member legislative council was created with limited powers to enact local laws, constituting the beginning of a transition to a form of Elected Dependency Governance (EDG) under British administration.

In 1901, the colony of New South Wales entered into a federation with the five other British colonies of Queensland, Victoria, Tasmania, South Australia and Western Australia to form the Commonwealth of Australia as a Dominion <sup>10</sup> of the British Empire. Under this arrangement, the governance of Norfolk Island was vested in the Governor of the former-colony-turned-State of New South Wales. The maintenance of Norfolk Island as a territory under the governance of the British colonial Governor for over a decade

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<sup>9</sup> Ibid

<sup>10</sup> A Dominion was regarded as a semi-independent country under the British crown, whilst the Balfour Declaration of 1926 subsequently recognised Dominions as "autonomous Communities within the British Empire." The 1931 Statute of Westminster recognised the full legislative independence of the Dominions as independent members of the British Commonwealth.

following the establishment of Australia as a Dominion in 1901 is further evidence of Norfolk Island as a separate political entity. Provision for the continued governance of the territory was made in Article 70 of the Constitution of the newly independent Australia:

**"70. Certain powers of Governors to vest in Governor-General**

In respect of matters which, under this Constitution, pass to the Executive Government of the Commonwealth, all powers and functions which at the establishment of the Commonwealth are vested in the Governor of a Colony, or in the Governor of a Colony with the advice of his Executive Council, or in any authority of a Colony, shall vest in the Governor-General, or in the Governor-General in Council, or in the authority exercising similar powers under the Commonwealth, as the case requires."

The unification of the former six British colonies in Australia had implications for the governance of Norfolk Island. Accordingly, the previous Legislative Council of Norfolk Island was replaced by an Executive Council in 1903 comprised of two elected members and four members appointed by the Governor-General.

The formal transfer of Norfolk Island from British ADG to Australian ADG took place in 1914 consistent with the British Australian Waste Lands Act of 1855, and given effect in the Australian Norfolk Island Act of 1913 which recognised, inter alia, that the Parliament of the Commonwealth of Australia was "willing that Norfolk Island should be placed under the authority of, and accepted as a Territory by, the Commonwealth, (and) by the Constitution it is provided that the Parliament may make laws for the Government of any Territory placed by the King under the authority of and accepted by the Commonwealth,..."<sup>11</sup> Accordingly, the Norfolk Act of 1913 was established as a successor Instrument of Unilateral Authority (IUA) for the governance of the territory within the framework of the Appointed Dependency Governance (ADG) which was being transferred from the United Kingdom to Australia. Accordingly, the Act provided, inter alia, that:

- "...the laws, rules, and regulations in force in Norfolk Island at the commencement of this Act shall continue in force, but may be altered or repealed by Ordinance made in pursuance of this Act.

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<sup>11</sup> An Act to provide for the acceptance of Norfolk Island as a Territory under the authority of the Commonwealth, and for the Government thereof, 19th December, 1913.

- Wherein any law, rule, or regulation in force in Norfolk Island at the commencement of this Act, any reference is made to the Governor, the reference shall be deemed to be made to the Governor-General (of Australia)
- The Acts of the Parliament (except this Act) shall not be in force in Norfolk Island unless expressed to extend thereto,
- The Executive Council of Norfolk Island, as existing at the Council commencement of this Act, shall continue in existence, but may be altered or abolished by Ordinance made in pursuance of this Act, Ordinances made by the Governor-General shall be published in Norfolk Island in the manner directed by the Governor-General, and shall come into force at a time to be fixed by the Governor-General, not being before the date of their publication in Norfolk Island,
- The Governor-General may constitute and appoint such Judges, Magistrates, and Officers as he thinks necessary for the good government of Norfolk Island..."
- Duties of Customs shall not be chargeable on goods into Australia from Norfolk Island if the goods produced :
  - (a) are the produce or manufacture of Norfolk Island;
  - (b) are shipped direct from Norfolk Island to Australia; and
  - (c) are not goods which if manufactured or produced in Australia would be subject to any Duty of Excise."

The 1913 Act precipitated the placement of Norfolk Island under Section 122 of the Australian Constitution, the latter of which became the new Source of Unilateral Authority (SUA) under Australian dependency governance, stating that:

"The (Australian) Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit." <sup>12</sup>

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<sup>12</sup> Commonwealth of Australia Constitution Act, 9th July 1900, as amended through 1977, Section 122..

Also cited as a corollary SUA was Section 52 of the Australian Constitution which empowers the Parliament with exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to:..... "(iii) other matters declared by this Constitution to be within the exclusive power of the Parliament."

Notwithstanding these actions taken by the U.K. and the Commonwealth in the shift of jurisdiction of the territory, former Norfolk Island Chief Minister Andre Nobbs questioned the legitimacy of the annexation in the publication "Norfolk Island Social, Economic and Governance Impacts Overview - Situation Report as at 8th June 2016, in which he argued that:

"It is difficult to determine whether it is the United Kingdom or Australia who are negligent in their responsibility to list Norfolk Island (as a non self-governing territory) as prescribed by the United Nations Charter. This point becomes evident throughout the various communications from Australia and United Kingdom that identify that Norfolk Island has never been ceded or annexed to Australia."

Nobbs cited one such 1999 communication from the Royal Australian Mint dated 1999 which state(d) that:

"...there was no evidence that Norfolk was incorporated into the Commonwealth and has never been ceded or annexed to Australia. Constitutionally, it remains a distinct and separate colony of the British Crown, supervised by Australia, not owned by Australia."

University of Wollongong Law Professor Dan Howard SC in a communication under the Optional Protocol of the International Covenant on Civil and Political Rights (ICCPR) to the Australian Electoral Commission (8th March 2018) argued in Comments on Objection 23 that:

"A proper legal examination of the constitutional history of Norfolk Island reveals quite clearly that the 1856 Order in Council of Queen Victoria established Norfolk Island as a 'distinct and separate settlement' – this status of Norfolk has never been abrogated by any subsequent Imperial Act, which is the only way that this can be changed. It cannot be abrogated by any Act of the Australian Parliament nor by any decision of the High Court of Australia. On the contrary, Australia does have clear obligations under Article 73 of the UN Charter (to which Australia is a party) to assist its territories (including Norfolk) towards self-determination."

Despite persistent questions surrounding the legality of the transfer, the transition of the territory from the British to the Australians resulted in a reversal of delegated authority and its accompanying EDG with the territory's newly elected Executive Council losing its law-making authority, and becoming primarily an advisory body. It is reiterated that the decision by the U.K. "to sever Norfolk Island from the Government of New South Wales and to annex it" to Australia, and the legislation giving effect to the annexation, constituted actions which were undertaken without a formal consent of the inhabitants of Norfolk Island. Unlike the six former colonies which would become states of Australia at independence in 1901, the other territories "attracted few constitutional guarantees" with a further differentiation between internal territories situated on mainland Australia (Northern Territory and Australian Capital Territory) and external territories such as Norfolk Island.<sup>13</sup>

The annexation preceded the accession by Australia to the 1920 Covenant of the League of Nations (Article 22), with particular reference to the relevant obligations of the signatory countries related to the "well-being and development of such peoples (that) form a sacred trust of civilisation.". Regarding the subsequent evolution of governance and successor internal governance arrangements, Irving pointed out that "in 1935, the Council was replaced by an eight member elected Advisory Council... (which) was abolished in 1957 and under the Norfolk Island Ordinance (1960) an elected Norfolk Island Council took its place."<sup>14</sup>

### **The 1976 Report of the Royal Commission**

Further developments were outlined in advance of the establishment of a Royal Commission which included an historical narrative on the evolution of dependency governance in its 1976 Report of the Royal Commission on matters related to Norfolk Island:

"In 1960, it was decided to confer on the Council a wide range of local government powers. Accordingly, the Norfolk Island Council Ordinance 1960, which gave the Council normal powers with regard to local functions, was passed. The powers were to be exercised by a fully elected Council with an elected president. It was proposed that the Council should maintain the electoral roll. Immediately after being elected in July 1960 the Council resolved that it could not accept the proposed powers because, first, the Administrator was given a power to veto bylaws passed by the Council and second, the Council would have to raise

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<sup>13</sup> 5 op. cit. at 5.

<sup>14</sup> 5 op. cit. at 8.

its own revenue, the then Administrator having stated that the traditional sources of revenue would be denied it." <sup>15</sup>

The 1976 Report of the Royal Commission also recalled proposals in 1961 that would have:

- 1) given the Norfolk Island Council power to direct the Administrator in regard to certain powers related to local government functions,
- 2) to determine how local revenue was to be expended.
- 3) to make laws - but subject to the approval of the Australian Parliament.

These proposals were not acted upon, but in 1963 a new Norfolk Island Council Ordinance Act was passed and entered into force in 1964 which made certain adjustments to the governance of the territory. These included the appointment of the Administrator as the ex officio Chairman of an eight-member Council with responsibility for maintaining the electoral roll, and the confirmation that the Commonwealth Parliament had the power under Section 122 of the Australian Constitution to make laws for the Government of Norfolk Island. Further adjustments were made in 1968 regarding eligibility to vote and stand for elected office.

The 1976 Royal Commission took these developments into account in its mandate to advance recommendations on the future governance of the Norfolk Island, its future political status, and its constitutional relationship to Australia going forward. Areas of focus included:

- (1) The future status of Norfolk Island and its constitutional relationship to Australia; and
- (2) The most appropriate form of administration for Norfolk Island if its constitutional position were changed."

Further, the Inquiry was mandated to take under consideration key elements:

- (a) The interests of Norfolk Island residents;
- (b) The historical rights of the descendants of the Pitcairn settlers, arising from their settlement in 1856;

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<sup>15</sup> Report of the Royal Commission on matters related to Norfolk Island; October, 1976, pp. 36.



- (c) Norfolk Island's legal position as a Territory of Australia;
- (d) The present and probable development of the economy of Norfolk Island;
- (e) Whether social security, health, educational, compensation and other benefits should be provided at levels similar to those which other Australian citizens enjoy;
- (f) The capacity and willingness of the Island to pay through taxation or other imposts for the provision of those benefits;
- (g) The extent to which Norfolk Island has been and is now being used to provide a base for activities (e.g. income tax, gift duty and death duty avoidance or evasion) which are harmful to the interests of Australia or of other countries;
- (h) Conditions for permanent entry into the Island community;
- (i) The need for adequate communications between the Island and Australia, and the rest of the world; and
- (j) The need for adequate law enforcement and judicial machinery.

The 1976 Royal Commission made some 74 recommendations in a wide range of areas on the future governance of Norfolk Island including:

- The disposition of the future status of Norfolk Island and its constitutional relationship to Australia and options for the most appropriate form of administration for Norfolk Island if its constitutional position were changed.
- The grant of a range of executive and legislative powers to the Assembly in a wide range of areas, with some powers in revenue generation, and the power in the Assembly to advise the Administrator on any matter relating to Norfolk Island over which the Commonwealth Government has power.
- The denial of the power of veto of the Administrator over the Assembly's legislative and executive responsibilities, and the prohibition of the administrator holding elected office, representing a most significant recommended reduction in unilateral authority.

- A five-year review of the performance of the Assembly with the aim of considering increased power to the Assembly, with the retention of an audit function by the Commonwealth Government.
- The requirement that the Commonwealth consult the Assembly on all matters which hold particular relevance to Norfolk Island and where practicable give the Island opportunity of sending representatives to meetings of international bodies whose deliberations may specifically affect the Island.
- The continuation of the exemption from sales tax of Australian-made goods.
- Consideration for the historic rights of the Pitcairn settlers arising from their settlement in 1856 including in the areas of agricultural and land rights, and the preservation of the Islanders' traditional interests and culture.
- Regulation on visitor arrivals, restoration of historic buildings, an improved public sanitation system, and a programme for reforestation.
- The requirement that all social security, all pension and all medical, hospital and other health benefits, as well as worker compensation of the Commonwealth Government be extended, and that the International Labour Organisation conventions be made applicable.
- The requirement that the onus would be on the Commonwealth Government to ensure that the educational facilities available in Norfolk Island are of the same standard as those obtaining in mainland Territories.
- The requirement that citizens in Norfolk Island be made liable to the same levels of taxation and other imposts as apply in the Australian Capital Territory
- Regulations governing land ownership of non-residents, whilst advocating for the elimination of residency preferences to Pitcairn descendants.
- The advance of an upgrade of air service and infrastructure, with the financing and control of the airport under the authority of the Commonwealth.
- The requirement that the Commonwealth be responsible for law enforcement, and that a general upgrade of the criminal justice system be undertaken.

### III. Review of Elected Dependency Governance

#### Norfolk Island Act 1979

Following the deliberations of the 1976 Royal Commission, the Norfolk Island Act 1979 entered into force, and in the process, repealed the Norfolk Island Act 1956 and the Norfolk Island Act 1963, respectively. The 1979 Act with a number of subsequent amendments represented the highest degree of Elected Dependency Governance (EDG) to date, providing for significant delegation of authority to local leaders freely chosen by the people. O'Collins observed that "since 1979, the Island has been governed under the provisions of the Norfolk Island Act 1979 (Cth), which provides the basis of the Island's legislative, administrative and judicial systems." <sup>16</sup>

O 'Collins referred to the "devolved power" under the 1979 Act for the Norfolk Island to "elect its own government, to have its own administration and to have major responsibility for raising its own revenue. It is to be observed that the United Kingdom Local Government Association defines the practice of devolution as the "transfer of power and funding from national to local government." <sup>17</sup>

In this regard, the characterisation of the powers granted to Norfolk under the 1979 Act may be more precisely described as *delegation* of power which is reversible, rather than as *devolution* of power which cannot be reversed so easily, and in many cases is irreversible. Subsequent decisions in 2016 to set aside the entire structure of Elected Dependency Governance (EDG) that had been established in the 1979 Act speaks to the reversibility of the provisions contained therein, and evidence of a unilateral authority exercised by the Commonwealth over the territory. Consistent with the historical practice of British dependency governance, it has been observed that:

"Dependency governance arrangements operating on delegated power were never meant to be permanent, and always understood to be transitional and preparatory to a model of full self-government in conformity with the minimum standards. Thus, the extension of delegated power, through constitutional orders, legislation or other methods, can always be reversed...There is a fundamental distinction between the exercise of delegated power in dependencies, and the exercise of devolved power in such places as Scotland, Wales and Northern Ireland. In short,

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<sup>16</sup> Maev O'Collins, "An Uneasy Relationship: Norfolk Island and the Commonwealth of Australia," Chapter II, ANU Press (2010).

<sup>17</sup> Local Government Association, United Kingdom, <https://www.local.gov.uk/topics/devolution/what-devolution>, accessed 1 August 2018.

delegation and devolution differ in their degree of permanence, and only devolution is irreversible." <sup>18</sup>

Former Chief Minister Andre Nobbs characterised the arrangement emerging from the 1979 Act as a form of limited self-government via an Act of the Australian Parliament with the territorial government acting as a cash economy with no access to the exclusive economic zone (*A\$100 million a year by some estimates*) that would otherwise be available to the territory; with responsibility for the three tiers of local, state and federal governance; with legislative decisions subject to the veto authority of Australia; and the responsibilities without the revenue.

In effect, the Norfolk Act 1979 granted the territory a greater degree of delegated, internal self government than had been recommended by the 1976 Royal Commission in key areas. The Commission Report, for example, recommended, *inter alia*, that all Commonwealth legislation apply to Norfolk Island, but the 1979 Act did not concur with this notion, and Commonwealth legislation was not immediately extended to Norfolk Island unless specified. Notwithstanding the delegated power contained therein, the Norfolk Act 1979 served as the principal IUA (as subsequently amended), in particular those provisions which took precedent over local law whereby particular powers could only be exercised with the consent of the Administrator who had the authority to withhold such assent. Given that the governing document was a law of the cosmopole, it remained vulnerable to unilateral amendment and abolition.

The Royal Commission made a significant determination that Norfolk Island was an integral part of Australia in its recognition that the overall power of the Commonwealth to legislate for the territory under Section 122 of the Australian Constitution. At the same time, the delegated internal self-government under the 1979 Act was unprecedented. Accordingly, the governance arrangement might have been characterised as political integration with autonomous characteristics - a form of autonomy within the State. Alternatively, the present Assessment is more inclined to characterise the governance arrangement as political autonomy with characteristics of political integration. Either way, Irving provided an accurate portrayal of these powers of the territory under the 1979 Act as of "mixed, local, regional and 'national' character." <sup>19</sup> O' Collins outlined the overall authority of the island government vis a vis the Commonwealth as:

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<sup>18</sup> Carlyle Corbin, "*Dependency Reform of Genuine Decolonisation?*" A Lecture to the H. Lavity Stoutt Community College, Paraquita Bay, Tortola, The Virgin Islands, 26 January 2017

<sup>19</sup> 3 op. cit. at 10

"...incorporat(ing) the functions of both local and state governments, in a manner similar to the Northern Territory or the Australian Capital Territory, but they also include a range of functions which are exercised exclusively by the Commonwealth in mainland Australia. The Act divides the legislative functions and responsibilities of the Assembly into Schedule 2 (*see Appendix*), which includes matters normally performed by state and local governments, and Schedule 3 (*see Appendix*), which covers matters normally reserved for the Commonwealth, such as customs, quarantine, immigration and social security." <sup>20</sup>

An examination of the structure of government under the Norfolk Act 1979 clarifies the power relationship between the unilateral authority of the Commonwealth and the exercise of delegated authority of the territory. In this connection, the Administrator of the Island "was appointed by the Governor-General of Australia, and administers the island under the authority of the Commonwealth of Australia." <sup>21</sup> The role of the Commonwealth in the governance of the territory provided that all legislation adopted by the elected Legislative Assembly required the assent of the Administrator before the law could be enacted. Additionally, the Governor-General could legislate for the territory through "Ordinances for the peace, order and good government of the Territory." <sup>22</sup> Both powers parallel those held by appointed governors within the British dependency governance system (*as evidenced in Pitcairn and the Caribbean overseas territories*) as set forth in the constitutional orders for the respective territories.

Further examination of the structure of government pursuant to the 1979 Act provided for the election of a nine-member Legislative Assembly whose members would serve for three years with powers to legislate with notable conditionality. In this regard, the Legislative Assembly:

"...may not pass bills authorising the coinage of money, nor any bills involving fishing, customs, immigration, education, quarantine, industrial relations, movable cultural objects and social security; these must be approved not only by the Australian Administrator, but also by Australia's Minister for Territories. Where any legislation is in conflict with ordinances made by Australia's Governor-General, the Norfolk Island legislation is deemed null and void." <sup>23</sup>

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<sup>20</sup> 16 op. cit.

<sup>21</sup> Norfolk Islands-The Website, <https://www.pitcairners.org/government2.html>, accessed 25 July 2018

<sup>22</sup> Norfolk Island Act 1979, Division 2—Legislative powers of the Governor-General , 19A: 'Governor-General may make Ordinances.'

<sup>23</sup> 21 op. cit.

The 1979 Act also provided for an Executive Council comprised of four of the nine members of the Legislative Assembly (who would carry the title of minister), and who would hold portfolios in Finance, Education, Immigration, Lands, Tourism or Works. The Executive Council had an advisory role in the development of policy, and counseled the Administrator on island governance. The nature and extent of political rights was also a consideration.

Whilst there was shared Australian citizenship, the privileges of citizens in the territories, including political participation and representation, were not the same as for those on the mainland. As Irving observed, "...not all the legal obligations or entitlements enjoyed by citizens in the Australian Commonwealth apply to these particular citizens (and) there is no commonwealth electorate for Norfolk..."<sup>24</sup> Further reference was made to the limitation of representation of Norfolk Island as an external territory in the Commonwealth Parliament, but with no member of Parliament.

According to *Norfolk Island - The Website*, the Norfolk Island Act 1979, "reserve(d) many powers to the Australian Government, which promised to release them within five years to the Government of Norfolk Island," (but)... Australia still retain(ed) much of what it promised to release."<sup>25</sup> Reference was also made to the interest of Norfolk Island in a free association arrangement with Australia controlling only defence and external affairs functions, but that "the Australian Government took the opposite tack and announced that Norfolk was to be incorporated into the Australian Federal electorate of Canberra." It was further noted that the people of Norfolk had rejected political annexation in two separate referenda by votes of 82% and 80.2 %, respectively. The implementation of the provisions of the 1979 Act and subsequent amendments proceeded with all deliberate speed in the wake of publicly expressed opposition to the 'annexation project'.

### **The 2003 Parliamentary Inquiry**

By 2003, and consistent with the unilateral authority of Australia, an *Inquiry into Governance on Norfolk Island* was conducted in Canberra by a Joint Parliamentary Standing Committee on the National Capital and External Territories of the Australian Parliament.<sup>26</sup> The Report of the 2003 Inquiry made a series of observations and recommendations on the performance of the territory under the Norfolk Act 1979 as "an attempt to recommend real and meaningful reform for Norfolk Island" (whilst seek(ing)

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<sup>24</sup> 5 op. cit. at 12

<sup>25</sup> 21 op. cit.

<sup>26</sup> "*Quis custodiet ipsos custodes?* Inquiry into Governance on Norfolk Island, Report of the 2003 *Inquiry into Governance on Norfolk Island*, conducted in Canberra by a Joint Parliamentary Standing Committee on the National Capital and External Territories of the Australian Parliament, 2003.

to preserve the principle of self-government..."<sup>27</sup> Accordingly, in the area of reform, the Report recommended:

"...that the continuation of self-government for Norfolk Island, as provided for under the Norfolk Island Act 1979 (Cth), be conditional on the timely implementation of the specific external mechanisms of accountability and reforms to the political system recommended in the Report (of the Inquiry)." <sup>28</sup>

The 2003 report also advocated the development of a method of increased and expanded programmes and services to be provided to Norfolk Island under enhanced accountability procedures and the introduction of specific federal programmes in social security, health, and review of pensions benefits and medical assistance matters. The Federal Government was also requested to take "immediate steps to work with the Norfolk Island Government to develop and implement a regime to regulate the permanent resident population, temporary residency and tourist numbers by the lawful operation of land, planning and zoning regulations."

Other key recommendations of the 2003 Inquiry included:

- The introduction of modalities for ensuring 'good governance' and related mechanisms for *independent and external scrutiny* of administrative action including the extension of the jurisdiction of the Ombudsman, the application of the Australian freedom of information law, and other relevant extension of federal laws on public disclosure, whistleblowing, et al. In a related vein, the expansion of jurisdiction to Norfolk Island of the Commonwealth Auditor-General to perform financial and performance auditing for reports to the Commonwealth Parliament was also advocated.
- The development of a regime to "regulate the permanent resident population, temporary residency and tourist numbers by the lawful operation of land, planning and zoning regulations."

In terms of structures of Elected Dependency Governance (EDG), the 2003 Inquiry recommended the designation of a Chief Minister who would be the leader of the government, who could appoint no more than three ministers, and who would be elected from amongst the sitting Members of the Legislative Assembly, which would in turn have the power to dismiss the Chief Minister through a vote of no confidence passed with a two-thirds majority of the Assembly Members.

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<sup>27</sup> *ibid*

<sup>28</sup> 26 *op. cit.* at xii

However, other internal governance changes were prescribed to enhance the powers of the Administrator who was appointed by and served at the pleasure of the Governor-General under the Norfolk Act 1979.<sup>29</sup> The additional powers recommended in the 2003 Parliamentary Inquiry included the authority of the Administrator to appoint the Speaker and Deputy Speaker of the Legislative Assembly. Additional powers endorsed for the Administrator, included the authority to terminate a Norfolk Minister or the Norfolk Executive as a whole, and the further discretionary authority to dissolve the Legislative Assembly and call new elections.

This power of the Administrator, as the Governor-General's appointee, would be consistent with the status of Australia as a constitutional monarchy, and specifically pursuant to the unilateral application of Section 70 of the Australian Constitution in the exercise of the executive powers vested in the Queen and exercisable by the Governor-General granted in Section 61 of the Australian Constitution. Hence, it is assumed that the Governor-General's governance of Norfolk Island through his appointed Administrator was not within the realm of reserved powers as the representative of the Crown, but rather in acting in accordance with the advice of the relevant Commonwealth minister(s) who is/are, in turn, responsible to the Australian Parliament (in which Norfolk was not represented).

The proposals of the 2003 Parliamentary Inquiry included the placement of all elections and referenda on Norfolk Island, as well as the preparation/maintenance of electoral rolls, under the supervision of the Australian Electoral Commission. On the matter of voter eligibility, the Parliamentary Inquiry recommended the re-affirmation of Australian citizenship (as opposed to Norfolk residency), and certain adjustments to duration of residency as requirements for voting in local elections. The mandatory inclusion of Norfolk Island in the Federal electorate of Canberra, and compulsory voting in Federal elections and referenda, were also broached.<sup>30</sup> Additional recommendations included a "phased reform of Norfolk Island law, with priority for redrafting of existing laws to be determined by both the Federal and Territory governments, with the Federal Government having the final say in the case of disagreement."

Overall, the recommendations emanating from the 2003 Parliamentary Inquiry provided significant detail in advancing the 'annexationist project.'

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<sup>29</sup> 22 op.cit. at Article 6

<sup>30</sup> The 2003 Inquiry into Governance on Norfolk Island followed on from a 2001 Committee Inquiry on Norfolk Island electoral matters. See hearing of the Joint Standing Committee on the National Capital and External Territories on electoral matters, Official Hansard, 2nd April 2001, Canberra.



### The 2006 Parliamentary Visit to Norfolk Island

The Joint Standing Committee on the National Capital and External Territories visited Norfolk Island in 2006 for the purpose of "discussions with the Norfolk Island Government and Legislative Assembly on current and future governance arrangements and the challenges arising from the current reform process"<sup>31</sup> earlier examined in the 2003 Parliamentary Inquiry. The Visit followed on from a mission of the Minister for Local Government, Territories and Roads earlier in 2006 to announce new federal policies consistent with the Australian exercise of unilateral authority over the territory motivated by concerns related to the financial sustainability and the governance system. The Minister had argued that "the current self-government arrangements (were) simply too complex and costly for a community the size of Norfolk Island to sustain."<sup>32</sup> The Minister had suggested alternative reform options which would, in effect, have increased the powers of the State in relation to the dependency governance model in place in Norfolk. These proposed options were framed as follows:

- A 'modified self-government model' – with greater powers for involvement by the Australian Government than currently exist; and (*emphasis added*)
- A 'local government model' in which the Australian Government might assume responsibility for state-type functions.

Accordingly to the Mission Report, representatives of the Norfolk Island Government did not share the Minister's views on the need for change in governance as they were seen as inappropriate to the territory. In the area of sustainable development, the territorial government argued that recommendations were overly focused on "issues of infrastructure and social welfare arrangements rather than the critical issue of economic sustainability."<sup>33</sup> In this connection, the territorial government indicated that the central issue of economic sustainability was being addressed through its planned reforms to reinvigorate the economy and to restructure the public sector. The territory emphasised that 'greater powers' of the State, including a 'reverse delegation of authority' in specific functions, was not warranted, and that that it wished to maintain control over its own affairs.

The Parliamentary Mission Report contained a series of recommendations, many of which followed on from previous parliamentary inquiries, and indicative of an imminent 'annexationist project.' These included:

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<sup>31</sup> *Report on the Visit to Norfolk Island of the Joint Standing Committee on the National Capital and External Territories*, 2–5 August 2006.

<sup>32</sup> 31 op.cit. at 3

<sup>33</sup> 31 op. cit. at 8

- The extension to Norfolk Island of relevant Commonwealth laws, including business and consumer laws, as being essential to the future well-being of the community, and the application of social security/Medicare services from the perspective of equal benefits and responsibilities for 'Australian citizens';
- The introduction of the Australian taxation system to Norfolk Island with the possibility for certain exemptions as is the case with the Indian Ocean Territories;
- The integration of Norfolk into the Commonwealth customs and quarantine laws whilst retaining duty free status;
- The introduction of Australian migration laws even as the Norfolk Islands Government had long argued that such local controls served to protect their unique identity;
- The creation of a joint funding mechanism for infrastructure development of a hospital, ports, and other facilities; and road upgrades, among other areas; as well as for economic diversification;
- The integration of Norfolk Island within the jurisdiction of the Commonwealth Ombudsman and the New South Wales Independent Commission Against Corruption;
- The inclusion of Norfolk Island within the Canberra electorate for purposes of federal representation, and changes to the voting system for the Norfolk Island Assembly, as recommended in earlier Parliamentary reports;

The 2006 Parliamentary Visit did not result in immediate changes to the governance of the territory along the lines of the recommendations whilst due attention was given to economic challenges experienced in the territory as a result of a downturn in tourism. A 2013 Parliamentary Visit made similar recommendations;<sup>34</sup>

This was preceded by the adoption of the Norfolk Island Road Map in 2011 which was projected in the later Report of the 2014 Parliamentary Inquiry<sup>35</sup> as a partnership agreed to by both the Commonwealth and Norfolk Island Governments with focus in the following areas:

- Governance through providing a stronger, more open and transparent form of government, building on the reforms in the Territories Law Reform Act 2010;

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<sup>34</sup> *Report of the visit to Norfolk Island*, Joint Standing Committee on National Capital and External Territories , 29-30 April 2013.

<sup>35</sup> *"Same country: different world, The future of Norfolk Island"* Joint Standing Committee on the National Capital and External Territories, October 2014.

- Economic development through quick action to address barriers to tourism, particularly reform of air services, access to the Island, and facilities for cruise ships;
- The enablement of the Norfolk Island Public Service to provide good financial and policy advice and effective services to the Norfolk Island Government and community;
- The enablement of social services including immigration and removing barriers to business investment;
- Access to the benefits provided by the Australian tax system and a fair contribution to the tax system in return for the benefits; and
- Extending Commonwealth laws to the Island to promote improved economic growth and diversification.

#### **The 2014 Parliamentary Inquiry - Rationale for Reverse Delegation**

The 2014 Parliamentary Inquiry made reference to a 2014 statement of the Commonwealth Assistant Minister for Infrastructure and Regional Development who had referred to the "abundance of reports and reviews produced to date" in apparent support of the 'annexationist project.' According to the narrative:

"Over the last four decades there has been a plethora of reviews and reports looking at these arrangements, including a Royal Commission conducted in 1976, 12 separate parliamentary inquiries and the commissioning of more than 20 reports from experts in various fields including outgoing reports from former administrators. All of these reviews, reports and audits have been unanimous in recommending significant changes and reforms."

Clearly, the die was cast to deconstruct the self-government arrangement as set forth in the Norfolk Island Act 1979 through the exercise of the unilateral authority of the Commonwealth. In the process, it was determined that the decision of the future governance of the territory, and what was to be in their best interest, was to be made for - rather than by - the people of the territory. Accordingly, the clear aim of the Commonwealth was to bring the territory further under Australian control through the replacement of the prevailing institutions of delegated Elected Dependency Governance (EDG) with an annexationist project that would introduce mechanisms of Appointed Dependency Governance (ADG). From the Commonwealth perspective, this was the most effective and convenient way of enacting governance 'reform.' In this vein, the

Report of the 2014 Parliamentary Inquiry sought to bring into question the effectiveness, over time, of the 1979 Act, beginning with the pointed conclusion that:

"The Norfolk Island Act 1979 (Cth) established self-government. Over the years, a number of reviews and reports have assessed the effectiveness of self-government and questioned whether it has best served the interests of Norfolk Island residents. Some 35 years on, it is clear that this model has failed and on many levels." <sup>36</sup>

Accordingly, the key actions called for in the 2014 Parliamentary review included:

- The repeal by the Commonwealth Government of the *Norfolk Island Act 1979* (Cth) and the establishment of an interim administration to assist the transition to a local government type body with new advisory mechanisms established, and which would effectively replace the elected government of the territory; and the transfer of competencies to the Commonwealth.
- The Commonwealth assumption of control of the infrastructure development programme.
- The appointment of officers in the transitional administration to strengthen Norfolk Island's economic and human resource capacity and Commonwealth technical support for the revamping of the tourism industry.

#### **IV. Suspension of Elected Dependency Governance**

The Norfolk Island Legislation Amendment Bill 2015 was introduced in the Australian Parliament on 26 March 2015 as the latest Instrument of Unilateral Authority (IUA) pursuant to Section 122 of the Australian Constitution as the prevailing Source of Unilateral Authority (SUA) with intention to implement major changes in the delegated elected dependency governance arrangements in place via the Norfolk Act 1979. In opposition to the changes, on constitutional grounds, the Norfolk Island Minister of Cultural Heritage and Community Services issued a press release on 1st May 2015 pointing out that because "Norfolk Island is not mentioned in the Australian Constitution... the closest thing to a constitution (for the territory) is the Norfolk Islands

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<sup>36</sup> 35 op. cit. at Chairman's foreword.

Act 1979 (which) should, therefore be treated like the Australian Constitution - no changes should be made without a referendum." <sup>37</sup>

In anticipation of the introduction of such legislation in the Australian Parliament, a petition was delivered to the Australian House of Representatives on 1st December 2014 "asking that before voting on any bill to change governance arrangements for Norfolk Island that the residents have the right to be provided with the facts and consulted at referendum or plebiscite and have a democratic say on the future model of governance..." A similar petition was presented to the Australian Senate on 18 November 2014. In this regard, the Norfolk Island Legislative Assembly adopted a measure on 18th March 2015 in support of such a referendum on the following question:

"Should the people of Norfolk Island have the right to freely determine their political status, their economic, social, and cultural development, and be consulted at referendum or plebiscite on the future model of governance for Norfolk Island before such changes are acted on by the Australian Parliament? YES/NO." <sup>38</sup>

The results of the referendum held two months later on 8 th May 2015 overwhelmingly favoured the conduct of a popular consultation on the political future of the territory. <sup>39</sup> According to former Chief Minister Andre Nobbs:

"The vote outcome demonstrated that the mythical "majority" purported to support Assistant Minister Jamie Briggs and NI Administrator's removal of self-government was grossly misleading and would have adversely affected previous assessment and consideration of the proposed governance and fiscal changes voted on by the Australian Senate. The Australian Government steadfastly ignored the Norfolk Island community views, even though significant numbers of signed petitions, form letters and attended public meetings, demonstrating that there was no majority support for the removal of self-government from Norfolk Island." <sup>40</sup>

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<sup>37</sup> See Statement of Robin Adams, Minister for Cultural Heritage and Community Services, "*Governance change is a constitutional matter*," Press release of the Government of Norfolk Island, 1 May 2015.

<sup>38</sup> See correspondence from Norfolk Island Chief Minister Lisle Snell to Australian Assistant Minister for Infrastructure and Regional Development James Briggs dated 13 November 2014.

<sup>39</sup> The results of the 8th May 2015 referendum were 624 in favour of a popular consultation on the political future of the territory to 266 against such a consultation.

<sup>40</sup> Andre Nobbs, "Norfolk Island Social, Economic and Governance Impacts Overview - Situation Report," 8th June 2016.

Nevertheless, reforms were proposed to abolish the Norfolk Island Legislative Assembly and replace it with a Norfolk Island Regional Council with limited powers to administer local services and to make laws on planning and development, with an interim Advisory Council created to reinforce the reversion to Appointed Dependency Governance (ADG) from Elected Dependency Governance (EDG). In correspondence to the Parliament, the Norfolk Island Chief Minister Lisle Snell called for a Senate Inquiry on the developments, expressing concern that "the Regional Council model will leave our community with no voice in the management of services and is not in the best interest of our community."<sup>41</sup> Additionally, it was argued that "the Australian Government (would) integrate Norfolk Island with the mainland tax and social security systems, including access to Medicare and the Pharmaceutical Benefits Scheme. Under the plan, Norfolk Islanders would not be subject to GST immediately, (and) Immigration, customs and quarantine services would be applied."<sup>42</sup>

The position of the elected government of Norfolk Island vis a vis the proposed legislation was set forth in the correspondence of the Chief Minister dated 9th May requesting a Senate Select Committee Inquiry on the Norfolk Island reform process, and in which the preferred elected Dependency Governance (EDG) model (first proposed by the territory in 2011) was articulated with respect to key elements of governance which would maintain the measure of EDG in line with the spirit of the Norfolk Island Act 1979. These elements included :

- The return of those federal powers which were being administered and funded by the territory since the 1979 Act entered into force, placing the territorial governance model more in line with the Australian Capital Territory and the Northern Territory, and consistent with 2011 and 2013 resolutions of the Norfolk Island Legislative Assembly.
- The introduction of Taxation, Social Security and Medicare systems to be conditional on transitional arrangements to be put in place so as not to disadvantage or displace Norfolk residents, and would not require the removal of self-government.
- The recognition that critical information on the nature of the legislative proposals was not provided in advance of the submission of the legislation, and the results of the 8th May 2015 referendum contradicted the contention that the

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<sup>41</sup> See correspondence from Norfolk Islands Chief Minister Lisle Snell to Senator Di Natale, Leader of the Australian Greens, Parliament House dated 9th May 2015.

<sup>42</sup> *"Delivering a stronger and more prosperous Norfolk Island,"* Press Release of The Hon. Jamie Brigg, MP, Assistant Minister for Infrastructure and Regional Development, 19 March 2015.

proposed governance reforms had significant support in the territory, and that there was wide support for a popular consultation on the future governance model before action is taken by the Australian Parliament.

Despite the clearly expressed wishes of the people of Norfolk Island expressed directly via referenda and through its democratically elected leadership, the Australian Parliament voted to adopt the Norfolk Island Legislation Amendment Act 2015 through which the structures of Elected Dependency Governance (EDG) in the territory were set aside, marking what was described as a "return to old colonial-style rule."<sup>43</sup>

Former Norfolk Islands Government Minister Robin Adams expressed that the move was an abuse of human rights, and that "the Australian Parliament will go down in history as the first since (the Australian) federation, and possibly the first in the British Commonwealth, to remove a democratically-elected parliament."<sup>44</sup> Nevertheless, the timetable for the implementation of the new arrangements was set forth in a press release of the Department of Infrastructure, Regional Development and Cities of the Australian Government with specific references to the legislative sequence:<sup>45</sup>

- In May 2015, the *Norfolk Island Legislation Amendment Act 2015* and related Acts came into effect. They provided for the Australian Government to assume responsibility for funding and delivering national and state level services and for the establishment of an elected Norfolk Island Regional Council from 1 July 2016.
- From 1 July 2016, mainland taxation, social security, immigration, biosecurity, customs and health arrangements, including Medicare and the Pharmaceutical Benefits Scheme, were extended to Norfolk Island.
- On 18 March 2016, the *Territories Legislation Amendment Act 2016* and the accompanying *Passenger Movement Charge Amendment (Norfolk Island) Act*

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<sup>43</sup> "Australia strips Norfolk Island of Independence" The Telegraph, United Kingdom, 12 May 2015.

<sup>44</sup> The United Kingdom Government performed a similar process in 2009 by abolishing the elected government of the Turks and Caicos Islands in the Caribbean, and instituting direct rule through an appointed governor.

<sup>45</sup> *Norfolk Island Governance*, <http://regional.gov.au/territories/norfolkIsland/governance/index.aspx>, accessed 17 June 2018.

2016 were passed which continued the extension of Commonwealth laws to Norfolk Island.

- Notably, the Act made enrolling to vote in federal elections compulsory, and provides for the representation of Norfolk Island electors in a single electorate in the Australian Capital Territory. The Act also provides for the phased introduction of the *Fair Work Act 2009* and associated workplace relations legislation to Norfolk Island.
- Work by the Department of Infrastructure, Regional Development and Cities is continuing to extend remaining Commonwealth legislation to Norfolk Island. This work is ongoing, and will continue into the foreseeable future to ensure Norfolk Island's laws are up to date and consistent with contemporary laws.

## **V. Dependency Governance in the Global context**

The reversal of Elected Dependency Governance (EDG) of Norfolk Island by Australia in 2016 was an extraordinary action, and synonymous with similar political maneuvers already undertaken or threatened by various cosmopoles since the beginning of the 21st Century. The expression of former Norfolk Island Government Minister Robin Adams that the Norfolk Island takeover may have been the first removal in the British Commonwealth of a democratically-elected parliament may have missed the action of the U.K. itself in its 'colonial coup' in 2009 in the Caribbean territory of the Turks and Caicos Islands, one of the seventeen Non Self-Governing Territories (NSGTs) formally listed by the United Nations.

In this example, Elected Dependency Governance (EDG) was abolished and was replaced with an Appointed Dependency Governance (ADG) model. Accordingly, the democratically-elected government was abolished and its legislative/executive functions transferred to an appointed governor from London. The unilateral action in that territory was by way of an imposition of a replacement Constitution (Interim Amendment) Order 2009, which entered into force for a period of two years in the first instance.

The 2009 Order abolished the posts of Premier and other Ministers (as well as the Cabinet and House of Assembly); Speaker and Deputy Speaker; Leader of the Opposition; Cabinet Secretary; member of the Judicial Service Commission other than that of Chairman; member of the Public Service Commission other than that of Chairman; and Complaints Commissioner.<sup>46</sup> The Order created an Advisory Council

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<sup>46</sup> Carlyle Corbin, "Recolonising the Colony 2014 , The Case of the Turks and Caicos Islands," A Paper presented to the 15<sup>th</sup> Annual Conference Sir Arthur Lewis Institute for Social and Economic Studies (SALISES), University of the West Indies; Port of Spain, Trinidad and Tobago, 23<sup>rd</sup> April 2014. p. 21.



consisting of the Governor, deputy governor, the Chief Executive, the Attorney General and the Permanent Secretary of Finance with up to seven other persons, who were known as 'the nominated members', appointed by the Governor. The newly created Norfolk Island Regional Council is a similar mechanism. The direct rule from London by an unelected governor in the Caribbean territory ushered in a scenario of 'governance by decree' with an Advisory Board whose advice was, well, 'advisory.' A lesser autonomous Constitution Order (2011) entered into force in 2012 which returned an elected government with fewer delegated powers. The powers of the Administrator for Norfolk Island served to parallel the governor in the Caribbean example cited above.

A second, more nuanced, move outside of the Commonwealth was undertaken in 2016 by the United States (U.S.) in its territory of Puerto Rico, creating an unelected, non-resident oversight board to take over the financial management of the territory from the elected government over vociferous opposition.<sup>47</sup> Puerto Rico is one of the Peripheral Dependencies (PDs) around the globe, having been placed on the original U.N. list of NSGTs via Resolution 66-1 of 1946, but having been de-listed by U.N. General Assembly resolution in 1954, or some six years before the adoption by the Assembly in 1960 of the landmark Decolonisation Declaration (Resolution 1514 XV) along with its companion Resolution 1541 XV outlining the minimum standards of the full measure of self-government.

The third interruption of elected dependency governance (EDG) was orchestrated within the European Union by the Kingdom of the Netherlands in the wake of the dismantling of the erstwhile five-island semi-autonomous territory of the Netherlands Antilles in 2010. In a similar vein to that which motivated the U.S. in relation to the takeover of the financial governance of Puerto Rico, the Dutch had similar aims in the reverse delegation of power through the extension of control over the financial management (as well as the justice system, public safety and other governmental functions) of two of the five territories under the guise of the guarantee of 'good governance'. This served as a variation on the takeover theme whereby the democratic institutions were not fully abolished, but their power was curtailed.

A most recent action by the Kingdom of the Netherlands, at the beginning of 2018, saw the abolishment of elected government and its attendant executive and legislative functions in the Caribbean 'public entity' (*special municipality*) of Sint Eustatius. This was followed by the appointment by the Kingdom of a 'Commissioner' answerable only to the Netherlands to run the affairs of government following

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<sup>47</sup> Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), 30 June 2016, Public Law 114-187.

recommendations of a group of Kingdom "*wise men*" who had alleged corrupt practices in the governance of the territory - although no corruption charges have been brought to date. This action came some eight years after a new political status had been conferred on the territory in 2010 tantamount to that of 'unequal integration' followed by a gradual annexation (unexpected in the territory) despite the expressed wishes of the people who had rejected the status in a 2014 referendum in favour of an autonomous political relationship.<sup>48</sup>

The unilateral application to Norfolk Island of ADG can be considered within a similar political context as the three examples earlier cited. Such actions pose a significant challenge to democratic governance in Non-Independent Jurisdictions (NIJs) whose delegation of power can be summarily reversed by unilateral action of the cosmopole. Such arrangements in NIJs can vary depending on the type of cosmopole-territorial political status model in place, and are governed by differing Instruments of Unilateral Authority (IUA). These models range from political arrangements of dependency status, partial integration or autonomy with larger states in Europe or North America - and in the case of Norfolk Island (*and others in the region*), a political status arrangement with a second tier, de facto administering Power which is a neighboring State (Figure 2 is instructive).

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<sup>48</sup> Assessment of the Preliminary Results of the Referendum on the Political Status of Sint Eustatius, Advisory Mission of the Dependency Studies Project, 18 December 2014.

**Figure 2. Non-Independent Pacific (2017)**

<u>Non-Self Governing (NSGTs)</u>	<u>Autonomous (ACs)</u>	<u>Integration (IJs)</u>
American Samoa a/ Guam a/ New Caledonia b/ * Fr. Polynesia b/ ** Tokelau c/ Pitcairn f/ Wallis and Futuna h/, j/	N. Mariana Islands d, /h/ Cook Islands e/, h/ Niue e/, h Bougainville l/ Norfolk Island (pre 2016)	Hawaii g/, h/ West Papua m/ Norfolk Island i/k/ (post 2016)

Notes

a/ US-administered dependent territory; listed by the U.N. as non self-governing.

b/ French-administered dependent territory; listed by the U.N. as non self-governing.

c/ NZ-administered dependent territory; listed by the U.N. as non self-governing.

d/ Semi-autonomous dependency administered by U.S.

e/ State in free association with NZ with some characteristics of integration.

f/ UK-administered dependent territory; listed by the U.N. as non self-governing.

g/ Former NSGT in full integration with U.S.

h/ Formerly an NSGT and removed from U.N. list by General Assembly resolution.

i/ Partially integrated with Australia, democratic governance suspended since 2016.

j/ French-administered dependent territory, not listed by the U.N.

k/ Never listed by the U.N. as non self-governing.

l/ Territory administered by Papua New Guinea; independence plebiscite in 2019.

m/ Territory integrated with Indonesia with some characteristics of autonomy.

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Source: Dependency Studies Project (DSP), St. Croix, Virgin Islands 2017.

Global oversight of these arrangements is uneven. Among myriad NIJ political status arrangements, only the seventeen remaining Non Self-Governing Territories (NSGTs) are presently subject to formal, annual U.N. listing and review. These include the six in the Pacific administered by the U.S., U.K. France and New Zealand,

respectively in addition to the seven in the Caribbean administered by the U.K. and U.S., with the three Caribbean French departments fully integrated into the Republic. The remaining four NSGTs are two in the South Atlantic (*Falkland Islands/Malvinas and St. Helena*); one in Europe (*Gibraltar*), and one in North Africa (*Western Sahara*). Of the latter four, only St. Helena is not the subject of a sovereignty dispute.

Apart from the NSGTs are the Integrated Jurisdictions (IJs) which are many of the former NSGTs previously under formal U.N. oversight, and which had been either judged by the U.N. General Assembly, or unilaterally proclaimed by the administering Power, as having advanced to full integration with the cosmopole. This attainment of full self-government through integration precipitated the removal from U.N. review of these former territories through the adoption of General Assembly resolutions (*Hawai'i and Alaska, et al*) on the one hand, and through unilateral means on the other hand as in the cases of the three overseas French departments of *Martinique, Guadeloupe, and French Guiana* in the Caribbean. In the case of the *French Overseas Establishments (French Polynesia, New Caledonia, Wallis and Futuna)*, the decision of the cosmopole to cease transmission of information to the U.N. on the territory was done unilaterally and without a U.N. resolution in 1947, or one year after the U.N. list was formed.

Yet, other IJs have been annexed by the cosmopole, sometimes against the will of the people of the former territory (*Bonaire and Sint Eustatius under the Netherlands*) even as the level of full political and economic equality required for genuine political integration has been brought into serious question. On the other hand, a number of Autonomous Countries (ACs) were removed from U.N. consideration when it was initially determined by the U.N. that the minimum level of self-government through autonomy had been achieved according to the prevailing international criteria.

This evolution to autonomous governance precipitated the dis-inscription of these former territories from the U.N. list of NSGTs (*Cook Islands, Niue, and the erstwhile Netherlands Antilles, et al*). The autonomous arrangements of the New Zealand model (*Cooks/Niue*) would be judged as meeting the contemporary criteria of genuine autonomous governance. Others, such as the erstwhile Netherlands Antilles, have been relegated to the Peripheral Dependency (PD) category, having been subsequently assessed as deficient in terms of the actual level of autonomy according to the recognised criteria originally codified in U.N. Resolution 1541 (XV) of 1960, and given further depth in the Self Governance Indicators (SGIs). In this light, a Self-Governance Assessment of the Dutch autonomous country of Curacao conducted in 2012 identified the deficiencies in that model.

Current U.N. procedures do not provide for a formal U.N. process to inscribe (or re-inscribe) territories which have been found to be deficient in terms of the minimum

standards of self-government under integrated or autonomous models in order to return (or place) them under U.N. oversight. Rather, the inscription/re-inscription procedure is carried out on a case-by-case basis through the attainment of a U.N. General Assembly resolution, and is a political decision of the U.N. member States.<sup>49</sup>

In light of identifiable democratic deficiencies, many of the Non-Independent Jurisdictions (NIJs) can be categorised as PDs as they have not achieved the full measure of self-government, but yet, do not come under U.N. review for reasons of premature de-listing by the U.N. in the past (*Northern Mariana Islands, Puerto Rico, Curacao, et al*). In this vein, there are also those PDs which were never formally listed by the U.N. at all, as in the case of *Norfolk Island, Rapa Nui*, et al. Despite the lack of U.N. oversight and limited avenue of redress, the PDs pose a significant challenge to contemporary self-government in accordance with modern international principles of self-determination and democratic governance. In this context, relevant international principles of self-determination are as wholly applicable to Norfolk Island as to other PDs.

## **VI. The International Mandate for Self-Determination**

The evolution of international criteria for the full measure of self-government has its genesis in Articles 1, 55 and 73 of the U.N. Charter, and continued to evolve following the adoption by the U.N. General Assembly of the Resolutions 1514 XV and 1541 XV. Subsequent U.N. resolutions, multilateral treaties, and other international instruments over the next five decades have served to further refine the required measure of self-government in assessing whether the contemporary threshold of full self-government has been met in relation to these respective political status arrangements. In this connection, four key self-determination mandates have been identified for the Pacific NICs:<sup>50</sup>

1. The importance of implementation of the international mandate on self-determination and resultant decolonisation in conformity with the U.N. Charter, human rights instruments and U.N. resolutions.

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<sup>49</sup> This procedure has only succeeded three times since the formation of the U.N. (the Portuguese-administered territories in 1960, Kanaky/New Caledonia in 1986, and most recently, Ma'ohi Nui/French Polynesia in 2013). Attempts to re-list other territories, such as Puerto Rico have fallen short.

<sup>50</sup> "Implementation of the Third International Decade for the Eradication of Colonialism - Pacific Non Self-Governing Territories," A briefing to the Permanent Representatives of the Pacific Small Island Developing States members of the United Nations by Dr. Carlyle Corbin, Senior Fellow, Dependency studies Project; 24th February 2016. See also "Plan of Implementation of the Decolonization Mandate 2006-07," U.N. Document A/60/853-E/2006/75, 17 Ma6 2006.

2. The recognition that there is no alternative to the principle of self-determination which is recognised as a fundamental human right under the relevant human rights conventions.
3. The recognition of the legitimate right of the peoples over their natural resources including land and marine resources.
4. The recognition that it is ultimately for the peoples of the territories themselves to determine freely their future political status in accordance with the legitimate three political status options: independence, free association and integration. [U.N. Resolution 1541 (XV)].

Amongst the numerous explanations on the meaning of the right to self-determination is the succinct definition offered by the Geneva-based Un-Represented Peoples Organisation (UNPO) which regards the principle as "the right of a people to determine its own destiny... (and which) allows a people to choose its own political status and to determine its own form of economic, cultural and social development."<sup>51</sup>

The UNPO definition explains that the "exercise of this right can result in a variety of different outcomes ranging from political independence through to full integration within a state." In recognition of this 'range' of options, care must be taken to avoid inadvertent or intentional legitimisation of dependency governance arrangements which do not meet the international standard of absolute political equality as set forth in relevant U.N. General Assembly resolutions and as measured by the global Self-Governance indicators (SGIs). Indeed, dependency legitimisation has become a prevailing diplomatic strategy employed by most of the countries which maintain dependencies reflective of an era of modernised dependency governance in play in the twenty-first century.

International recognition of the fundamental right to self-determination began to emerge from the signing of the 1919 Covenant of the League of Nations (Article 22) which applied to the "colonies and territories" the principle that "the well-being and development of such (colonised) peoples form a sacred trust of civilisation, and that securities for the performance of this trust should be embodied in this Covenant." This standard was subsequently contained in the 1941 Atlantic Charter which was the forerunner of the 1945 U.N. Charter in which the principle was further developed in Chapters I and IX concerning the "principle of equal rights and the self-determination of peoples."

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<sup>51</sup> *Self-Determination*, Unrepresented Peoples Organisation (UNPO), 19 July 2006.

Of specific relevance to the small island Pacific dependencies was Chapter XI on the "Declaration Regarding Non Self-Governing Territories," and Chapter XII creating the "International Trusteeship System." Subsequent international instruments also reflected recognition of this principle as a legal norm. These include, *inter alia*, the 1970 "Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States" adopted by the U.N. General Assembly, the 1975 "Helsinki Final Act" adopted by the Conference on Security and Co-operation in Europe (CSCE), the 1981 "African Charter of Human and Peoples' Rights," and the 1993 "Vienna Declaration and Programme of Action." Further, the principle of self-determination has been upheld in decisions of the International Court of Justice, and is pivotal in the deliberations of the U.N. Human Rights Committee and the Committee on the Elimination of Racial Discrimination, among other international bodies.

The right to self-determination and consequent decolonisation is confirmed through decades of U.N. General Assembly resolutions, and specific recommendations on how to achieve these rights have been contained in resolutions largely upon the urging of the U.N. Decolonisation Committee after its creation in 1961 by U.N. Resolution 1654 of 27 November 1961. Many of the prescriptive actions adopted by the U.N. paved the way for successful self-determination processes resulting in the decolonisation of former territories in the Caribbean, Pacific and elsewhere through either independence genuinely autonomous governance arrangements, or political integration.

However, the process began to slow at the beginning of the 1990s coinciding with the thawing of the Cold War and the independence of Namibia. This was a function of a faulty assumption that self-determination and decolonisation were merely reflections of East-West ideological considerations which by then had dissipated. As an unfortunate byproduct, the new political environment characterised by political adjustment and realignment rendered the international decolonisation of significantly lesser importance on the global scale of priorities.

Accordingly, the contemporary Pacific had been increasingly regarded as critical to geo-political projections in the immediate post-Cold War period with the fall of the Soviet Union, and the steady emergence of China as an economic and military power. Thus, the political realignment had specific implications for the Pacific as the focus shifted to heightened regional tensions motivated by Western concerns for the growth and influence of China, and secondarily the continued nuclear testing programme of the Democratic Peoples Republic of Korea (DPRK).

Amid these developments, the use of Pacific dependencies for military purposes became increasingly important for cosmopolis which maintained dependencies in the Pacific; such as the U.S. in relation to Guam and the Northern Mariana Islands; and

within the context of the military provisions of the respective free association arrangements of the former U.S.-administered strategic U.N. trust territories of the Federated States of Micronesia, Marshall Islands and Palau. France has also sought a role in this Western "pivot" towards China through its strategic control of three dependencies under French administration inclusive of significant military presence.

Regional States aligned with the West, in particularly Australia and New Zealand, have sought to play their part in the alliance through such multilateral security agreements as the Quadrilateral Defence Coordination Group (QUAD) among U.S., Australia, New Zealand and France<sup>52</sup> and the France-Australian-New Zealand (FRANZ) security arrangement, et al. The geo-strategic positioning of Norfolk Island as an external territory of Australia is part of this geo-strategic calculus.

### **Applicability of Right of Self-Determination to Norfolk Island**

Article 73 of the United Nations Charter makes specific reference to "... *peoples (who) have not yet attained a full measure of self-government.*" In the overall context of Norfolk Islands vis vis the U.N. self-determination and decolonisation processes, former Chief Minister Andre Nobbs concluded in 2016 that Norfolk Island should have been listed as a 'Non-Self Governing Territory' as obligated under the United Nations Resolution 1514 (the Decolonisation Declaration), passed on 14 December 1960, which proclaimed the necessity of bringing a speedy and unconditional end to colonialism in all its forms and manifestations.<sup>53</sup> The U.N. Declaration emphasised that:

"All peoples have the right to self-determination and by virtue of that right can freely determine their political status and freely pursue their economic, social and cultural development."

Nobbs concluded that the adoption of the 1960 Decolonisation Declaration "had the effect of requiring Australia under international law to list Norfolk Island on to the United Nations list of non self-governing territories", (and) once listed, Norfolk Island could then participate in a United Nations assisted transition towards a legally protected and accountable governance model designed in accordance with the wishes of the Norfolk Island People." He also referred to a 1978 report by the United Nations Association of Australia which:

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<sup>52</sup> Le Corre, Philippe and O'Hanlon, Michael (2016), *"France's Pivot to Asia: It's More than just Submarines."* The National Interest, 11 May.

<sup>53</sup> 40 op. cit., p.3



"...confirmed Australia's obligation to list Norfolk Island; however, Australia had always strongly resisted listing Norfolk Island, probably in the knowledge that by doing so they risked losing control over the extended 200nm territorial waters surrounding Norfolk Island...;the reason that Norfolk Island was, in 1972, attached to the Department of Capital Territory instead of Science and External Territories with Cocos and Christmas Islands, was deliberately to avoid U.N. scrutiny." (Nimmo Royal Commission, 1976)." <sup>54</sup>

In 2013, Irving observed that "Norfolk is treated outside the class of territories by the U.N. in 1960 as geographically separate and...distinct ethnically and/or culturally from the country administering it."<sup>55</sup> However, the failure of Australia to inscribe the territory on the original U.N. list in 1946, or at any time thereafter (*particularly in 1960 and after later consideration in 1970*), may have been more a function of geo-strategic interests (*including factors earlier referenced by Nobbs*), rather than a matter of non-applicability of the principle of self-determination to Norfolk Island. The objective reality is that the territory was - and remains - geographically as well as culturally distinct from Australia under a dependency governance arrangement of political inequality, thus placing the territory below the threshold of meeting the criteria for self-governing territorial status under Resolution 1514 (XV) and other relevant resolutions.

The "Introductory Note on the Decolonisation Declaration Res. 1514 (XV)" in the U.N. Audiovisual Library of International Law written by Law Professor Edward McWhinney observed that there was a "prophetic quality of Resolution 1514 (XV) in providing an inevitable legal linkage between self-determination and its goal of decolonisation, and a postulated new international law-based right of freedom also in economic self-determination."

Overall, many Pacific island territories have evolved over time from a colonial past which had reflected a proliferation of models of dependency governance by the end of the 19<sup>th</sup> century, with most now having achieving political independence, genuine autonomy with clearly defined mutuality or political integration with full rights in the country in which they have integrated. But for many others, the colonial past has been systematically refined with the emergence of a 'colonial present' through complex dependency governance arrangements increasingly projected - and sometimes accepted - as legitimate modes of democratic governance. In the case of Norfolk Island, it was the reverse delegation of power which was experienced in 2016, reverting to a situation of Appointed Dependency Governance (APG) through direct rule, and reversing the degree

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<sup>54</sup> ibid

<sup>55</sup> 5 op. cit. at 4.

of delegated Elected Dependency Governance (EDG) formally exercised pursuant to the Norfolk Act 1979.



A common denominator amongst these gradations of dependency governance is the exercise of unequal political power distribution between the territories and the cosmopole vis a vis democratic sufficiency. Thus, the U.N. Charter reference to *"...territories whose peoples have not yet attained a full measure of self-government"* was the fundamental provision which qualifies Norfolk Island for global consideration as an NSGT. In this vein, it is important to note that there was no reference to a formal list of NSGTs in 1945 when the U.N. Charter was adopted since the original roster of 74 territories was only created by the U.N. General Assembly a year later by Resolution 66/1 of 14 December 1946.

Some have assumed that the original roster of NSGTs contained the exhaustive list of territories to which the U.N. Charter applied. However, the language of the U.N. Charter predating the 'list', and other relevant international instruments, intended a broader scope. The original list, therefore, was not intended to be all-encompassing, and it has emerged that the significance of the list relates merely to the identification of which territories the U.N. decolonisation process would formally consider. A similar conclusion was articulated in the 2016 "Joint Opinion in the Matter of the Status of Norfolk Island as a Non Self-Governing Territory":

"Nothing in Chapter XI of the (U.N.) Charter suggests that it was intended to be temporarily limited, applicable to a closed category of territories in existence in 1945 when Article 73 was adopted, or in the 1960s when the U.N. General Assembly resolutions 1514 and 1541 were adopted. (These two resolutions), which implement the principles set out in Chapter XI, are framed in general terms...(and) there is nothing to suggest that the authors of the Charter regarded the category of such territories as closed." <sup>56</sup>

It is instructive to note that other territories not formally listed as NSGTs are included in the U.N. agenda for consideration under separate agenda items including the Situation in the occupied territories of Azerbaijan, the Question of the Comorian island of Mayotte, the Question of the Malagasy islands of Glorieuses, Juan de Nova, Europa and Bassas da India, the "Request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965," et al.

Accordingly, and in reiteration, dependencies not formally listed are, nevertheless, covered by the principle of self-determination under Article 73 of the U.N. Charter, the Decolonisation Declaration, and other relevant U.N. resolutions on the right to self-determination and decolonisation. In this context, it is to be recognised that the U.N. General Assembly has a separate agenda item entitled the '*Right of Peoples to Self-determination*' under the category of the '*Promotion of Human Rights*,' and is addressed in the Third Committee of the General Assembly (See Appendix). This is separate and distinct from the agenda item on the '*Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*' which is addressed in the Special Committee on Decolonisation which reports to the Fourth Committee (*Special Committee and Decolonisation Committee*) under the category of the '*Maintenance of Peace and Security*.'

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<sup>56</sup> See "*In the Matter of the Status of Norfolk Island as a Non Self-Governing Territory -Joint Opinion*," Christopher Ward SC, Vaughan Lowe QC, Steven Tully, and Richard Hoyle; 6 May 2016, pp.12-13.

The roster of territories on the formal U.N. list of NSGTs, and historically reviewed by previous and current U.N. decolonisation mechanisms, has been adjusted over time with the delisting of territories through U.N. resolutions following U.N. review by the predecessor *Committee of Information from Non Self-Governing Territories*. This was the case of the Netherlands Antilles (*as earlier referenced*) which was de-listed through U.N. General Assembly Resolution 945 (X) of 15 December 1955, and in the case of Puerto Rico which was similarly de-listed through U.N. General Resolution 748 (VIII) of 27 November 1953. Earlier adjustments to the NSGT list were made with respect to the French Establishments in Oceania, New Caledonia and Dependencies, et al through a unilateral, de-facto de-listing by France in 1947 following a change in nomenclature depicting the territories in the French Constitution - only one year after the NSGT list was created through voluntary inscription by the respective cosmopoles.

Of particular note was the de-listing of the Australian-administered Cocos (Keeling) Islands from the U.N. list of NSGTs via U.N. General Assembly Resolution 59/30 of 5 December 1984. Accordingly, the resolution expressed, inter alia, appreciation to Australia as the administering Power for its cooperation with the U.N. in the territory's self-determination process including the acceptance of U.N. visiting missions to the territory in 1974 and 1980, and the facilitation of a formal U.N. observation mission to the 1984 political status referendum in the territory on the options of integration, free association and independence (consistent with U.N. Resolution 1541(XV) of 15 December 1960).

A variation of the French approach of unilateral de-listing was seen in the failure of Portugal to inscribe the dependencies under its administration in Africa and Asia on the original NSGT list. This absence was addressed by the U.N. General Assembly with its adoption by the U.N. General Assembly of Resolution 1542 (XV) of 15 December 1960 (*with the objection of Portugal*) inscribing the Portuguese-administered territories on the U.N. list - the same day of the adoption of Resolution 1541 (XV) providing the minimum standards for the full measure of self-government. Any initiative to have Norfolk Island inscribed in a similar fashion as the Portuguese dependencies could be met with similar opposition from Australia, and would be determined in large measure by the identification of a country or countries which would initiate the inscription process for Norfolk Island.

It is to be emphasised that the early French and Portuguese approaches are reflective of an aversion by certain U.N. member countries to place their stewardship of dependencies under U.N. review. This attitude prevailed in the earliest years of the U.N.'s existence, and this reticence endures through the 21st Century. This is evidenced by the withdrawal of the U.K. from cooperation with the U.N. Decolonisation Committee with

respect to its island territories in 1986, the similar withdrawal of cooperation by the U.S. in 1992 (circa), and the continued refusal of France since 2013 to meet its obligations under Article 73(e) of the U.N. Charter to provide information to the U.N. on Ma'ohi Nui/French Polynesia following the re-inscription of the territory by the U.N. General Assembly by Resolution 67/265 of that year.

The broader matter of self-determination was taken up as early as 1981 in a comprehensive U.N. study on *"The Right to Self-Determination."* undertaken by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and the Protection of Minorities.<sup>57</sup> In this connection, the study emphasised that:

"220. The principles of equal rights and self-determination of peoples is part of the group of human rights and fundamental freedoms. Its recognition is the ineluctable logical consequence of the recognition of human rights. They cannot be separated. Without political freedom, civil rights cannot be fully respected...Consequently, the right of peoples to self-determination has the same universal validity as other human rights.

"221. Recognition of the right of peoples to self-determination as one of the fundamental human rights, is bound up with recognition of the human dignity of peoples, for there is a connexion between the principle of equal rights and self-determination of peoples, on the one hand, and respect for fundamental human rights and justice on the other. The principle of self-determination is the natural corollary of the principle of individual freedom, and the subjection of peoples to alien domination constitutes a denial of fundamental human rights."

In the report, the U.N Special Rapporteur argued that it was the right of peoples "to determine their own future and to organise their national life as they see fit...(and) violation of the principle of equal rights and self-determination of peoples jeopardises the very existence of those peoples...Thus the principle of equal rights and self-determination of peoples is a fundamental component of the international legal and political order.

The Special Rapporteur observed, however, that "although the principle of equal rights and self-determination of peoples has been embodied in the (U.N.) Charter and has been reaffirmed and developed in several fundamental instruments of the United Nations and in other instruments concluded between States, it is continually being violated in various parts of the world (with)...many examples of denial of the right of peoples to self-determination."

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<sup>57</sup> *"The Right to Self-Determination- Historical and Current Development on the Basis of United Nations Instruments,"* Study prepared by Aureliu Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and the Protection of Minorities; United Nations, 1981.

With specific relevance to Norfolk Island, the Special Rapporteur concluded by drawing attention to the "fundamental problem... aris(ing) in regard to equal rights and self-determination... of identifying the holder of the rights and the nature of the corresponding duties." It was concluded that "...peoples, whether or not they are constituted as a State, whether or not they have attained nation status, are the holders of equal rights and of the right to self-determination," and that the guarantee of those rights have (sic) been dictated by "historical necessity." As the Special Rapporteur indicated:

"It is also clear from a reading of other legal instruments of the United Nations, and from the Organization's consistent practice, that all peoples possess the right in question. The principle of equal rights and self-determination should be understood in its widest sense. It signifies the inalienable right of all peoples to choose their own political, economic and social system and their own international status. The principle of equal rights and self-determination of peoples thus possesses a universal character, recognised by the Charter, as a right of all peoples whether or not they have attained independence and the status of a State."

The 1981 Special Rapporteur Report identifies 'peoples' as "those who are able to exercise their right of self-determination, who occupy a homogenous territory and whose members are related ethnically or in other ways." The Rapporteur's Report indicated that the right of peoples to choose and develop their internal political system is expressed most clearly in the General Assembly "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States" in accordance with the U.N. Charter which makes specific reference to "territories whose peoples (who) have not yet attained a full measure of self-government." A range of relevant resolutions of the General Assembly have confirmed these conclusions to present day. In this light, the *oeuvre* of research establishes the clear applicability of the right to self-determination for the peoples of Norfolk Island.

## **VII. Evolution of Self-Governance Indicators (SGI's)**

The nature of the various political and constitutional status models in place in Non Independent Jurisdictions (NIJs) has become increasingly complex over time as reforms and other modifications have been enacted, and often unilaterally imposed. It is, therefore, appropriate to examine the elements of the political status arrangement of Norfolk Island to determine compliance with the minimum international standards of democratic self-governance irrespective of whether the territory as a PD is formally listed by the U.N. as an NSGT. This is particularly urgent when actions are taken against the

will of the people of a dependency and its elected political leadership, as occurred with Norfolk Island in 2016, serving to reverse self-governance authority.

Accordingly, the diagnostic tool of Self-Governance Indicators (SGIs) assesses compliance with international standards of the full measure of self-government. In this connection, the SGIs are used to determine the political power relationship between the respective NIC and the cosmopole by gauging the balance/imbalance of political power between the two polities, and to make relevant recommendations, as appropriate, to raise the level of governance in line with requisite absolute political equality. A description of the prevailing international mandate for self-determination, as included in specific international legal instruments and upon which the SGIs are primarily based, is included in the 2012 edited volume on the non-independent Caribbean and Pacific. The applicable international standards of political equality, as referenced in the present Assessment, were described in the text:

"The international norms establishing minimum standards for a full measure of self-governance are derived primarily from international law and principles beginning with the United Nations (UN) Charter, coupled with subsequent international conventions and U.N. resolutions providing greater specificity. The Covenant of the League of Nations pursuant to Article 23 was the first international instrument to deal with the evolution of peoples under non self-governing arrangements, with its reference to securing 'just treatment of the 'native inhabitants' of such territories.'" <sup>58</sup>

Among the issues identified were 1) the importance of Chapter XI of the U.N. Charter which gives definition to the principle of self-determination, and 2) the obligation of countries which administer dependencies to ensure the cultural integrity of the people concerned, along with fostering their political, economic, social and educational advancement including the promotion of the full measure of self-government through free political institutions. The role of Chapters I, IX and XI of the U.N. Charter as a basis for prescriptive remedy in addressing persistent democratic deficits inherent in the remaining dependency governance arrangements was also highlighted, as referenced earlier in the present Assessment.

Apart from the U.N. Charter, further recognition was given to other international instruments confirming the international legal mandate of the promotion and subsequent realisation of the right to self-determination and full political equality as fundamental human rights. In this connection, the key instruments of the International Covenant on

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<sup>58</sup> Corbin, Carlyle. "Applicable International Standards of Political Equality." In *The Non-Independent Territories of the Caribbean and Pacific: Continuity or Change?*, edited by Peter Clegg and David Killingray, 168-171. London: Institute of Commonwealth Studies, University of London, 2012.

Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESR), were cited as preemptory norms of *jus cogens*. Further reference was made to the lengthy and comprehensive legislative authority of decades of U.N. resolutions to carry out prescriptive remedies in addressing the democratic deficits which characterise the dependency arrangements classified as non self-governing in U.N. doctrine.

In this connection, reference was also made to territories which achieved full self-government pursuant to these U.N. resolutions, and were removed from the U.N. list of NSGTs, relieving the administering powers (cosmopoles) from the responsibility to provide information to the U.N. under Article 73(e), and ending the U.N. formal review process of the territory.

As earlier described, some of the delisted territories have been relegated to the 'dependency periphery,' having experienced unilateral adjustments to their political status arrangements after being removed from U.N. review, rendering them below the threshold of full self-government but outside international scrutiny. Then there are those dependencies, such as Norfolk Island, which had never been formally listed, and which remained isolated from U.N. review designed to ascertain the level of self-government vis a vis international standards.

In this connection, the issues related to Norfolk Island are multilayered beginning with 1) the failure by Australia to inscribe the territory on the original NSGT list in 1946 (or subsequently), 2) the emergence of forms of Appointed Dependency Governance (ADG) which were never reviewed on the basis of minimum international standards of self-government, and 3) the emergence of limited self-government delegated to the territory under the Norfolk Act of 1979 as a form of Elected Dependency Governance (EDG), and its subsequent unilateral reversal with a return to a form of direct ADG.

The U.N. General Assembly from its earliest sessions considered the factors which should be taken into account in deciding whether a territory was - or was not - non self-governing. Within the first decade of the U.N's existence, the General Assembly entrusted the issue to four different subordinate organs, and the matter was also discussed in the Fourth Committee of the General Assembly as outlined in the *Repertory of Practice of United Nations Organs*:

"The question was first considered by the Committee on Information from Non-Self-Governing Territories in 1951. It was then considered by a sub-committee of the Fourth Committee, also in 1951. By decision of the General Assembly, an ad hoc committee examined the matter again in 1952. A second ad hoc committee was constituted for this purpose and met in 1953. Following these studies and the



consequent reports, the General Assembly in 1953 adopted Resolution 742 (VIII), under which it set forth in considerable detail its conclusions as to the factors to be taken into account in determining the geographical scope of the application of Chapter XI of the Charter."

It is to be recalled that two years after the adoption of the formal U.N. list of NSGTs to which Article 73 of the Charter applied, the Assembly adopted Resolution 222 (III) of 1949 on the "Cessation of Transmission of Information under Article 73(e) of the Charter" which requested the administering Power to "communicate to the Secretary-General, within a maximum period of six months," information on its political relationship with the territory. Subsequent action by the U.N. General Assembly was chronicled in a 2006 analysis prepared for the Chair of the U.N. Special Committee on Decolonisation:<sup>59</sup>

"The (General) Assembly adopted Resolutions 567 (VI) and 637 (VII) in 1952, and Resolution 742 (VIII) in 1953, initiating the process of identifying a full measure of self-government through the political options of independence, internal self-government, and integration. Resolution 567 (VI) emphasised that for the standard for internal self-government to be met, "freedom from control or interference by the government of another State in respect of the internal government" of the territory was required. Resolution 567 also emphasised the need for complete autonomy in respect of economic and social affairs.

Resolution 637 (VII) further confirmed that the administering powers include in the information transmitted to the United Nations under Article 73(e) of the Charter "details regarding the extent to which the right of peoples and nations to self-determination is exercised by the peoples of those territories, and in particular regarding their political progress and the measures taken to develop their capacity for self-administration, to satisfy their political aspirations and to promote the progressive development of their free political institutions."

In this regard, the administering powers were obligated to advise the U.N. of relevant changes in the political status of a given NSGT, and if a request was made to the U.N. by the administering Power, a detailed review of the elements of the proposed political arrangement would be conducted by the relevant General Assembly committee on whether these changes met the established criteria for a full measure of self-government. (*This obligation continues to present day even as a process of comprehensive review is not formally reflected in the U.N. programme of work*). Thus, the

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<sup>59</sup> Corbin, Carlyle. "Criteria for the Cessation of Transmission of Information under Article 73 (e)," Overseas Territories Report, Vol. V, No. 5. (2006).

"Factors Indicative of the Attainment of Independence or of Other Separate Systems of Self-Government" adopted by the U.N. General Assembly in Resolution 742 (VIII) of 1953 provided an initial framework which codified the standards for determining whether a territory had achieved a full measure of self-government.<sup>60</sup>

Resolution 742 (VIII) established a number of key provisions to guide the international community in dealing with the question of the legitimacy of cessation of transmission of information to the U.N. by the respective cosmopoles in regards to NSGTs with the aim of justifying their deletion from the U.N. list. The resolution confirmed that the 'freely expressed will of the people' was one important prerequisite in determining the validity of political relationships between an NSGT and a cosmopole. This requirement and other relevant provisions as referenced below remain in play, and has direct applicability to Norfolk Island and other PDs.

Accordingly, Resolution 742 (VIII) set forth the principle that "fully self-governing" status" is primarily through the attainment of independence although it is recognised that self-government can also be achieved by association with another State of group of States if this is done freely and on the basis of absolute equality (emphasis added)." The resolution also affirmed that "for a territory to be deemed self-governing in economic, social or educational affairs, it is essential that its people shall have attained a full measure of self-government (emphasis added)."

Resolution 742 (VIII) proceeded with the identification of the factors indicative of self-government for the political options of independence and the attainment of other separate systems of self-government including autonomy and integration. The resolution set forth a number of specific factors in analysing the level of self-government including the opinion of the population; freedom of choice; the capacity of the territory to modify the status; geographic proximity between the cosmopole and the territory; ethnic and cultural distinctions; external relations capacity; the extent of internal self-government in connection with the legislative, executive and judiciary; and control of the political and electoral system, et al.

The codification of self-governance principles contained in Resolution 742 (VIII) delineated the standards for a full measure of self-government and full political equality, and remain applicable to present day in conjunction with subsequent resolutions including Resolution 1541 (XV). During the period, Resolution 742 was used effectively as the primary basis for a process to assess the acquisition of a full measure of self-

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<sup>60</sup> Resolution 742 (VIII) of 27 November 1953 provided a framework for the subsequent adoption of Resolution 1541 (XV) which further defined the minimum standards for whether a territory had achieved a full measure of self-government and, therefore, eligible for removal from the U.N. list of non self-governing territories.

government in a number of territories during the 1950s, and was fundamental to the decision of the General Assembly in its delisting of Puerto Rico; Greenland; and the Netherlands Antilles and Suriname during the period.

In this connection, the administering powers (cosmopoles) of these territories submitted the relevant documents to the U.N. providing their perspective on the nature and extent of self-government exercised in the three abovementioned political arrangements for review by the General Assembly pursuant to the recognised criteria contained in Resolution 742 which had given clarity to earlier resolutions on the issue. Accordingly, the General Assembly subsequently adopted separate resolutions removing the three territories from the U.N. list after determining that a sufficient level of political equality had been achieved according to the interpretation of the criteria of the period.

Thus, the procedure of transmitting information on new political developments in the territories for review by the General Assembly was established as far back as the 1950s, and the process of review of the political and constitutional arrangements based on the established criteria continued to evolve. In 1954, the General Assembly adopted Resolution 850 (IX) which was the initial legislative authority for the use of U.N. visiting missions, and participation in, or observation of, acts of popular consultation in the territories. Such missions were intended to provide the U.N. with first hand information on the situation in the territories in respect of determining whether the obligation of the administering power to transmit information regarding the territory was still in order.

Further clarity of the prerequisites to the attainment of a full measure of self-government was provided in 1960 of Resolutions 1514 (XV) and 541 (XV) cited earlier in this text. Particular note at this juncture is Resolution 1541(XV) which further refined the principle of absolute political equality earlier identified in the 1950s, with the identification and elaboration of the three options of *independence*, *free association*, and *integration*. This resolution remains the current standard for determining the full measure of self-government, and has been annually reaffirmed by the U.N. General Assembly to the present day.

In 1970, the General Assembly adopted Resolution 2625 (XXV) which affirmed, inter alia, that“...the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law...” In this section, the resolution reiterated many of the principles on self-determination contained in earlier resolutions, and reaffirmed that the three options of independence, integration or free association constituted the achievement of implementing the right to self-determination. The resolution made specific reference to the political distinctiveness of a dependency with particular applicability to Norfolk Island:

"The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles."

Resolution 2625 also cited "the emergence of any other political status freely determined by the people" as a mode of implementing the right to self-determination. Some have interpreted this reference to "*any other political status*" to mean that if the people of an NSGT territory choose to remain in a dependency status, or if their internal governance arrangement is modified short of the achievement of a full measure of self-government with political equality, the U.N. should accept the arrangement as legitimate. In some cases, an argument is made that a prevailing dependency arrangement may fit the mold of "*any other political status*" without further examination of that arrangement.

In fact, the intent of the reference in Resolution 2625 (XXV) was to recognise the emergence of differing and flexible self-governing political models as transitional to full self-government. The understanding was clear that the minimum level of political equality and the attainment of a full measure of self-government as clearly stated in Resolutions 1514(XV) and 1541(XV) remained an essential prerequisite. This has been consistently reaffirmed in the legislative authority contained in General Assembly resolutions on individual territories to present day, and is indicative of the primacy of Resolution 1541 (XV). To this point, Resolution 72/105 of 7 December 2017 on the "Question of Pitcairn is illustrative:

"The General Assembly...calls upon the administering Power, in cooperation with the territorial Government and appropriate bodies of the United Nations system, to develop political education programmes for the Territory in order to foster an awareness among the people of their right to self-determination in conformity with the legitimate political status options, based on the principles clearly defined in Assembly resolution 1541..." (XV) (*emphasis added*).

In effect, the reference to '*any other status*' in Resolution 2625(XXV) constituted a mode of implementing the right to self-determination, and did not imply that self-determination had been achieved. Rather, the legislative intent of the measure was recognised as an acceptance of a transitional measure on the path to the attainment of the full measure of self-government - not the attainment itself. In short, it was never the intention of the General Assembly, by Resolution 2625 (XXV), to legitimise political dependency models which did not provide for a full measure of self government. Accordingly, the basis of the full measure of self-government according to the minimum

standards remain firmly rooted in resolutions 1514(XV) and 1541 (XV), respectively, as confirmed by the General Assembly annually.

In examining the present level of self-governance sufficiency of Norfolk Island against established international principles of the full measure of self-government, it is appropriate to take into account this extensive mandate of the General Assembly in connection with the establishment of relevant parameters and the international legal obligations under the U.N. Charter of those States which administer territories. As earlier referenced, the pertinence of these principles to a given territory is not determined by whether that territory is on the U.N. formal list of NSGTs as this is not a requirement for their applicability.

In this context, whilst Article 73 (e) of the U.N. Charter on the transmission of information is continually stressed in determining the obligations of an administering State, such provision of information on un-listed territories would be administratively and politically problematic within the framework of current U.N. practice which is consistently questioned as to its sufficiency of review of the territories on its list. However, the primary focus of any review is on Article 73 (b) of the U.N. Charter in relation to the requirement of the Administering State to promote genuine self-government in the territories, and is directly relevant to all such dependences, listed or not. In the context of Norfolk Island, the reversion to a unilaterally-imposed governance model of Appointed Dependency Governance (ADG) does not constitute an adherence to Article 73(b) of the U.N. Charter, but has the opposite effect of 'self-government in reverse.'

The key elements of the international self-governance mandate adopted by the U.N. General Assembly chronicled above have been synthesised into specific measurements in key functional areas which serve as indicators on the level and extent of self-governance. This prevailing international mandate for self-government with full political equality constitutes part of the *jus gentium* of the international rule of law, and serves as the basis for assessing the power relationship between a non-independent polity and a cosmopole.

## **VIII. Application of Self-Governance Indicators (SGI's)**

In the context of the present assessment, the SGIs have been used to illustrate the nature of the power relationship between a given cosmopole and a dependent polity, with specific reference to Norfolk Island, taking into account increasingly intricate dependency, semi-autonomous and partially-integrated arrangements made more complex by unilateral reform measures. As in the case of Norfolk Island, delegated elements of both autonomy and integration are examined, and the relevant SGIs are

informed by different factors since self-governance in many cases is projected to have already been achieved, albeit through a reversible delegation of power.

The focus of concentration is, therefore, on 1) whether the immediate past arrangement under the EDG of the Norfolk Act 1979 met international standards of full self-government before its replacement, and 2) whether the ADG under the Australian Territories Legislation Amendment Act 2015 (Cth) and companion legislation currently meets international standards of full self-government in light of its reversal of the delegated autonomy previously exercised by the elected government of Norfolk Island.

In applying the specific SGIs, the present examination of Norfolk Island focuses on compliance with the minimum acceptable standards for autonomy with elements of integration with the Commonwealth of Australia. The reference to integration should not be regarded as lending legitimacy to the U.K. and Australian coordinated orchestrations paving the way for the 1914 unilateral annexation of the territory by Australia, as it is fully recognised that the acquisition of Norfolk Island was undertaken without the position of the people of the territory being formally ascertained through popular consultation.

Accordingly, the applicability of the legal principle of *ex injuria jus non oritur* moving forward may be germane even as its acceptance as a legal norm is not universal among States.<sup>61</sup> Following the review of the evolution of dependency governance from the perspective of the power relationship between cosmopole and dependency, the present Self-Governance Assessment (SGA) concentrates on the powers of the territory exercised under the former EDG arrangement pursuant to the 1976 Norfolk Island Act in assessing their level of actual self-government on the basis of the minimum standards. This is juxtaposed with the reduction of powers under the existent, unilaterally imposed ADG political status arrangement of Norfolk Island in 2016.

In this connection, the present SGA for Norfolk Island has provided a synopsis of the historical evolution of the Self-Governance Indicators (SGIs) reflective primarily of the minimum standards for political autonomy whilst also employing selected SGIs indicative of political integration, in particular, political participation and representation in the cosmopole. The present SGA also applies the overall SGIs for NSGTs pertinent to Norfolk and other unlisted peripheral dependencies (PDs) notwithstanding their omission

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<sup>61</sup> See "The Principle *ex injuria jus non oritur* in International Law," Ms. Anne Lagerwall, Professor of Public International Law, International Law Centre, Université libre de Bruxelles; Audiovisual Library of International Law, United Nations, New York, [http://legal.un.org/avl/ls/Lagerwall\\_IL.html#](http://legal.un.org/avl/ls/Lagerwall_IL.html#) accessed 11 August 2018.

from the U.N. list of NSGTs.<sup>62</sup> In this light, the general areas of review in the political/constitutional dimension for Norfolk Island include the right to self-determination, the nature of applicability of cosmopole laws to the territory, autonomy in the internal political process, and the nature of military activities. In the social/economic dimension, the areas of examination include the ownership of natural resources, degree of autonomy in cultural affairs, and the degree of economic dependency on the cosmopole.

## **A. Political Advancement and Constitutional Dimension**

### **i. The Right to Self determination**

The international mandate for the right to self-determination has been described in considerable depth in Section VI of the present Assessment. This right is generally regarded as "a fundamental principle of human rights law...(and) an individual and collective right to freely determine...political status and (to) freely pursue...economic, social and cultural development."<sup>63</sup> Decolonisation as a logical outcome of the self-determination process provides a remedy to the democratic deficit of dependency governance. Yet, there are a number of cases which suggest an "imperfect decolonisation" which include forced (or involuntary) annexation; and political amalgamation of states with different ethnicities, religions or cultures."<sup>64</sup>

This practice has resulted in a proliferation of Peripheral Dependencies (PDs) in the Caribbean and Pacific 'under the radar' of the U.N. owing to a lack of political will symbolic of the current U.N. decolonisation disengagement environment. The resultant *laissez faire* approach by the U.N., particularly for most of the island NSGTs, is insufficient to facilitate a method of work to examine the self-governance sufficiency of PDs without the intervention of an interested U.N. member State either 1) to propose a U.N. resolution for inscription/re-inscription (*as earlier referenced with respect to New Caledonia, French Polynesia and the Portuguese colonies*); or 2) to gain a decision at the level of the U.N. Special Committee on Decolonisation to examine a given territory only at committee level, (*as decided by the Committee by its 1972 decision with respect to Puerto Rico*).

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<sup>62</sup> A third set of SGIs are devised for the purpose of identifying the democratic deficits in existing dependency arrangements applicable to those formally listed as non self-governing, as well as the Peripheral Dependencies (PDs).

<sup>63</sup> Parker, Karen. "Understanding Self-determination: The Basics." In *The Right to Self-Determination Non-Independent Territories of the Caribbean and Pacific: Collected Papers of the first international Conference on the Right to Self-determination and the United Nations Geneva 2000*, edited by Y.N. Kly and D. Kly, 63. Atlanta: Clarity Press, 2001.

<sup>64</sup> *ibid*

It is to be noted that some scholars of dependency governance and relevant political actors have cautioned that the self-determination of dependent territories could be regarded as secession from the State, and violative of the territorial integrity of that State. An example is the claim of legitimacy of secession which was (arguably) validated by the 2010 International Court of Justice (ICJ) Advisory Opinion on Kosovo pointed out that "the scope of territorial integrity is confined to the sphere of relations between States," and that "the international legal principle of territorial integrity did not bar a sub-state entity's right to decide its political destiny." <sup>65</sup>(emphasis added).

This argument, even when considered from the perspective of a 'remedial secession', is inapplicable to the PDs because they do not form a part of the State from which the territory would be presumably 'seceding' - regardless of the annexationist actions which may have been taken unilaterally by the State and the consequent projection of the dependency as an integrated part of that State. In fact, the dependencies have a relationship with the State, albeit colonial in nature, and are sometimes subjected to an involuntary annexation, as in the case of Norfolk Island.

In the final analysis, the States party to the two 1966 U.N. Conventions on Human Rights are obligated to "promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations." <sup>66</sup> A fundamental question arises as to whether Australia has ever formally recognised the right of the peoples of Norfolk Island to self-determination that would provide the people with an opportunity to choose a constitutionally recognised status of political equality, or whether the State regards the unilateral annexation/integration of the territory as '*fait accompli*'.

A review of the relevant governance instruments reveal that there is no evidence that the several Norfolk Island Acts including the Norfolk Act 1979 contains explicit or implicit recognition by the State of any right to self-determination for the people of Norfolk Island. Hence, the references in the Preamble of the 1979 Act to various British parliamentary acts confirming British unilateral authority following the 1856 permanent settlement in Norfolk Island, and the subsequent relevant Australian Act accepting the territory pursuant to the Norfolk Island Act 1913 (and subsequent acts), were recognised as the Source of Unilateral Authority (SUA) exercised by the State with no reference to

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<sup>65</sup> "Catalonia's Legitimate Right to Decide-Paths to Self-Determination," A Report by a Commission of International Experts, 2017 (circa).

<sup>66</sup> Article 1 § 3, common to the 1966 UN Covenant Economic, Social and Cultural Rights (ICESR) and the UN Covenant on Civil and Political Rights (ICCPR).



any right to self-determination. The closest reference to political evolution in the 1979 Act relates to delegated self-government under the jurisdiction of the State:

"...WHEREAS the Parliament considers it to be desirable and to be the wish of the people of Norfolk Island that Norfolk Island achieve, over a period of time, internal self-government as a Territory under the authority of the Commonwealth and, to that end, to provide, among other things, for the establishment of a representative Legislative Assembly and of other separate political and administrative institutions on Norfolk Island;" <sup>67</sup>

This reference falls well short of an acknowledgment of the right to self-determination, and emphasises only that "internal self-government as a Territory" would be delegated under the authority of the Commonwealth" with provision for "consideration" within five years to extending the (delegated) powers conferred by or under this Act on the Legislative Assembly and the other political and administrative institutions of Norfolk Island..." Indications are that the promised further delegated powers under the 1979 Act were not fully delegated.

The *Norfolk Island Legislation Amendment Act 2015* enacted by the Australian Parliament to replace the Norfolk Island Act 1979, unsurprisingly, did not make reference to whether a self-determination right, as internationally recognised, would be respected in the overall intended reversal of the delegated power which had characterised the 1979 Act. In this regard, reference was made to 'self-determination' in the portion of the 2015 Act, *Statement of Compatibility with Human Rights*, noting that "some of this population identify as a people with rights to self-determination under Article 1 of the International Covenant on Civil and Political Rights and Article 1 of the International Covenant on Economic, Social and Cultural Rights." The Statement, however, falls short of actual recognition of any applicability of these and other relevant international instruments. Instead, the Statement concluded that a key objective of the Act was to provide for "sustainable economic and social development" referred to as "an important aspect of the right to self-determination in maintaining the Norfolk-Pitcairn culture." The Statement did acknowledge the limitations in democratic governance of the 'interim arrangements' but argued that the 'final arrangements' would correct this deficit through an elected Regional Council.

In fact, such 'final arrangements' and the process through which they have been unilaterally enacted do not constitute a formal recognition of the right of the peoples of Norfolk Island to self-determination which would include an internationally-recognised process leading to the popular determination of a political status of full political equality,

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<sup>67</sup> See Preamble of the Norfolk Island 1979, Act No. 25 of 1979 as amended.

as opposed to the apparent position of the State that the unilateral annexation/integration of the territory was a '*fait accompli*', and an internal matter.

In the final analysis, the SGI on the right to self-determination within the framework of the political relationship under the Norfolk Island Act 1979 is judged at level 1 on the scale of 4 with level 1 representing the lowest level of adherence to the self-determination principle as evidenced by the omission of recognition by the cosmopole of the right to self-determination in the dependency governance instruments governing the political relationship. This does not imply in any way that the principle of self-determination is inapplicable, or that it cannot be operationalised, but rather is singularly reflective of the absence of reference to the recognition in the formal political relationship as is often reflected in the Preamble of relevant dependency governance documents.

## **ii. Unilateral applicability of laws and extent of mutual consent**

The nature and extent of internal self-government is a critical factor in the dependent territory-cosmopole relationship. This is affected by the level of applicability of cosmopole laws, regulations and treaties which can have a significant influence in the governance of the territory. This applicability is established in various sections of the Norfolk Act of 1979 which provided a degree of delegated authority, and in the subsequent 2015 Act which reversed this power which had been exercised until 2016.

Accordingly, whilst Section 16 of the Norfolk Island Act of 1979 provided for the repeal of the Norfolk Islands Acts of 1957 and 1963, respectively, "all other acts in force immediately before the date of commencement of this section (of the Norfolk Island Act 1979) in or in relation to the Territory continue in force."<sup>68</sup> Subsequent subsections of the 1979 Act provided for the application of Commonwealth laws. In this regard, Section 18 of the 1979 Act provided for Commonwealth law to be applicable only when "expressed to extend to the territory." This provision served to moderate the automatic extension of cosmopole laws, but reserved for the Commonwealth final determination of which laws would apply. Irving was generous in the observation that "otherwise the powers are broad (and) are listed in two Schedules to the Act, in respect of which different mechanisms for (cosmopole) disallowance apply."<sup>69</sup>

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<sup>68</sup> See Norfolk Island Act 1979, Part IV—Legislation, Division 1—Laws; (16) Continuance of existing laws (1).

<sup>69</sup> 5 op. cit. p. 9.

The generosity is qualified by the fact that the assent of the Administrator was required for laws adopted by the territorial government under Schedule 2 powers (see Appendix) to enter into force (*see Appendix*), conditioned by the requirement to act in accordance with the advice of the Executive Council unless the power is considered *ultra vires*. Meanwhile, laws promulgated under Schedule 3 powers (*see Appendix*) were required to first be submitted by the Administrator to the Australian Minister for Territories who had the authority to issue instructions on the proposed legislation. Irving described the Schedule 2 powers as "extensive and broad ranging from subjects normally associated with local government..to large 'national' subjects (with) a range of powers normally exercised by the Australian states...expanded significantly since 1979..."<sup>70</sup>

In the final analysis, the SGI on the applicability of laws under the Norfolk Act of 1979 is judged at indicative levels 2 on the scale of 4, with level 1 representing the least exercise of autonomy. Accordingly, the measurement reflects a degree of consultation with the elected leadership, but with the clear unilateral authority of the cosmopole to apply laws to the territory. This measure is closely related to the specific SGI which measures the extent of mutual consent between the cosmopole and the territory in the overall decision-making process.

In this regard, the level of applicability of laws and mutual consent is judged at indicative level 2 in consideration of the considerable powers delegated to the territory as outlined in Schedule 2, and to a lesser degree in Schedule 3 of the 1979 Act. The conditionality of the final determination remaining with the cosmopole served to limit the exercise of a significant degree of mutuality, and is only bolstered by the exercise of much of the delegated authority from the cosmopole which voluntarily or inadvertently refrained from interference in the governance by the elected authorities in key areas.

### **iii.      Extent of Internal Self-Government**

The immediate two indicators assessed above, in turn, are closely related to the specific SGI which measures the level of internal self-government exercised by the territory and the extent of involvement by the cosmopole. It is to be noted that U.N. General Assembly Resolution 748 on the question of 'internal self-government' sets forth the measurement of "the nature of control or interference, if any," by the cosmopole in respect of the "internal government" in the areas of the "legislature; executive; judiciary; and economic, social and cultural jurisdiction." Additionally, Resolution 1541(XV), in regards to autonomous arrangements, makes reference to the necessity of the territory's

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<sup>70</sup> *ibid*

"right to determine its internal constitution without outside interference in accordance with due constitutional processes and the freely expressed wishes of the people." <sup>71</sup>

In this connection, attention is drawn to the role of the cosmopole in the person of the Administrator who was appointed by the Governor-General, as set forth in Part II (Administration) of the Norfolk Island Act 1979, and who "shall administer the Government of the Territory as a Territory under the authority of the Commonwealth." As set forth in the Act, the Administrator's powers were significant but conditioned by the requirement to act in accordance with advice of the Executive Council (an advisory body to the Administrator over which he presided) in relation to competencies contained in Schedules 2 and 3 of the Act, or of the Legislative Assembly. The powers of the Administrator included giving or withholding assent to all laws adopted by the elected Legislative Assembly.

As set forth in the 1979 Act, the Legislative Assembly exercised authority to enact territorial laws in defined areas with proposed laws subsequently presented to the Administrator for consideration of assent. Such consideration reflected an elaborate procedure of the exercise of unilateral authority over the lawmaking process. At this stage, the Administrator had the option of assenting to legislation, withholding assent or submitting the proposed law to the Governor-General whose options included assenting, withholding assent or returning the proposed law to the Administrator with amendments for consideration of the Legislative Assembly which could, in turn, consider the recommendations of the Governor-General and re-submit the proposed law to the Administrator for assent.

It is also to be noted that the Governor-General had extensive legislative powers pursuant to the act with the authority to disallow a law or recommend to the Administrator amendments to a law which had been given assent by its own Administrator within six months of the original assent. The Governor-General also had the authority to introduce legislation into the Legislative Assembly with respect to "peace, order and good government of the Territory." The Governor General also possessed a power synonymous to the '*Order-in-Council*' whereby the Governor in the British overseas territories has the authority to introduce legislation which the elected legislative body has no recourse but to adopt. <sup>72</sup>

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<sup>71</sup> See Principle 7(b) of the Annex to U.N. Resolution 1541 (XV) of 15 December 1960.

<sup>72</sup> An example is contained in the Pitcairn Constitution Order 2010: "*Power reserved to Her Majesty 10. There is reserved to Her Majesty full power to make laws from time to time for the peace, order and good government of Pitcairn including, without prejudice to the generality of the foregoing, laws amending or revoking this Order or Schedule 2.*"

In the context of the exercise of internal self-government, there was a clearly dominant role of the cosmopole legislated under the 2017 Norfolk Island Act. These competencies may have been moderated by the pro-active exercise of authority by the respective elected governments of the territory but the legislative authority for the exercise of unilateral power was firmly contained within the Act. The fact that the powers may have lay dormant and not exercised by the cosmopole to the fullest extent through the mandate of the Governor-General and his appointed representative, the Administrator, did not obviate the fact that the powers existed and that they could be unveiled at any time.

In the final analysis, the SGI on the level of internal self-government under the Norfolk Act of 1979 is judged at indicative level 2 on the scale of 4, with level 1 representing the least exercise of internal self-government. Accordingly, the measurement indicates, on the one hand, the clear exercise of delegated authority by the elected authorities reflective of a less than proactive approach to the application of cosmopole power in a variety of areas. On the other hand, the nature of the elaborate mechanisms of dependency governance and unilateral authority were latent, but were revealed at the time of the ultimate exercise of unilateral power which set aside the Norfolk Act 1979 in favour of the Norfolk Island Amendment Act 2015 which effectively abolished the Elected Dependency Governance (EDG).

#### **iv. Geo-Strategic Considerations**

The 2016 Defence White Paper of Australia paid particular attention to the "regional security environment" vis a vis the role of "Australia's borders and offshore territories." In this regard, it was emphasised that "safeguarding Australia's maritime approaches, offshore territories and borders is essential for Australia's national security" whilst projecting "grow(th) in sophistication and scale" (of) "threats to our maritime resources and our borders." It was also observed that "Australian fisheries remain relatively abundant, particularly in the Southern Ocean, making them appealing targets for long-range illegal fishing fleets." <sup>73</sup> Further reference was made to global factors which continue to precipitate illegal migration and other illegal activity through the region. The 2016 Defence White Paper also indicated the importance of preparation "to help protect Australia's offshore resource extraction activities, (and to) maintain Australia's sovereignty over our offshore territories and Exclusive Economic Zone..." <sup>74</sup>

In a detailed Norfolk Island Government Submission to the earlier Defence White Paper 2015 (*published date*), the issue of the territory's "strategic positioning in the Pacific Ocean and its importance to the Australian Defence Forces both as a sea and air

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<sup>73</sup> 2016 Defence White Paper, Department of Defence, Australian Government, p. 53.

<sup>74</sup> *op cit* 77, p. 73.

base" was highlighted. In connection therewith, the Submission recalled "the 1976 Australian Nimmo Royal Commission into Norfolk Island (which) suggested that one of the key reasons Australia should retain Norfolk Island was its strategic positioning and its potential to be a key link in a "future defence chain." <sup>75</sup> Reference was also made to the the 1976 Nimmo report which had recommended "that the airport be upgraded by Australian Army and Royal Australian Air Force engineers to enable the airport to cater for both immediate and foreseeable demands and to yield maximum flexibility."

The Norfolk Island Government Submission went on to advise that:

"Norfolk Island is at the extremity of the eastern boundary of the Australian Defence Primary Operating Environment and is considered a vital component of Australian interests in protecting trade routes, fishery operations , surveillance, transnational crime and people smuggling." <sup>76</sup>

The submission elaborated on the various facilities in the territory with military application including the Norfolk Island Fuel Depot, along with two jetties at the sea ports which were "Commonwealth assets but maintained by the (previous) Administration of Norfolk Island" (which were) "designed for local small boat use." Other facilities described as having military applications included the Norfolk Island Airport which "is used for defence purposes, and...as an airstrip for emergency landings and a staging post for Australia, New Zealand and South Pacific flights and (previously) as a base for anti-submarine patrols in the Pacific during World War II." The Submission explained the role that the Norfolk Island Airport has played, and continues to play, in defence-related activities of the cosmopole, including regional military activities and providing access to cosmopole-allied countries:

"The Airport has continued to be used by the Royal Australian and New Zealand Air Forces and French Navy aircraft. The Norfolk Island Airport is central to any eastern approaches to the Pacific Island community and New Zealand. A prime example was during the 1987 Fijian Coup d'état when Norfolk Island facilities provided an evacuation and forward response base for Operation 'Morris Dance' which enabled Australian Defence Force military personnel to be transferred to/from Royal Australian Navy ships enroute to the Fijian area."

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<sup>75</sup> Norfolk Island Government Submission Defence White Paper 2015, Tim Sheridan, MLA' Minister for Finance, Government of Norfolk Island, 24 October 2014.

<sup>76</sup> *ibid*



Norfolk Islands The Website points out that the new military barracks which are used at present as Norfolk Islands Administrative Centre:

"...provide an excellent and rare example of a pre-1850 fortified military compound. It was completed in 1837 in response to a need for greater protection of the soldiers from possible convict uprisings. It(s) complex housed 164 soldiers and four sergeants, and contained a soldiers' barracks, officers' quarters, an ammunition magazine, a military hospital - used initially as a ballroom - and various outbuildings."<sup>77</sup>

In the 2014 Norfolk Island Government Submission to the Australian White Paper, there was expressed support for the key findings and recommendations of the 2008 Future Directions International Occasional Paper entitled *'Australia's External Territories: The Forgotten Frontiers'*<sup>78</sup> which proposed, inter alia, that:

1. "In the future, the External Territories will be the leading geopolitical edge of Australia's presence in its surrounding region" and in terms of the Pacific Ocean, the authors suggest that 'Australia will have to expand its defence and strategic

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<sup>77</sup> [https://www.pitcairners.org/vt\\_new\\_military\\_barracks.html](https://www.pitcairners.org/vt_new_military_barracks.html) accessed 15 August 2018.

<sup>78</sup> See *"Australia's External Territories: The Forgotten Frontiers,"* Future Directions International, FDI Occasional Paper, 2008.

planning to consider additional areas of operation and flanks which were previously considered secure, often due to their inaccessibility'.

2. A rethinking of the External Territories position with regards to national defence is important'; and
3. "Consider(ation be given to) the ability of the Australian Defence Force to adequately protect its External Territories, and ensure a dedicated Australian Defence Force planning capability relative to the Territories."

The 2014 Norfolk Island Submission concluded with the following recommendations:

- "1. It is in the best interests of the Australian Defence Forces to ensure that facilities in Norfolk Island that would support the Australian Defence Force during emergencies or day to day operations are in a condition that could be utilized by it immediately.
2. That the Australian Defence Force consider improvements to the Norfolk Island jetties in any review of Defence facilities for foreseeable demands."

International decolonisation doctrine has consistently provided support for the adoption of U.N. General Assembly resolutions in regard to military-related activities of cosmopolis that might affect the territories. In this connection, the U.N. General Assembly, most recently, addressed the issue in Resolution 72/111 of 7 December 2017 calling for the administering powers to ensure, inter alia, that such defence-related activities under their administration "do not adversely affect the interest of the peoples..." whilst calling on the cosmopolis "not to involve those Territories in any offensive acts or interference against other States."<sup>79</sup>

This portion of the present Assessment relative to the former, current and projected use of Norfolk Island in the framework of the geostrategic considerations of the cosmopolis is limited to the extent of consultation with the elected government regarding such activities and their effects on the territory. On these points, the Submission by the Norfolk Island Government on the previous Defence White Paper was indicative of a structured avenue for comment on defence matters as related to and affecting the territory during the period of the Norfolk Island Act 1979. It is unclear, however, as to whether

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<sup>79</sup> See UNGA Resolution 39/91 of 14 December 1984, 40/57 of 2 December 1985, 41/41 of 2 December 1986, 42/71 of 4 December 1987, 43/45 of 22 November 1988, 44/101 of 11 December 1989, 45/34 of 20 November 1990.



this consultation rose to the level of effective input into the defence decisions involving military activities in and surrounding the territory.

Hence, the indicative level for geo-strategic considerations regarding Norfolk Island is judged between indicative levels 1 and 2 on the scale of 4, representative of the existence of a formal process for the territory to have commented on defence related issues, with level 1 representing the cosmopole's unilateral authority to engage in military activities without such consultation with the territory.

#### **v. Participation in the Political Process of the Cosmopole**

In the earlier section of the present Assessment which introduced the specific SGIs used to examine Norfolk Island, it was indicated that the territory would be examined from the perspective of an autonomous territory with characteristics of integration. In this regard, the relevant indicator for integration identified for review vis a vis Norfolk Island was the nature and extent of political representation and participation in the political process of the cosmopole. To this end, U.N. Resolution 742 is to be recalled with respect to the concern for the level and extent of legislative representation "without discrimination in the central legislative organs on the same basis as other inhabitants and regions." Resolution 1541(XV) went further by mandating "equal status and equal rights of citizenship..., and equal rights and opportunities for representation and effective participation" in the political system of the cosmopole.

It is to be noted that a consistent feature of Elected Dependency Governance (EDG) in play in British and U.S. administered territories in the Caribbean and Pacific, and in the Dutch 'public entities' in the Caribbean (as opposed to the freely associated states such as Cook Islands, Niue et al), is the exercise of a form of unequal integration, to varying degrees. Whilst there is shared citizenship in each of the models, the level of representation and participation in the political process varies. For Norfolk Island, Irving pointed out in 2013 that:

"Representation of the territories in the Commonwealth Parliament is limited - only the Northern Territory and the ACT (Australian Capital Territory) currently have seats in the Parliament (with) Norfolk...represented by the responsible Commonwealth Minister for Territories, but has no member of the House of Representatives.<sup>80</sup>

Irving went further to explain that pursuant to the Norfolk Island (Electoral and Judicial) Amendment Act:

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<sup>80</sup> 5 op. cit. at 13.

"...provision was made for islanders to enrol in a mainland electorate, either one with which the individual has some connection (or in which he or she was previously enrolled), or alternatively in one of the Commonwealth electorates for the ACT. Exceptionally...enrolment for Norfolk Islanders is optional, while it is compulsory in the rest of Australia...Citizens in territories without representation, or those who are not enrolled in the Commonwealth Parliament, are excluded from voting on proposals to change the (Australian) Constitution under which their own self-government is framed. Norfolk Islanders may vote as electors of another Australian electorate, but not as (Norfolk) Islanders." <sup>81</sup>

Following the demise of delegated self-government exercised under the Norfolk Island Act 1979, the island's population is now governed by the laws of New South Wales, but has no say in those laws, and the people must vote in Australian elections in Canberra, a large landlocked electorate 1,900km away. The new procedures under the 2016 Act of mandated electoral participation whilst still remaining without effective representation results in the indicative level of between 1 and 2 for the SGI of participation in the political process of the cosmopole.

## **B. Economic, Social and Cultural Dimension**

### **i. Extent of ownership and control of natural resources**

U.N. emphasis on the natural resources question continues to be extensive. The U.N. General Assembly adopts annual resolutions with provisions related to the ownership and control of natural resources by NSGTs, most recently in 2017 by a vote of 128 in favour with 7 against and 40 abstentions. <sup>82</sup> Australia joined other cosmopoles of the U.K. and the U.S. in voting against the measure. Nevertheless, the relevant paragraphs of the resolution establish global policy on the matter:

"(Operative 15) Urges the administering Powers to take effective measures to safeguard and guarantee the inalienable rights of the peoples of the Non-Self-Governing Territories to their natural resources and to establish and maintain control over the future development of those resources, and requests the relevant administering Powers to take all steps necessary to protect the property rights of the peoples of those Territories."

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<sup>81</sup> *ibid*

<sup>82</sup> See operative paragraph 15 of Resolution 72/111 on the *Implementation of the (Decolonization) Declaration*, 7 December 2017.

Other annual resolutions are also relevant to the issue of natural resources ownership. The 2017 text on economic and other activities which affect the interests of the peoples of NSGTs<sup>83</sup> made specific references to this effect. Australia voted in favour of this 2017 resolution:

"(Preamble 7) Taking into account General Assembly resolution 1803 (XVII) of 14 December 1962 regarding the sovereignty of peoples over their natural wealth and resources in accordance with the Charter and the relevant resolutions of the United Nations on decolonization.

.....  
"(Operative 4) Reaffirms its concern about any activities aimed at the exploitation of the natural resources that are the heritage of the peoples of the Non-Self-Governing Territories, including the indigenous populations, in the Caribbean, the Pacific and other regions, and of their human resources, to the detriment of their interests, and in such a way as to deprive them of their right to dispose of those resources.

.....  
(Operative 7) Calls upon the administering Powers to ensure that the exploitation of the marine and other natural resources in the Non-Self-Governing Territories under their administration is not in violation of the relevant resolutions of the United Nations, and does not adversely affect the interests of the peoples of those Territories."

Other resolutions have *"reaffirmed... that the natural resources are the heritage of the peoples of the Non-Self-Governing Territories, including the indigenous populations."*<sup>84</sup> Resolutions on individual territories have also expressed "concern over the use and exploitation of the natural resources of the Non-Self Governing Territories by the administering Powers for their benefit."<sup>85</sup>

Notwithstanding the clear international confirmation of the ownership of natural resources by the peoples of dependent territories, Australia (as other cosmopolis) has consistently exercised complete control over the particular resources of Norfolk Island's Exclusive Economic Zone (EEZ), and the "Environment Protection and Biodiversity Conservation Act 1999" was made applicable unilaterally to the territory. The marine

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<sup>83</sup> See preamble paragraph 7 of Resolution 72/92 on *Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories*, 7 December 2017.

<sup>84</sup> See preamble paragraph 6 of U.N. Resolution 72/92 on *"Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories"* 7 December 2017

<sup>85</sup> See preamble paragraph 8 of U.N. Resolution 72/105 of 7 December 2017 on the "Question of Pitcairn", and other resolutions on specific island territories.

environment including the sea around Norfolk Island out to 200 nautical miles was extended to Norfolk Island during the period of Norfolk Island Act 1979:

**Figure 3 Maritime Zone claimed by Australia**



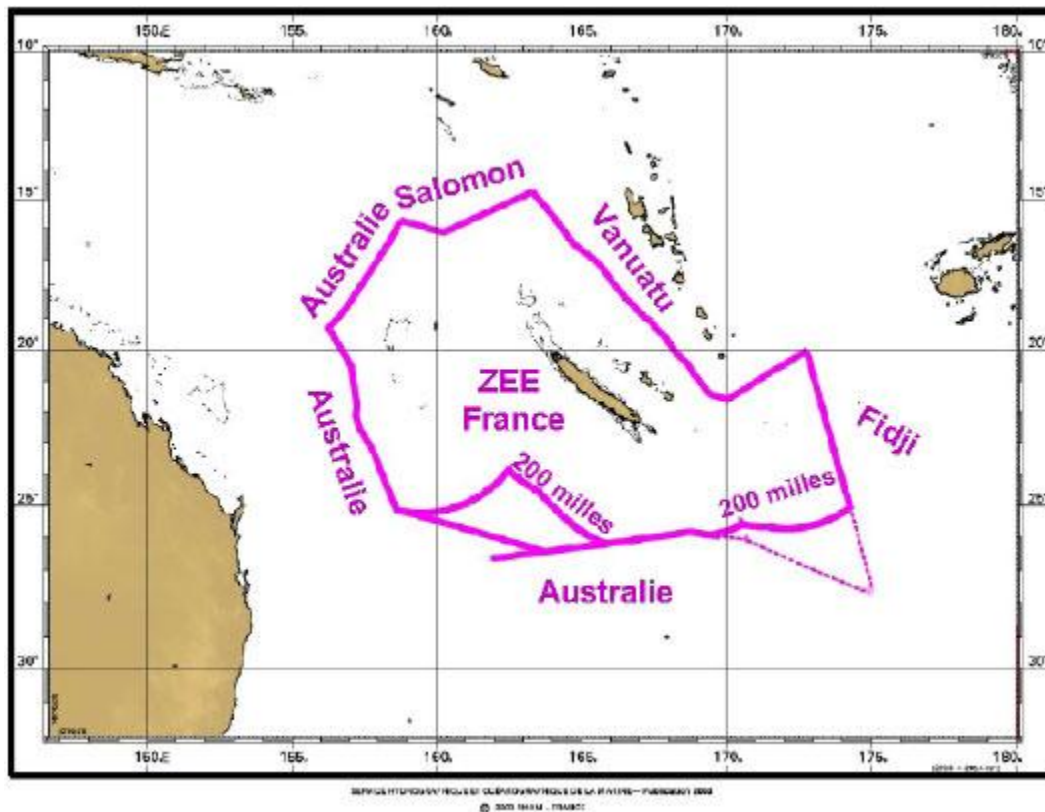
In this connection, the *Norfolk Island People for Democracy* made the following observation:

"Norfolk Island Exclusive Economic Zone (NIEEZ) is the area of water that extends 200 Nautical miles from the coast of Norfolk Island, in every direction, and includes all of the resources in & under it. The Norfolk Island EEZ is more than 4 times larger than Tasmania, 3 times larger than the North Island of New Zealand and almost twice as large as Victoria. The Norfolk Island EEZ has the potential to generate substantial wealth for the Norfolk Island Community; wealth that could and should be used to support a business case for a sustainable future for the Norfolk Island Community. This model has been proven to work

extremely well in the Falklands to the financial benefit of both Britain and the Falkland Island People." <sup>86</sup>

Meanwhile, other States with dependencies in the Pacific also claim the natural resources of the sea by virtue of their administration of these territories, and have direct implications for Norfolk Island by virtue of geographic proximity.

**Figure 4. Proximity of Australian and French Economic Zones**



In the final analysis, the SGI on the extent of ownership and control of natural resources under the Norfolk Act of 1979 provided for a system of shared governance through territorial and cosmopole laws in respect of terrestrial resources, with far less power in terms of issues related to marine resources. In this regard, it is to be recalled that the competency in fishing was included as a Schedule 3 power which could only be exercised by referral of the (cosmopole) Administrator to the Commonwealth Minister for Territories.

<sup>86</sup> <http://www.norfolkonline.com/norfolk-island-people-for-democracy>, accessed 10 July 2018.

Overall, the ownership and control of natural resources exercised by the territory is judged between indicative levels 1 and 2 on the scale of 4 with level 1 representing the least degree of territorial authority. The measurement reflects the complete control of the EEZ by the cosmopole despite the confirmation by the international community through U.N. resolutions that such resources belong to the peoples concerned. On the matter of land granted by the British Crown to the peoples who constituted the first permanent settlement, there is insufficient indication that the cosmopole has accepted the legitimacy of this act, and evidence that they have dismissed the claim.

## **ii. Degree of Autonomy in Economic Affairs**

U.N. General Assembly Resolution 748 identifies the relevance of the autonomy in economic affairs as an important factor in autonomous arrangements, and refers to the degree of "*freedom from economic pressure*" exerted on the society. Other relevant resolutions emphasise the responsibility of the cosmopole to advance the economies of the territories concerned. A 2016 analysis by a former Chief Minister of the territory on the socio-political history of Norfolk Island shed considerable light on developments which resulted in the ultimate loss of autonomy in the economic sphere as part of the demise of Elected Dependency Governance (EDG) in the territory:

"Norfolk Island's Governance has survived, if not flourished since 1979. Even with the serious constraints applied to the limited form of Self-Governance. Norfolk Island's Governments of the day have operated their budgets in the positive for more than 30 years. An impressive track record, particularly when the same evaluation takes into account the span and capacity of the island's infrastructure and service delivery – paid for by the islands own taxes and revenues." <sup>87</sup>

The 2016 analysis made reference to the denial of the Norfolk Island 2015 request to the cosmopole for temporary financial assistance in an amount below AUD \$4 Million in the wake of the global financial crisis which had affected the Norfolk economy, whilst the cosmopole was simultaneously running significant deficits. At the same time, concern was expressed that the cosmopole "could hoard the financial benefits of Norfolk Island's Exclusive Economic Zone (EEZ) (in the amount of AUD 100 million), accept indirect and direct taxes from the people on the island, refuse to assist throughout the (global financial crisis); and then claim 'financial reasons' and 'failed state' status for the island as a reason to collapse the islands Parliament and remove the elected representatives."<sup>88</sup>

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<sup>87</sup> Andre' Nobbs, *Norfolk Island Social, Economic And Governance Impacts Overview: Situation Report as at 8th June 2016*.

<sup>88</sup> *ibid.*

It was further emphasised in the 2016 analysis that "access to revenues from the island's Exclusive Economic Zone would immediately bring the island into a financially sustainable position, (as) the revenues from the EEZ were to (have been)...transferred to Norfolk Island as a part of the review/expansion of self-government capacities" under the 1979 Norfolk Island Act. The lack of capacity to retain revenue from the EEZ has served to divert significant revenue from the territory. One estimate has indicated that revenue from fishing licences alone would more than sustain the territorial economy, and there is significant potential for the mining of undersea minerals in the EEZ.

The 2016 analysis highlighted the "limited self-governance" of the territory, originally intended to be the "commencement of a pathway to full self-government through a review process, inclusive of providing the island access to the revenues from the exclusive economic zone 200 nautical miles around Norfolk Island." The analysis argued that "Norfolk Island based taxes and government revenue streams have enabled infrastructure and service delivery beyond the means of most, if not all remote Australian communities of similar size." Indeed, much of the revenue generated in the territory during the period of the Norfolk Island Act 1979 were derived from airport landing and departure fees, and other levies, customs duties, stamp duties and other fees.

As much of the infrastructure developed from local revenue had since been taken possession of by the cosmopole in the demise of the Norfolk Act of 1979 and the resultant imposition of Appointed Dependency Governance (ADG), the issue of revenue diversion is particularly significant. In connection therewith, the *Norfolk Island People for Democracy* provided an optimistic picture of economic self-sufficiency if locally generated revenue was allowed to be retained:

"The Norfolk Island Exclusive Economic Zone (NIEEZ) is the area of water that extends 200 Nautical miles from the coast of Norfolk Island, in every direction, and includes all of the resources in & under it. The Norfolk Island EEZ is more than 4 times larger than Tasmania, 3 times larger than the North Island of New Zealand and almost twice as large as Victoria. The Norfolk Island EEZ has the potential to generate substantial wealth for the Norfolk Island Community." <sup>89</sup>

The cosmopole perspective vis a vis the Norfolk Island economy painted a different picture, taking little notice of the economic potential of the island through locally generated resources, minimising the effectiveness of economic diversification efforts of the previous elected governments, and concluding that levels of government

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<sup>89</sup> "What is the real wealth of Norfolk Island, Norfolk Island People for Democracy, <http://www.norfolkschoice.com/> accessed 22 July 2018.



income have not matched levels of expenditure required to fund operations and services, and to fund depreciated infrastructure. Such determinations led to the ultimate withdrawal of economic autonomy, and the introduction of cosmopole programmes heretofore not made available to the territory.

Accordingly, as announced by the Australian Government in a 19th March 2015 press communique, *"taxation, social security and healthcare arrangements on Norfolk Island effective from 1 July 2016"* were introduced.<sup>90</sup> This significantly contributed to the unilateral changes in the economic relationship between the territory and the cosmopole with respect to economic autonomy.

Accordingly, there was a substantial degree of autonomy in economic affairs under the 1979 Norfolk Island Act, but this internal control was set aside in the abolishment of the limited self-government arrangement. The lack of authority of the territory to retain the revenue which was generated from its own economy, in particular that which is derived from the EEZ (*as described above*), is a major deficiency in economic governance experienced by many dependencies globally - in the case of Norfolk Island, estimates range as much as \$A 450 million a year, whilst investments in the island from non-Australian sources were reported to be repeatedly blocked by the cosmopole.

Against this background, the level of autonomy exercised by the territory in economic affairs under the 1979 Act is judged at indicative level of between 1 and 2 on the scale of 4, emblematic of considerable delegated power of revenue generation and independent financial management, but simultaneously reflective of a familiar scenario where the cosmopole derived significant revenue generated by the territorial economy that would have otherwise sustained the territory in difficult economic periods, and which would have provided it with the resources to continue to address infrastructure upgrades.

### **iii. Degree of Autonomy in Cultural Affairs**

Professor Peter Mühlhäusler in a seminal study on Norfolk Island ethnicity, culture and language concluded that the Norfolk Islanders of Pitcairn ancestry are recognised as a "genetic isolate" with "(a)nthropometric research suggest(ing) significant physiological differences between Norfolk Islanders and Anglo--Australians." Mühlhäusler observed that:

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<sup>90</sup> *"Delivering a stronger and more prosperous Norfolk Island,"* The Hon. James Briggs, MP, Assistant Minister for Infrastructure and Regional Development, Media Release, 19 March 2015.



"Pitcairn homeland and the Pitkern---Norf<sup>o</sup>k language play a central role in defining the identity of Norfolk Islanders. The Norfolk Islanders are distinct from mainland Australians with regard to all parameters that define ethnicity: homeland, shared ancestry, cultural narrative and cultural core values; Norfolk Islanders subscribe to a separate Anglo---Polynesian rather than Australian identity... The material culture of the Norfolk Islanders combines Tahitian, West Indian and British influences with a large amount of adaptation as well as later influences from American whalers and the High Anglican Melanesian Mission... Islanders subscribe to a separate Anglo---Polynesian rather than Australian identity... The Pitcairn homeland and the Pitkern---Norf<sup>o</sup>k language play a central role in defining the identity of Norfolk Islanders..."<sup>91</sup>

Mühlhäusler further noted that:

"The Norf<sup>o</sup>k language is neither directly related to English nor mutually intelligible. It is technically characterized as an Anglo---Polynesian---St. Kitts Creole language. Its core grammar is typologically different from English. The semantic and pragmatic properties of the Norf<sup>o</sup>k language are more Polynesian than English. Polynesian pragmatics is carried over into the variety of English used by Norfolk Islanders." <sup>92</sup>

However, it was argued that an Australian policy of attempted assimilation was in play in the promotion by Australian Government authorities of the notion of Norfolk Islanders as "ethnically and culturally akin to the population of mainland Australia." This was reported to be used as a rationale for not listing Norfolk Island on the U.N. list of NSGTs as it was projected as an integral part of Australia.<sup>93</sup> This projection by Australia has formed part of the justification for the current reversal of EDG.

However, it has been confirmed earlier in the present Assessment that the right to self-determination including the right to the exercise of cultural expression, is held by "*peoples who are able to exercise their right of self-determination, who occupy a homogenous territory and whose members are related ethnically or in other ways,*" and that the guarantee of those rights have been dictated by historical necessity."<sup>94</sup>

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<sup>91</sup> See Peter Mühlhäusler, *Expert Report on The Distinctiveness of Norfolk Islander Ethnicity, Culture and the Norf<sup>o</sup>k Language (Norfolk Island South Pacific)*, Executive Summary (2007 circa).

<sup>92</sup> *ibid*

<sup>93</sup> *ibid*, p. 6

<sup>94</sup> 57 *op. cit.*

The preponderance of research establishes the clear recognition of Norfolk Islanders as a distinct set of 'peoples' characterised as native inhabitants of the territory with a common ancestry and homeland, shared history, and shared core cultural values. In this connection, specific international instruments have addressed the question of autonomy for peoples in the expression of cultural affairs. The U.N. Declaration on the Rights of Indigenous Peoples (UN-DRIP) <sup>95</sup> contains provisions of particular relevance to the right of cultural expression and the broader context of human rights.

#### **Article 1**

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

#### **Article 2**

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

#### **Article 3**

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

#### **Article 4**

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

#### **Article 5**

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

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<sup>95</sup> See U.N. Resolution 61/295 *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007.

**Article 8**

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture...

2. States shall provide effective mechanisms for prevention of, and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

.....

**Article 11**

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

.....

**Article 18**

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

**Article 19**

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

**Article 20**

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities...

.....

**Article 23**

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

.....

**Article 26**

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned

.....

**Article 27**

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

.....

## Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

.....

## Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

An earlier international mandate with relevance to the question is contained in the U.N. *"Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities"* adopted by the U.N. General Assembly by Resolution 47/135 of 3 February 1993. Several provisions of the resolution are instructive whereby the U.N. General Assembly:

"Not(ed) the importance of the even more effective implementation of international human rights instruments with regard to the rights of persons belonging to national or ethnic, religious and linguistic minorities."

Accordingly, two relevant provisions of the Declaration, as contained in its Annex shed considerable light on the longstanding mandate from which the General Assembly proclaimed, inter alia:

"States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.

.....

States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs..."

A further international mandate is contained in U.N. Resolution 742 (VIII) in relation "factors indicative of the association of a territory on equal basis with the metropolitan or other country as an integral part of that country or in any other form." The resolution refers to the importance of the "extent to which the population are of different race, language or religion or have a distinct cultural heritage..."<sup>96</sup> U.N. Resolution 1541(XV) is also relevant in its reference to the obligation of the cosmopole to "*transmit information with respect to a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.*"<sup>97</sup>

A particularly important mandate is Article 27 of the International Covenant on Civil and Political Rights (ICCPR)<sup>98</sup> which indicates that:

"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

In the framework of adherence to these provisions, it is to be emphasised that the Preamble of the Norfolk Island Act 1979 contained specific provisions in favour of recognition by the cosmopole of the cultural distinctiveness of Norfolk Island. Accordingly, the Australian Parliament, in its adoption of the 1979 Act, recognised in the Preamble:

"...the special relationship of the said descendants with Norfolk Island and their desire to preserve their traditions and culture (and that) the Parliament consider(ed) it to be desirable and to be the wish of the people of Norfolk Island that Norfolk Island achieve, over a period of time, internal self-government as a Territory under the authority of the Commonwealth and, to that end, to provide, among other things, for the establishment of a representative Legislative

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<sup>96</sup> see U.N. Resolution 742 (VII) on "*Factors which should be taken into account in deciding whether a Territory is or is not a Territory whose people have not yet attained a full measure of self-government*," 27 November 1953.

<sup>97</sup> 60 op. cit.

<sup>98</sup> See Article 27 of the *International Covenant on Civil and Political Rights (ICCPR)*, Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976. Also see "*Universal Declaration on Cultural Diversity, adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization*," 2 November 2001.

Assembly and of other separate political and administrative institutions on Norfolk Island..."

In that sense, a number of initiatives were undertaken by the Norfolk Island Government in promotion of the formal recognition of the culture of the territory, including the *Norfolk Island Language (Norf'k) Act 2004 (NI)*, adopted in 2004 and assented to by the Australian resident representative, that "recognise(d) the Norfolk Island Language (Norf'k) as an official language of Norfolk Island." The Act declared that:

"3. (The) 'Norfolk Island Language or 'Norf'k' means the language known as 'Norf'k' that is spoken by descendants of the first free settlers of Norfolk Island who were descendants of the settlers of Pitcairn Island.

#### **Acknowledgment of Norf'k**

4. By this enactment the government and people of Norfolk Island recognise and affirm the Norfolk Island Language (Norf'k) and the right of the people of Norfolk Island to speak and write it freely and without interference or prejudice from government or other persons.

#### **Use of Norf'k**

5. (1) The Norfolk Island Language may be used in all forms of communication between persons of Norfolk Island (but need not be) but when used in official communications must always be accompanied by an accurate translation in the English language.

(2) Norf'k may be used as a language of learning and instruction in schools in Norfolk Island but no child shall be compelled to learn or be instructed in it."

In 2007, In furtherance of the international recognition of the authenticity of the Norf'k language, the Chief Minister of the Territory announced that:

" The United Nations Educational, Scientific and Cultural Organisation (UNESCO) ha(d) agreed to include Norf'k in the next edition of its '*Atlas of the World's Languages in Danger of Disappearing*' following submission to UNESCO by the Norfolk Island Government of a research paper <sup>99</sup> (referenced above) prepared by Prof Peter Muhlhausler setting out the case for recognition and protection of our language."

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<sup>99</sup> 91 op. cit.

The Chief Minister noted that "the advice from UNESCO is a significant step in building recognition of the unique language and culture of Norfolk Island," and made reference to "other exciting cultural initiatives...including the progress toward establishing a cultural centre."

Overall, the level of autonomy exercised by the territory in cultural expression under the 1979 Norfolk Island Act was considerable as evidenced by the abovementioned references in the Preamble to the Act, and subsequent initiatives such as the *Norfolk Island Language (Norf'k) Act 2004 (NI)* as assented to by the cosmopole. Accordingly, the degree of autonomy in cultural affairs when the 1979 Act was in force is judged at indicative level 3 on the scale of 4, reflective of active cultural expression coupled with its formal recognition by the cosmopole in the context of the political relationship with the territory.

The abolition of the EDG model and its replacement with an ADG framework has served to set aside the formal recognition of the cosmopole in autonomy of cultural expression, in legislative and executive powers, and in other areas. With respect to culture, this observation was made by letter from the (then) Chief Minister Lisle Smith to an Australian parliamentarian in the run-up to the Australian removal of elected government in May 2015.

"...the fact that the proposed amendments to the Norfolk Act 1979 remove the Preamble to that Act would seem an impingement on the rights of minorities. The Preamble to the Act is the only place in legislation that recognises the descendants of Pitcairn Island as residents of Norfolk Island. In the Australian population, Norfolk Islanders of Pitcairn descent are a minority. The Preamble, amongst other things, 'recognises the special relationship of the said descendents with Norfolk Island and their desire to preserve their traditions and culture.' There has been no consultation on the removal of the Preamble which recognises these people. Therefore the conclusion contained within the Statement of Compatibility that the bill is compatible with Human Rights is incorrect. It is our opinion and the opinion expressed on 8 May 2015 by the Norfolk Island electorate, that the reform Bills as proposed do in fact limit human rights and should be the subject of a Senate Inquiry."<sup>100</sup>

Notwithstanding the concerns expressed by the elected leader of the territory, the Preamble was repealed with the enactment of the Norfolk Island Legislation Amendment

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<sup>100</sup> See correspondence from Lisle Snell, Chief Minister and Minister for Tourism, Government of Norfolk Island to Senator Di Natalie, Leader of the Australian Greens, 9 May 2015.



Act 2015. Accordingly, the degree of autonomy in cultural affairs following the abolition of the 1979 Act is judged at indicative level 1 on the scale of 4, reflective of a reversal of recognition of the distinctiveness of the Norfolk Island culture apart from the Australian culture.

## **Concluding Observations**

Significant attention was paid to the elements of the Norfolk Island Act 1979 as the framework for Elected Dependency Governance (EDG) and the instrument which governed the territory until the enactment of the "Norfolk Island Legislation Amendment Act 2015" which unilaterally set aside elected government in favour of Appointed Dependency Governance (ADG) in contravention of the democratically expressed will of the people of the territory. Note is taken of interest expressed in returning to the provisions of the 1979 Act, including its Preamble, as it is may be perceived as an acceptable form of democratic governance.

The present Assessment does not support this notion, however, as the governance arrangement under the 1979 Act (and prior Acts) operated from a position of delegated authority - indeed the very governmental structures created pursuant to the 1979 Act and its antecedents were subject to continuation or abolition at the whims of the plenary authority of the Commonwealth Government. The application of the relevant Self-Governance Indicators (SGIs) revealed that within the context of the operation of delegated governance, unilateral authority prevailed in most of the important areas. Hence, a future return to the same form of EDG governance that earlier prevailed would place the territory in a similar position of political vulnerability experienced under the 1979 Act which led to the deconstruction of EDG in the territory in the first instance.

University of Wollongong Law Professor Dan Howard weighed in on the matter of the dissolution of elected government, arguing that:

"In complete disregard of these obligations, Australia in 2015 amended the Norfolk Island Act so as to abolish Norfolk's Legislative Assembly and to take away Norfolk's significant degree of self-governance. This is not only unconstitutional under Australian law, but in clear breach of Article 73 (of the U.N. Charter). Alarming, the amendments to the Norfolk Island Act (1979) also deleted all of the important Preamble to the Act that had acknowledged the distinct and close cultural connection of the Pitcairn descendants to Norfolk Island. This was a most serious development, purporting to obliterate all acknowledgement of Norfolk's distinct culture by stroke of legislative pen."

Indeed, the 2015 Act was the vehicle that removed any semblance of democratic governance, and the Norfolk Island Administration Act 2016 "to authorise New South Wales to provide services and exercise functions in connection with the administration of Norfolk Island" confirmed the administrative attachment of the territory to that Australian state. The 2015 Act went on to abolish the Legislative Assembly, the post of Chief Minister and the Executive Council, and further to transfer the powers of the erstwhile elected government to the appointed Administrator who serves under the direction of an Australian Minister with a designated Advisory Council named by the Minister to "advise the Administrator on matters affecting the peace, order and good government of the Territory."

Meanwhile, the Governor-General retained the power to "make Ordinances for the peace, order and good government of the Territory" but the reporting responsibilities of the Administrator were re-directed from the Governor-General to the designated Minister, implying a reduced connection of the territory with the British Crown. In the process, property and records under the control of the previously elected government were transferred to the Australian-administered authority. According to Australian scholar Roger Wettenhall, the 2015 and 2016 Acts has "reduced (Norfolk Island) to the status of a local government area within the state of New South Wales, and its citizens forced to enrol for compulsory federal elections in a Canberra electorate."<sup>101</sup>

As Attorney Geoffrey Robertson wrote in an *Op Ed* in the publication, The Guardian,

"Abolishing Norfolk Island as an autonomous territory may not seem to matter much in the grand scheme of things, but for an international order that cherishes self-government and proclaims the right of self-determination of people it is a regressive and unimaginable action, an example of the inability to tolerate democracy and difference. " <sup>102</sup>

Overall, the result of the takeover of the elected government has rendered the territory in a political arrangement of dependency periphery, and insufficient international oversight of such unilateral actions can result in the establishment of dependency governance models under significant political imbalance supported by a

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<sup>101</sup> , " Roger Wettenhall, "*Decolonizing through Integration: Australia's off-shore island territories*, Island Studies Journal, (Vol II, No. 2), Institute of Governance and Policy Analysis, University of Canberra, Australia 2016.

<sup>102</sup> See Geoffrey Robertson, "*The recolonisation of Norfolk Island is a heavy-handed act of aggression*," The Guardian ,22 April 2016

disturbingly reactionary school of thought that "Western Countries should reclaim the colonial toolkit and language as part of their commitment to effective governance..." <sup>103</sup>

The present Assessment has reviewed the constitutional, political and socio-economic dimensions of the erstwhile and present political status of Norfolk Island, and in the process has identified relevant democratic deficiencies in the earlier arrangements inclusive of the 1979 Norfolk Island Act. The democratic deficit in the current successor arrangement is self-explanatory with the abolition of elected government and the unilateral imposition of direct rule by a parliament in which the people have no representation. Against this background, the present Assessment has also examined issues related to the applicability of the right to self-determination for the people of the territory - a right which is significantly constrained under the prevailing circumstances in Norfolk Island brought on by the unwanted Appointed Dependency Governance (ADG) under the 2015 Act.

There appears little scope for consultation on a restoration of elected government as the unilateral decisions taken by the cosmopole are not regarded within the framework of a "*suspended sovereignty*," <sup>104</sup> whereby the governance arrangements might be restored following some adjustments. On the contrary, all indications are that the ADG in play is deemed by the cosmopole as reflective of a permanent and legitimate dependency governance model irrespective of the political and economic inequalities contained therein.

In this context, it is often the case that political interests often take precedence over such lofty values as democratic governance and self-determination. Nevertheless, the historical privilege of colonial power is an uneasy condition for those who are colonised, and the international community through its several deliberative processes are appropriate forums to bring these matters for adjudication.

The intention of the present Self-Governance Assessment (SGA) was to scrutinise through the application of the relevant Self-Governance Indicators (SGIs) the former and prevailing power relationships between the territory and the cosmopole. Accordingly, the present SGA has determined that 1) the previous governance model of Elected Dependency Governance (ADG) did not meet the recognised international standards for the full measure of self-government through autonomous governance, and that 2) the current Appointed Dependency Governance (ADG) model presently does not meet the recognised international standards for the full measure of self-government through

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<sup>103</sup> Bruce Gilley, "*The Case for Colonialism*," Third World Quarterly, 2017.

<sup>104</sup> Alexandros Yanniss, "*The Concept of Suspended Sovereignty in International Law and its Implications in International Politics*," European Journal of International Law, 2002.

integrated governance. The prevailing arrangement which has been unilaterally imposed represents a denial of the right to self-determination of the peoples of Norfolk Island.

## **APPENDIX**

**United Nations**  
**General Assembly Resolution 1514**

***947th plenary meeting***  
***14 December 1960***

**1514 (XV). Declaration on the granting of independence  
to colonial countries and peoples**

*The General Assembly,*

*Mindful* of the determination proclaimed by the peoples of the world in the Charter of the United Nations to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small and to promote social progress and better standards of life in larger freedom,

*Conscious* of the need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples, and of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

*Recognizing* the passionate yearning for freedom in all dependent peoples and the decisive role of such peoples in the attainment of their independence,

*Aware* of the increasing conflicts resulting from the denial of or impediments in the way of the freedom of such peoples, which constitute a serious threat to world peace,

*Considering* the important role of the United Nations in assisting the movement for independence in Trust and Non-Self-Governing Territories,

*Recognizing* that the peoples of the world ardently desire the end of colonialism in all its manifestations,

*Convinced* that the continued existence of colonialism prevents the development of international economic cooperation, impedes the social, cultural and economic development of dependent peoples and militates against the United Nations ideal of universal peace,

*Affirming* that peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law,

*Believing* that the process of liberation is irresistible and irreversible and that, in order to avoid serious crises, an end must be put to colonialism and all practices of segregation and discrimination associated therewith,

*Welcoming* the emergence in recent years of a large number of dependent territories into freedom and independence, and recognizing the increasingly powerful trends towards freedom in such territories which have not yet attained independence,

*Convinced* that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory,

*Solemnly proclaims* the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations;

And to this end,

*Declares* that:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.
2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.
4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.

5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.



**United Nations**  
**General Assembly Resolution 1541**

*948th plenary meeting*  
*15 December 1960*

**[Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter]**

*The General Assembly,*

*Considering* the objectives set forth in Chapter XI of the Charter of the United Nations,

*Bearing in mind* the list of factors annexed to General Assembly resolution 742 (VIII) of 27 November 1953,

*Having examined* the report of the Special Committee of Six on the Transmission of Information under Article 73 e of the Charter,<sup>12</sup> appointed under General Assembly resolution 1467 (XIV) of 12 December 1959 to study the principles which should guide Members in determining whether or not an obligation exists to transmit the information called for in Article 73 e of the Charter and to report on the results of its study to the Assembly at its fifteenth session,

1. *Expresses its appreciation* of the work of the Special Committee of Six on the Transmission of Information under Article 73 e of the Charter;
2. *Approves* the principles set out in section V, part B, of the report of the Committee, as amended and as they appear in the annex to the present resolution;
3. *Decides* that these principles should be applied in the light of the facts and the circumstances of each case to determine whether or not an obligation exists to transmit information under Article 73 e of the Charter.

*948th plenary meeting, 15 December 1960.*

## **ANNEX**

### **PRINCIPLES WHICH SHOULD GUIDE MEMBERS IN DETERMINING WHETHER OR NOT AN OBLIGATION EXISTS TO TRANSMIT THE INFORMATION CALLED FOR IN ARTICLE 73 E OF THE CHARTER OF THE UNITED NATIONS**

#### ***Principle I***

The authors of the Charter of the United Nations had in mind that Chapter XI should be applicable to territories which were then known to be of the colonial type. An obligation exists to transmit information under Article 73 e of the Charter in respect of such territories whose peoples have not yet attained a full measure of self-government.

#### ***Principle II***

Chapter XI of the Charter embodies the concept of Non-Self-Governing Territories in a dynamic state of evolution and progress towards a "full measure of self-government". As soon as a territory and its peoples attain a full measure of self-government, the obligation ceases. Until this comes about, the obligation to transmit information under Article 73 e continues.

#### ***Principle III***

The obligation to transmit information under Article 73 e of the Charter constitutes an international obligation and should be carried out with due regard to the fulfilment of international law.

#### ***Principle IV***

*Prima facie* there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.

#### ***Principle V***

Once it has been established that such a *prima facie* case of geographical and ethnical or cultural distinctness of a territory exists, other elements may then be brought into consideration. These additional elements may be, *inter alia*, of an administrative, political, juridical, economic or historical nature. If they affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination, they support the

presumption that there is an obligation to transmit information under Article 73 e of the Charter.

### ***Principle VI***

A Non-Self-Governing Territory can be said to have reached a full measure of self-government by:

- (a) Emergence as a sovereign independent State;
- (b) Free association with an independent State; or
- (c) Integration with an independent State.

### ***Principle VII***

- (a) Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes. It should be one which respects the individuality and the cultural characteristics of the territory and its peoples, and retains for the peoples of the territory which is associated with an independent State the freedom to modify the status of that territory through the expression of their will by democratic means and through constitutional processes.
- (b) The associated territory should have the right to determine its internal constitution without outside interference, in accordance with due constitutional processes and the freely expressed wishes of the people. This does not preclude consultations as appropriate or necessary under the terms of the free association agreed upon.

### ***Principle VIII***

Integration with an independent State should be on the basis of complete equality between the peoples of the erstwhile Non-Self-Governing Territory and those of the independent country with which it is integrated. The peoples of both territories should have equal status and rights of citizenship and equal guarantees of fundamental rights and freedoms without any distinction or discrimination; both should have equal rights and opportunities for representation and effective participation at all levels in the executive, legislative and judicial organs of government.

### ***Principle IX***

Integration should have come about in the following circumstances :

(a) The integrating territory should have attained an advanced stage of self-government with free political institutions, so that its peoples would have the capacity to make a responsible choice through informed and democratic processes;

(6) The integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage. The United Nations could, when it deems it necessary, supervise these processes.

### ***Principle X***

The transmission of information in respect of Non-Self-Governing Territories under Article 73 e of the Charter is subject to such limitation as security and constitutional considerations may require. This means that the extent of the information may be limited in certain circumstances, but the limitation in Article 73 e cannot relieve a Member State of the obligations of Chapter XI. The "limitation" can relate only to the quantum of information of economic, social and educational nature to be transmitted.

### ***Principle XI***

The only constitutional considerations to which Article 73 e of the Charter refers are those arising from constitutional relations of the territory with the Administering Member. They refer to a situation in which the constitution of the territory gives it self-government in economic, social and educational matters through freely elected institutions. Nevertheless, the responsibility for transmitting information under Article 73 e continues, unless these constitutional relations preclude the Government or parliament of the Administering Member from receiving statistical and other information of a technical nature relating to economic, social and educational conditions in the territory.

### ***Principle XII***

Security considerations have not been invoked in the past. Only in very exceptional circumstances can information on economic, social and educational conditions have any security aspect. In other circumstances, therefore, there should be no necessity to limit the transmission of Information on security grounds.

**Seventy-second session**

**Agenda item 71**

**Resolution adopted by the General Assembly  
on 19 December 2017**

[on the report of the Third Committee ([A/72/438](#))]

**72/159. Universal realization of the right of peoples to self-determination**

*The General Assembly,*

*Reaffirming* the importance, for the effective guarantee and observance of human rights, of the universal realization of the right of peoples to self-determination enshrined in the Charter of the United Nations and embodied in the International Covenants on Human Rights,<sup>105</sup> as well as in the Declaration on the Granting of Independence to Colonial Countries and Peoples contained in its resolution 1514 (XV) of 14 December 1960,

*Welcoming* the progressive exercise of the right to self-determination by peoples under colonial, foreign or alien occupation and their emergence into sovereign statehood and independence,

*Deeply concerned* at the continuation of acts or threats of foreign military intervention and occupation that are threatening to suppress, or have already suppressed, the right to self-determination of peoples and nations,

*Expressing grave concern* that, as a consequence of the persistence of such actions, millions of people have been or are being uprooted from their homes as refugees and displaced persons, and emphasizing the urgent need for concerted international action to alleviate their condition,

*Recalling* the relevant resolutions regarding the violation of the right of peoples to self-determination and other human rights as a result of foreign military intervention, aggression and occupation adopted by the

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<sup>105</sup> Resolution 2200 A (XXI), annex.

Commission on Human Rights at its sixty-first<sup>106</sup> and previous sessions,

*Reaffirming* its previous resolutions on the universal realization of the right of peoples to self-determination, including resolution [71/183](#) of 19 December 2016,

*Reaffirming also* its resolution [55/2](#) of 8 September 2000, containing the United Nations Millennium Declaration, and recalling its resolution [60/1](#) of 16 September 2005, containing the 2005 World Summit Outcome, which, inter alia, upheld the right to self-determination of peoples under colonial domination and foreign occupation,

*Taking note* of the report of the Secretary-General on the right of peoples to self-determination,<sup>107</sup>

1. *Reaffirms* that the universal realization of the right of all peoples, including those under colonial, foreign and alien domination, to self-determination is a fundamental condition for the effective guarantee and observance of human rights and for the preservation and promotion of such rights;

2. *Declares its firm opposition* to acts of foreign military intervention, aggression and occupation, since these have resulted in the suppression of the right of peoples to self-determination and other human rights in certain parts of the world;

3. *Calls upon* those States responsible to cease immediately their military intervention in and occupation of foreign countries and territories and all acts of repression, discrimination, exploitation and maltreatment, in particular the brutal and inhuman methods reportedly employed in the execution of those acts against the peoples concerned;

4. *Deplores* the plight of millions of refugees and displaced persons who have been uprooted as a result of the aforementioned acts, and reaffirms their right to return to their homes voluntarily in safety and with honour;

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<sup>106</sup> See *Official Records of the Economic and Social Council, 2005, Supplement No. 3 and corrigenda* ([E/2005/23](#), [E/2005/23/Corr.1](#) and [E/2005/23/Corr.2](#)), chap. II, sect. A.

<sup>107</sup> [A/72/317](#).

5. *Requests* the Human Rights Council to continue to give special attention to violations of human rights, especially the right to self-determination, resulting from foreign military intervention, aggression or occupation;

6. *Requests* the Secretary-General to report on this question to the General Assembly at its seventy-third session under the item entitled “Right of peoples to self-determination”.

*73rd plenary meeting  
19 December 2017*

# **Norfolk Island Act 1979**

## **Schedule 2 Powers**

### **Sections 4, 7, 12, 21, 27, 47 and 67**

1. The raising of revenues for purposes of matters specified in this Schedule.
2. Public moneys of the Territory (other than the raising of revenues)
3. Surface transport (including road safety, traffic control, carriers, vehicle registration and the licensing of drivers)
4. Roads, footpaths and bridges
5. Street lighting
6. Water supply
7. Electricity supply
8. Drainage and sewerage
9. Garbage and trade waste
10. Primary production
11. The slaughtering of livestock
12. Domestic animals (including birds)
13. Public pounds
14. Pests and noxious weeds
15. Recreation areas
16. Cemeteries
18. Fire prevention and control
19. Quarrying
20. Building control (including the repair or demolition of dangerous buildings)
21. Advertising hoardings
22. The prevention and suppression of nuisances
23. Noxious trades
24. Gases and hydrocarbon fuels
25. Firearms
26. Explosives and dangerous substances
27. Tourism
28. Places of public entertainment
29. Boarding houses and hotels
30. Museums, memorials and libraries
31. Foodstuffs and beverages (including alcoholic liquor)
32. Trading hours
33. Markets and street stalls
34. Hawkers



35. Radio and television
36. Postal services
37. Coastlines, foreshores, wharves and jetties
38. The transporting of passengers or goods to and from ships
39. The maintenance of rolls of residents of the Territory
41. The registration of births, deaths and marriages
42. Matters in respect of which duties, powers, functions or authorities are expressly imposed or conferred on executive members by or under laws in force in the Territory other than a matter that relates to immigration or the operation of the *Immigration Act 1980* of the Territory
43. Public Service of the Territory
44. Public works
45. Lotteries, betting and gaming
46. Civil defence and emergency services
47. Territory archives
48. The provision of telecommunications services (within the meaning of the *Telecommunications Act 1989*) and the prescribing of rates of charge for those services
49. Branding and marking of live-stock
50. Pasturage and enclosure of animals.
51. Registration of bulls
52. Bees and apiaries
53. Exportation of fish and fish products from the Territory
54. Live-stock diseases (other than quarantine)
55. Plant and fruit diseases (other than quarantine)
56. Water resources
57. Energy planning and regulation
58. Fences
59. Business names
60. Navigation, including boating
61. Price and cost indexes
62. Fund-raising from the public for non-commercial purposes, and associations registered for fund-raising of that type
63. Administration of estates and trusts
64. Census and statistics
65. Inquiries and administrative reviews
66. Registration of medical practitioners and dentists.
67. Public health (other than: dangerous drugs, within the meaning of the *Dangerous Drugs Ordinance 1927* of the Territory; psychotropic substances; quarantine)

68. Mercantile law (including sale or lease of goods; charges and liens on goods or crops; supply of services)
69. Law relating to the interpretation of enactments
70. Civil legal proceedings by and against the Administration of the Territory
71. Official flag and emblem, and public seal, of the Territory
72. Fees or taxes imposed by the following enactments of the Territory: *Absentee Landowners Levy Ordinance* 1976; *Cheques (Duty) Act* 1983; *Departure Fee Act* 1980; *Financial Institutions Levy Act* 1985; *Fuel Levy Act* 1987; *Public Works Levy Ordinance* 1976
73. Protection of birds
74. Matters incidental to or consequential on the execution of executive authority
75. Remuneration, allowances and other entitlements in respect of services of members of the Legislative Assembly, members of the Executive Council and other offices in or in connection with the Legislative Assembly that can be held only by members of the Assembly
76. Prices and rent control
77. Printing and publishing
78. Public utilities
79. Housing
80. Community and cultural affairs.
81. Industry (including forestry and timber, pastoral, agricultural, building and manufacturing)
82. Mining and minerals, (excluding uranium or other prescribed substances within the meaning of the *Atomic Energy Act 1953* and regulations under that Act as in force from time to time), within all the land of the Territory above the low-water mark
83. Provision of rural, industrial and home finance credit and assistance
84. Scientific research
85. Legal aid
86. Corporate affairs
87. Censorship
88. Child, family and social welfare
89. Regulation of business and professions
90. The legal profession
91. Maintenance of law and order and the administration of justice
92. Correctional services
93. Private law

## **Norfolk Islands Act 1979**

### **Schedule 3 Powers**

**Sections 4, 7, 12, 21, 27 and 67**

1. Fishing
2. Customs (including the imposition of duties)
3. Immigration
4. Education
5. Human quarantine
6. Animal quarantine
7. Plant quarantine
8. Labour and industrial relations, employees' compensation and occupational health and safety
9. Moveable cultural heritage objects
10. Social Security

## List of heads of government of Norfolk Island

*(Dates in italics indicate de facto continuation of office, irrespective of continuation of status of that office)*

Term	Incumbent	Notes
1896 to <i>15 January 1897</i>	<u>Oliver Masey Quintal</u> , President of the Council of Elders	
15 January 1897	<i>Self-government revoked</i>	
<i>15 January 1897</i> to 1899	<u>Oliver Masey Quintal</u> , President of the Council of Elders	
1899 to 1900	<u>John Buffett</u> , President of the Council of Elders	
1900 to 1903	<u>John Forrester Young</u> , President of the Council of Elders	
1903 to 1909	<u>Francis Mason Nobbs</u> , President of the Executive Council	
1909 to 1915	<u>Joseph Allen McCleave Buffett</u> , President of the Executive Council	
1915 to <i>1 July 1916</i>	<u>Charles Chase Ray Nobbs</u> , President of the Executive Council	1st Term
1916	<u>Charles Chase Ray Nobbs</u> , President of the Executive Council	1st Term (contd.)

1916 to 1919	<b><u>Matthew Frederick Howard Christian</u></b> , President of the Executive Council	
1919 to 1920	<b><u>Albert Randall</u></b> , President of the Executive Council	1st Term
1921 to 1922	<b><u>Enoch Cobbcroft Robinson</u></b> , President of the Executive Council	1st Term
1922 to 1923	<b><u>Albert Randall</u></b> , President of the Executive Council	2nd Term
1924 to 1928	<b><u>Eustace Buffett Christian</u></b> , President of the Executive Council	1st Term
1928 to 1933	<b><u>Enoch Cobbcroft Robinson</u></b> , President of the Executive Council	2nd Term
1933 to 19 May 1934	<b><u>Charles Chase Ray Nobbs</u></b> , President of the Executive Council	2nd Term
1934 to 1934	<b><u>Eustace Buffett Christian</u></b> , President of the Executive Council	2nd Term
1934 to 20 July 1935	<b><u>Francis Rawdon M. Crozier</u></b> , President of the Executive Council	
1 August 1935 to 31 July 1936	<b><u>Charles Chase Ray Nobbs</u></b> , President of the Advisory Council	
1 August 1936 to 31 July 1937	<b><u>Enoch Cobbcroft Robinson</u></b> , President of the Advisory Council	1st Term

1 August 1937 to 31 July 1941	<b>William McLachlan</b> , President of the Advisory Council	
1 August 1941 to 31 July 1947	<b><u>George Hunn Nobbs Buffett</u></b> , President of the Advisory Council	
1 August 1947 to 31 July 1948	<b><u>Ray Herbert Hastings Nobbs</u></b> , President of the Advisory Council	1st Term
1 August 1948 to 31 July 1949	<b><u>David Campbell Dunsmere Buffett</u></b> , President of the Advisory Council	
1 August 1949 to 31 July 1950	<b><u>Ray Herbert Hastings Nobbs</u></b> , President of the Advisory Council	2nd Term
1 August 1950 to 31 July 1951	<b><u>Leonard Dixon Holloway</u></b> , President of the Advisory Council	1st Term
1 August 1951 to 5 June 1952	<b><u>Enoch Cobcroft Robinson</u></b> , President of the Advisory Council	2nd Term
1 August 1952 to 31 October 1952	<b><u>Leonard Dixon Holloway</u></b> , President of the Advisory Council	2nd Term
1 November 1952 to 31 July 1953	<b><u>Charles Marie Gustav Adams</u></b> , President of the Advisory Council	
1 August 1953 to 31 July 1956	<b><u>Ray Herbert Hastings Nobbs</u></b> , President of the Advisory Council	3rd Term
1 August 1956 to 15 June 1959	<b><u>Wilfred Metcalfe Randall</u></b> , President of the Advisory Council	

15 June 1959 to 22 June 1960	<i>Vacant</i>	
22 June 1960 to 1967	<b><u>Frederick James Needham</u></b> , President of the Island Council	
1967 to 1974	<b>William M. Randall</b> , President of the Island Council	
1974 to 1976	<b><u>Richard Albert Bataille</u></b> , President of the Island Council	
1976 to 1978	<b><u>William Arthur Blucher</u></b> , President of the Island Council	
10 August 1978	<i>Restoration of self-government</i>	
10 August 1979 to 21 May 1986	<b><u>David Ernest Buffett</u></b> , Chief Minister	
21 May 1986 to 22 May 1989	<b><u>John Terence Brown</u></b> , President of the Legislative Assembly	
22 May 1989 to 20 May 1992	<b><u>David Ernest Buffett</u></b> , President of the Legislative Assembly	
20 May 1992 to 4 May 1994	<b><u>John Terence Brown</u></b> , Head of Government	
4 May 1994 to 5 May 1997	<b><u>Michael William King</u></b> , Head of Government	

5 May 1997 to 28 February 2000	<u><b>George Charles Smith</b></u> , Chief Minister	
28 February 2000 to 5 December 2001	<u><b>Ronald Coane Nobbs</b></u> , Chief Minister	
5 December 2001 to 1 June 2006	<u><b>Geoffrey Robert Gardner</b></u> , Chief Minister	
2 June 2006 to 28 March 2007	<u><b>David Ernest Buffett</b></u> , Chief Minister	
28 March 2007 to 24 March 2010	<u><b>Andre Nobbs</b></u> , Chief Minister	
24 March 2010 to 20 March 2013	<u><b>David Buffett</b></u> , Chief Minister	
20 March 2013 to 17 June 2015	<u><b>Lisle Snell</b></u> , Chief Minister	
<i>Self-government abolished, absorbed into <u><b>New South Wales</b></u> from 1 July 2016</i>		
6 July 2016 to present	<b>Robin Adams</b> , Mayor	

**Source: Wikipedia adjusted by territorial sources.**



