Christmas Island: A question of self-determination

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Chapter 4: Governance and Legislative Arrangements

This chapter will begin with discussing the notion and meaning of self-determination as described by various academic literature sources, with particular emphasis on its application to Christmas Island (and the IOTs) in accordance with the study outcomes. The chapter will also discuss the current governance and legislative regime applicable to the non-self-governing Territory of Christmas Island that has developed since the Island was first settled. In doing so, a comparative analysis will be made with other non-self-governing and self-governing territories, not only in Australia but also with some recent overseas models. For the purposes of providing a context to this chapter, the historical development of governance and legislative arrangements that have been explained in some of the previous chapters will again be briefly discussed as an introductory context to the current arrangements in the IOTs that is consistent with the intent of the design and methodology approach of the study as outlined in the Introduction. This will also include reference to previous literature that has been cited in the thesis study to date and the introduction of other literature and references that are relevant to this chapter’s discussion that again has been discussed in the literature review of the Introduction.

Against the backdrop of the historical governance and legislative arrangements that currently apply to Christmas Island (and the IOTs), the purpose of this chapter is to then discuss the issues regarding these arrangements, as well as explore other alternative self-determination models that can be proposed in the study summary and conclusion. Further, based on the definition of a non-self-governing territory under Chapter XI of the United Nations Charter (Article 73) ‘Declaration Regarding Non-Self-Governing Territories’, where a territory such as Christmas Island has not achieved a full measure of self-determination, the issue of governance subordination must be addressed in the development of any improved governance arrangements.
This chapter will build on Chapter One, demonstrating that the principle of representative democracy is not present on Christmas Island given the applied laws regime and Service Delivery Agreements (SDAs) which underpin the island’s governance. The chapter will outline how the (WA) elected representatives who vote on the WA laws which apply on the island are not accountable to the people who live there. It will also show how the SDA process does not include consultation with the community, either for the purpose of informing them about service delivery or in its review process. At best the consultative process has been sporadic and the results of any consultative and/or review process are only evident in the Annual Reports that the Commonwealth produce. The chapter will begin by considering the current arrangements and the ways in which these can be improved. Exploring the current governance arrangements will facilitate a discussion in Chapter Seven about whether there are alternatives which might better embody democratic principles and meet the aspirations of Christmas Islanders.

The Notion of Self-Determination

Thomas Franck provides a definition of self-determination as the oldest aspect of democratic entitlement, stating that hence its creditability is the best established. Self-determination postulates the right of a people organised in an established territory to determine its collective political destiny in a democratic fashion and is therefore at the core of democratic entitlement. 276 While this definition is only one of many, it underpins the principle of self-determination as being the right of a community to control its own destiny. The very notion of self-determination, as briefly noted at the end of the previous chapter, has a significant bearing on the contents and discussion of this chapter. What are the circumstances within the self-
determination paradigm where Christmas Island can realistically claim any self-determination status? The interpretations and comments by Sterio, Weller, Corbett, Franck and Cassese regarding the notion of self-determination (internal and external), and the meanings of people and minority groups as well as colonised and non-colonised peoples, are not exhaustive although they are the primary and important contextual reference points for discussion and consideration in this chapter.

To determine whether or not the community of Christmas Island are colonised or non-colonised people has significance in the discussion outcome for Christmas Islanders in positing themselves in relation to legitimately and democratically progressing their self-determination aspirations. Sterio continues with her explanation of colonised and non-colonised peoples which was briefly referenced at the end of the previous chapter, where non-colonised peoples living within larger mother States became entitled to a form of internal governance within their mother State. However, non-colonised peoples did not acquire the right to seek independence from their mother States. Thus, colonised peoples acquired the right to determine their political fate: to form an independent State, or to remain a part of their existing coloniser or to associate with another State.277

Cassese supports this, stating that unlike non-colonised peoples, colonised peoples could rely on the (United Nations) Covenants to exercise their right to self-determination and to seek a legal separation from their coloniser through remedial secession.278 As Corbett notes, there is growing recognition that cultural practices can and do contribute to the maintenance of democratic institutions, and that hybrid

277 Sterio, 11.
arrangements are not always a perversion of either an ideal modern or traditional system. Conversely Weller provides a persuasive discussion against the application of the right to self-determination based solely on the old model of traditional and cultural independence for colonial entities and argues that the concept of self-determination in the post-colonial era should concentrate more on resolving the current ongoing self-determination conflicts globally. Weller also provides a discussion regarding the meaning of remedial self-determination in his definition of self-determination as the right of all peoples to freely determine their political, economic and social status and examines a wide range of options utilised in realising self-determination, which also includes constitutional self-determination. As Sterio notes, towards the end of the decolonisation movement in the early 1970s, the legal position on self-determination could be summarised as follows. First, all peoples subjected to colonial rule had the right to self-determination, pursuant to the provisions of the Covenants, as well as to two Resolutions passed in the General Assembly, namely Resolution 1514 of 1960 (the so-called Declaration on Granting Independence to Colonial Countries and Peoples), and Resolution 1541 passed one day later. This second resolution contained an annex specifying the modalities of self-determination for colonised peoples. Second, for colonised peoples the right to self-determination entailed the choice to freely decide their future status. Third, the right belonged to a people as a whole, living in a given colonial territory. Thus, if various ethnic groups lived in a single colony, their right to self-determination had to be exercised as a whole, with all ethnic groups uniting to a single ‘self’ that corresponded to the entire territory of that colony.


280 Weller, 23.

281 Sterio, 11.
In this regard, it must be demonstrated that the community of Christmas Island, noting the various predominant ethnic groups such as the Malay and Chinese that were discussed in the previous chapter, can exercise their right to self-determination under this qualification, given they live (and have lived) in a single colony and can exercise their self-determination as a whole group (or people). Accordingly, the question raised is should Christmas Islanders be classified as including colonised or non-colonised peoples according to the meaning applied by Sterio, Weller and Cassese? That is, should the contemporary community of Christmas Island be classified as colonised or non-colonised people considering the historical development and cultural composition of the community that has developed progressively under colonial conditions? Hence, the answer to this question is integral to applying the notion of self-determination to the Christmas Island community in regard to the circumstances in which they currently live as a people in a community, which was previously a colony of Great Britain (and under the Straits Settlement of Singapore) and then Australia when sovereignty was formally transferred in 1958 as a non-self-governing external territory, as explained in Chapter Two regarding the historical background of Christmas Island.

According to Steele and Rockman, the term “colonisation” is derived from the Latin word ‘colere’, which means ‘to inhabit’. The Dictionary of Sociology notes that the terms colonialism and imperialism are interchangeable. Further, its meaning was often given to a system of organised colonial trade and organised colonial rule. However, these simple definitions of ‘colonisation’ are not sufficient in determining whether Christmas Islanders can be classified as colonised or non-colonised people.

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283 Abercrombie, Hill and Turner, 120.

While Chapter Two discussed the historical background of Christmas Island and the way in which the island was settled, one of the main criteria when considering applying the concept of colonisation to Christmas Island is that there were no recorded inhabitants on the Island prior to Great Britain declaring sovereignty of the Island for establishing phosphate mining. In this regard, the large Asian labour workforce that was required for the mining of phosphate was ‘imported’ from neighbouring countries under the subjugation and control of the (then) British colonial administration. Therefore, it can be argued that colonisation on Christmas Island occurred progressively (as described in Chapter Two) to the extent where there was a migration pattern established to Christmas Island by the colonisers (British) who kept their strong links with the (then) British Empire. They did so for the purpose of retaining their status and privileges by subjugating the other peoples also living on the Island (the Asian population) that were bought to the Island for the specific purpose of providing economic services to the colonisers.

Notwithstanding this historical development is the fact that Christmas Island was uninhabited prior to the British establishing sovereignty, and therefore perhaps, the true meaning of ‘terra nullius’ (as incorrectly applied to the Australian mainland by the British explorer Captain Cook), is relevant to Christmas Island prior to British control. This aspect was established by the recent 2016 University of WA Study commissioned jointly by the Shire of Christmas Island and the CIP mining company that is referred to later in this chapter. As Weller notes, no formal definition is provided of what constitutes a colonial territory; however, as a rule of thumb it only includes those territories that one would intuitively recognise as such. These are territories forcibly acquired by a racially distinct metropolitan power, divided by an ocean during the time of imperialism and subjected to a colonial regime for the purposes of economic exploitation. The long list of qualifications contained in this sentence indicates the lengths to which governments have gone to ensure that self-
determination cannot ever be invoked against them.\textsuperscript{285} Therefore, it would seem obvious that this interpretation by Weller could be applied to Christmas Island, given the historical development of the Island and its current status as an Australian non-self-governing external territory. Weller further notes that the classical right of colonial self-determination is now a core part of international law, enjoying a status that is legally superior to other international norms that do not enjoy this elevated position, and it is applied only to colonial and non-self-governing territories of which practically none remains.\textsuperscript{286}

Christmas Island is not included in this reference by Weller as it remains today as a non-self-governing external territory and the community of Christmas Island has never been afforded the opportunity to consider and decide its self-determination status. Similarly, defining (and applying) the meaning of peoples and minority groups to Christmas Islanders is important for determining the classification of the community of Christmas Island. Sterio refers to the definition applied by Scharf that under the principle of self-determination, a group with a common identity and a link to a defined territory is allowed to decide its political future in a democratic fashion. For a group to be entitled to exercise its collective right to self-determination, it must qualify as a people. Traditionally a two-part test has been applied to determine when a group qualifies as a people. The first prong of the test is objective and seeks to evaluate the group to determine to what extent its members ‘share a common racial background, ethnicity, language, religion, history, and cultural heritage’, as well as ‘territorial integrity of the area the group is claiming’.

\textsuperscript{285}Weller, 34.

\textsuperscript{286} Weller, 35.
The second prong of the test is subjective and examines ‘the extent to which individuals within the group self-consciously perceive themselves collectively as a distinct people’, and ‘the degree to which the group can form a viable political entity’.\textsuperscript{287} Further, it necessitates that a community explicitly express a shared sense of values and a common goal for its future. Accordingly, under the principle of self-determination, all self-identified groups with a coherent identity and connection to a defined territory are entitled to collectively determine their political destiny in a democratic fashion and to be free from systematic persecution. For such groups, the principle of self-determination may be brought about through a variety of means, including self-government, substantial autonomy and free association, or arguably, in certain circumstances, outright independence/full sovereignty. For a group to be entitled to a right to collectively determine its political destiny, it must possess a focus of identity sufficient for it to attain distinctiveness as a people.\textsuperscript{288}

The discussion in Chapter Three regarding the social and cultural demography of the Christmas Island community is therefore relevant to the discussion of determining the entitlement of the community to exercise any collective right as a people. It has been demonstrated in Chapter Three that the community of Christmas Island would in part meet the objective test as described above by Sterio and Scharf, where even though there are separately distinct cultural minority groups on the Island, such as the Chinese and Malay communities, they appear to meet the first prong of the test by sharing a common racial background, ethnicity, language, history and cultural heritage, as well as territorial integrity of the area they may claim. The one exception is religious, where the Malay community are overwhelming Islamic and the Chinese community are Buddhist. While only partly

\textsuperscript{287} Sterio, 16.

meeting the objective test as described by Sterio and Scharf, undoubtedly the community would completely meet the subjective test as Christmas Islanders do perceive themselves as a collective distinctive group, given the long historical connection they have with the Island, and importantly with each other. Further, the collective group has already demonstrated they can form a viable political entity by exercising their democratic right to elect, and be elected to, the local government authority on the Island.

This event occurred with the creation of the Shire of Christmas Island at its establishment in 1992 in accordance with the recommendation(s) of the Island in the Sun report. As Sterio notes, the term ‘people’ is also distinct from the notion of minority group rights where the latter confer on a minority group living within a larger state a set of rights.289 Weller expands on this distinction by providing that self-determination is also a right that can be invoked by members of certain groups, such as national, religious, ethnic or linguistic minorities. In this sense, self-determination is congruent with minority rights. Minority rights protect the existence of national, religious, linguistic or ethnic groups, facilitate the development of their identity and ensure that they can participate fully and effectively in all aspects of public life within the state. While it was previously argued that minority rights are only held by members of minorities individually, it is clear that they can be exercised in a community with others.290

Wippman notes, few issues in the history of the modern state have proved more vexing than the relationship between majorities and minorities. Even the definition of minorities is contested, so much so that most contemporary international legal instruments dealing with minority rights fail to include a definition of the rights

289 Sterio, 17.
290 Weller, 6.
holders. Some theorists emphasise objective markers of identity, such as race, language or religion that distinguish members of minorities from other sub-state communities. Others focus on subjective characteristics, such as belief in common descent or possession of a shared culture. Most theorists insist that minorities can only be defined by a combination of objective and subjective elements. This refers to a combination of objective and subjective characteristics that defines a minority as a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members being nationals of the state possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity directed towards preserving their culture, traditions, religion or language. For the purpose of a precise definition, it is necessary only to recognise that the defining characteristics of minorities, whatever they may be in a particular case, are sufficient ‘to set the group apart’ from the rest of the society in the eyes of the group members as well as outsiders.

This perception of difference lends itself to political mobilisation, whether on behalf of minorities or against them, and there in lies the central difficulty of minority–majority relations. Having said this, what then is the definition of minority group rights in its distinction from the term of people, especially in its application to the community of Christmas Island? The summary provided by Sterio would seem to provide some answers for the purpose of determining the situation regarding self-determination for Christmas Islanders and how they may be referred to as a ‘people’ for the purpose of allowing them to pursue self-determination. This will be further qualified at the end of this chapter given that ‘all peoples are also a minority group, but not all minority groups qualify as a people’. Thus, the distinction in international

law between a minority group and a people is purposeful and incredibly significant. Often, identifying a people may be the first step towards assessing the groups’ rights to self-determination.\footnote{Sterio, 18.}

The final discussion regarding the notion of self-determination concerns the concept of ‘internal’ and ‘external’ self-determination and the ways the meaning of either can be applied to Christmas Island as a model of self-determination to consider. According to Sterio, self-determination of such groups that qualify as a people can be effectuated in different ways: through self-government, autonomy, free association or, in extreme cases, independence. Co-existence of a people within a larger central state, where the people have rights to self-government, political autonomy and cultural, religious and linguistic freedoms, is an example of internal self-determination.\footnote{Sterio, 18.} Scharf also supports this view, where the right to self-determination can take different forms that are less intrusive on state sovereignty than is secession.\footnote{Scharf, 379.} Conversely, Weller advocates external free association, or in extreme cases, independence. Co-existence of a people’s self-determination in the form of secession and independence is his preferred model of self-determination that is the basis for his publications, \textit{The Self-Determination Trap} and \textit{Escaping the Self-Determination Trap}. For example, at the conclusion of his article Weller notes that there is a sense emerging that it is necessary to escape from the current self-determination trap, either by engineering new forms of co-governance within states or by accepting that secession cannot, in the end, be ruled out if other options do not suffice.\footnote{Weller, 27.}
In this regard, Weller puts forward a persuasive argument against the broad application of the right to self-determination based solely on the old model of independence for colonial entities and conflates self-determination with secession and independence. While recognising and analysing other options of self-determination in his articles, Weller appears to prefer the external model of secession as the only realistic means to achieve self-determination and hence the need to escape the ‘self-determination trap’. To agree solely with his definition of self-determination limits its scope and usage to independence or secession and is a narrow application of the definition. Self-determination should retain its original connotation wherein all peoples freely determine their political, economic, social or other status without a prescription of the form it takes. Whatever arrangement is agreed upon with the State should not be seen as precluding self-determination but as an affirmation of this right. For the right to self-determination to mean solely independence or secession, as Weller implies, would be an infringement upon the right of peoples to freely determine their status. As Sterio notes, the international community views secession with suspicion and traditionally the right to independence or secession as a mode of self-determination has only applied to people under colonial domination or some kind of oppression.296

It is apparent from the above definitions of internal and external self-determination that the internal model would be the applicable form for Christmas Islanders to pursue. The choice becomes more relevant when considering the simple comparison by Weller where external self-determination will normally be taken to include the right to secession while internal self-determination concerns the choice of a system of governance and the administration of the functions of governance according to the will of the governed.297 No conflict exists within the Christmas Island community or

296 Sterio, 19.
297 Weller, 6.
oppression of any type by the mother state (Commonwealth) as described by Weller that would warrant any consideration by the community to choose the external model of self-determination. Conversely, pursuing the internal model of self-determination for the Christmas Island community would appear to be the most favourable, and most likely to succeed. This is because the distinction between internal and external self-determination serves the purpose of limiting secession to extremely narrow circumstances, and by providing peoples other forms of (self-determination) autonomy within the existing mother state through the exercise of internal self-determination, international law achieves the goal of preserving territorial integrity of existing states, except in truly exceptional circumstances.\footnote{Sterio, 22.}

Finally, it is important to note that according to Weller (and other academics) the right to self-determination expires once exercised. As noted by Weller, this is particularly evident in the doctrine of ‘uti possidetis’ (Latin for ‘as you possess under law’) and in the view that self-determination is a one-time-only event and the existence of the right of self-determination therefore served as a convenient legitimising myth for the existing state system.\footnote{Weller, 26.} While Christmas Island has never been afforded the right to self-determination, contrary to the principles of Chapter XI, Article 73 of the Charter of the United Nations Act 1945, applying this concept to the Cocos (Keeling) Islands would imply that the Cocos (Keeling) Islands community has exhausted the only opportunity they had to express the right to self-determination.

On 6 April 1984, in what was described by Australian and United Nations officials as an act of self-determination, the Cocos Islanders voted for integration of the Islands...
with Australia. However, in support of Weller’s comments, Tahmindjis further notes that paragraph two of the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly Resolution 1514 (XV) of 14 December 1960 states: ‘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’. The Cocos situation illustrates that the ‘freedom’ of the determination may be effectively a myth and that once the political status has been decided the freedom to determine economic, social and cultural development is extinguished if integration with another State is chosen and what would therefore appear to be clear to the Australian Government is that once the expression is exercised, self-determination has been completed and the resulting situation must then be determined by reference to other areas of law and politics. Prinsen notes in his article that one striking aspect of the decolonization process is that since the 1980s no non-self-governing islands has either opted (or voted) for, or acquired full independence from its colonial metropole. While the Cocos (Keeling) Islands vote in 1984 substantiates this, there is no such ambiguity regarding this situation for Christmas Island since the community has never been afforded the option of determining its right to self-determination.

Recommendation 13 of the Joint Standing Committee on the National Capital and External Territories (JSCNET) Report, Current and Future Governance Arrangements for the Indian Ocean Territories of May 2006 supports this position and reiterates the principle that self-determination should retain its original connotation wherein all peoples freely determine their political, economic, social or

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301 Tahmindjis, 197.
other status without a prescription of what form it takes. The Committee recommended that the Australian Government undertake to develop options for future governance for the IOTs in conjunction with the communities on Christmas Island and the Cocos (Keeling) Islands, with a view to, where practical, submitting options to a referendum of those communities by the end of June 2009. Importantly, as with all JSCNET Inquiry outcomes, these are recommendations only and the Government is not obliged to follow and/or implement them. Possible options could include, but not be limited to, maintaining current governance arrangements with some refinement, incorporation into the State of WA and a form of limited self-government.  

However, this was contradicted in the recently released 2016 JSCNET Final Report where there is no reference to any referendum or plebiscite with the community and only minimal reference to consulting with the community about the outcome of discussions between the Commonwealth and the NT and the WA State Governments. This is referenced as Recommendation 19 of the Final Report: ‘The Committee recommends that the Australian Government seek formal advice from the Governments of Western Australia and the Northern Territory to determine whether they are receptive to the proposal for incorporation of the IOTs into their State or Territory. Based upon a positive response to this proposal, the Australian Government should develop an incorporation model for consultation and review’. Whatever arrangement is agreed upon with either the State (WA) or (Northern Territory), it should not be at the expense of consulting with the community and


conducting a referendum or plebiscite to gauge the views/opinions of the community. Further, it should also not be seen as excluding the question of self-determination and should be seen as an affirmation of the right for the community.

Governance and legislative arrangements in the non-self-governing external Indian Ocean Territories

Figure 4.1 Christmas Island Flag

Christmas Island was placed under the authority of the Governor of the Straits Settlements in 1889 and incorporated within the Settlement of Singapore in 1900.305 This was, of course, the first legislative instrument for the governance of Christmas Island and remained in force (with minor amendments) until the Japanese occupation of the Island from 1942 to 1945. Not until the Japanese departed did

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305 Islands in the Sun, 33.
governance arrangements change when the Singapore Colony Order-in-Council of 1946 provided that the Island of Singapore and its dependencies, which included the Cocos (Keeling) Islands and Christmas Island, shall be governed and administered as a separate colony and should be called the Colony of Singapore. In 1955, the Cocos (Keeling) Islands were excised from the Colony of Singapore and transferred from the United Kingdom to the Commonwealth of Australia.

Shortly afterwards, in 1958, Christmas Island was also excised and transferred from the United Kingdom to the Commonwealth of Australia. Neither excision from the Colony of Singapore or transfer to Australia involved any reference/ question to the people living on Cocos (Keeling) Islands or Christmas Island at that time. The subsequent agreement for self-government for Singapore included agreement that Singapore would no longer administer Christmas Island and would receive compensation from the Australian Government for the loss of income from phosphate royalties. The possibility of transferring the sovereignty of both places (Christmas Island and the Cocos Keeling Islands) to Australia was discussed for the first time. Australia had been advised that Singapore seemed to have little interest in either Cocos or Christmas Islands. These Islands were deemed dependencies, by accident, of Singapore. According to Kerr, they had no real connection with the Colony of Singapore and any question of allocating funds for them was bitterly resented there. Both these transfers were enacted on the authority of the Queen and by legislation of the Parliament of the United Kingdom and the Parliament of the Commonwealth of Australia when each Island became a separate external non-self-governing territory of Australia.

306 Islands in the Sun, 33.
307 Williams and McDonald, 440.
308 Kerr, 269.
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The Commonwealth of Australia formally accepted Christmas Island as a Territory by authority of the Commonwealth under the *Christmas Island Act 1958* and the Act was proclaimed to come into force on 1 October 1958.\(^\text{309}\) Christmas Island celebrates the 1\(^{st}\) of October every year as ‘Territory Day’ and has a week of festivities and celebrations. Similarly, the Cocos (Keeling) Islands annually celebrate the 23\(^{rd}\) of November 1955 when the Cocos Islands Act was proclaimed with the formal transfer of the Cocos (Keeling) Islands to the Commonwealth of Australia.\(^\text{310}\) The Cocos (Keeling) Islands also mark the significance of 6 April 1984 every year when the smallest act of self-determination ever conducted occurred under the auspices of the Australian Electoral Commission, observed by the United Nations mission.\(^\text{311}\) As Heng and Forbes note, each of Australia’s external territories owes its existence to an Act of Federal Parliament. Under section 122 of the Australian Constitution, the Federal Parliament retains authority to enact laws for all territories, including its external territories. As a plenary power, all that needs to be demonstrated to support an exercise of this power in the form of a statute is that there is sufficient connection between the law and the relevant territory. Thus, Federal Parliament retains overall plenary power to promulgate laws as it sees fit in respect of all its Territories, subject to any other inherent limitations contained in the Australian Constitution.\(^\text{312}\) While both Islands of the IOTs achieved representation in the Australian Commonwealth, some years elapsed before any further meaningful progress was made towards further governance incorporation and representation. This occurred because of the *Islands in the Sun* Parliamentary Inquiry into the legal regimes of Australia’s external territories that was released in March 1991. This Parliamentary Inquiry envisioned the introduction of the applied laws system within a broader package of initiatives

\(^{309}\) *Islands in the Sun*, 34.

\(^{310}\) Tahmindjis, 185.

\(^{311}\) Tahmindjis, 192.

\(^{312}\) Heng and Forbes, 73.
and actions to ensure that the system had relevance that the laws were applied in a manner acceptable to the community, and that other political and administrative reforms occurred.

At the very least, the laws of Christmas Island were outdated, anachronistic, incomplete and not readily identifiable. The prospect of retaining the status quo was quite untenable. Further, the Territories Law Reform Act 1992 amended the Christmas Island Act 1958 whose laws were largely based on those of Singapore. The Territories Law Reform Act 1992 applied certain Commonwealth Acts and the laws of the State of Western Australia as were capable of being applied subject to amendments and modifications in Territory Ordinances made by the Governor-General. It represented a major advance for the Territory. Therefore, the Islands in the Sun Parliamentary Inquiry recommendations are the basis for the current applied laws regime as introduced by the Territories Reform Act 1992 in the IOTs, including Christmas Island.

The current governance and legislative arrangements in the IOTs have been in place without any significant change or review since the recommendations of the Islands in the Sun Parliamentary Inquiry were implemented. This situation is despite the numerous Commonwealth Inquiries and Reports, the latest being the JSCNET Inquiry commissioned in 2015 with the final report released in March 2016. This is specifically referenced in the Report which made recommendations for improvement. Yet, it seems that change, when it has occurred, has not always been for the better or necessarily benefited IOTs’ residents.

313 Islands in the Sun, 195.
314 Heng and Forbes, 74.
Integral to this study then is to undertake an analysis of the current applied governance arrangements that should or will reveal the inadequacies and the undemocratic application of these arrangements more than 26 years after their implementation. This is despite the several recommendations of various JSCNET Inquiry Reports over the years, and while there is no procedural obligation by the Government for the implementation of any JSCNET Report recommendation, it nonetheless appears that many have not been implemented. The analysis will also suggest or recommend outcome options to consider in progressing to new governance arrangements for Christmas Island that are consistent with the outcome intentions of this study.

Fundamental to this is the principle of undemocratic representation currently evident in the IOTs (both Christmas and Cocos Islands). The application of the West Australian legal regime does not translate into the people of the IOTs having any democratic vote (and therefore parliamentary representation) in the WA political system that subsequently enacts and enables legislation that is applied to the IOTs. Section 8A of the Territories Law Reform Act 1992 provides the legislative base for the application of WA laws to the IOTs. Under this model, WA laws are applied to the IOTs as Commonwealth laws. New and amended laws in WA automatically apply as Commonwealth laws in the IOTs unless the Commonwealth Parliament determines otherwise, and the Commonwealth decides if the WA laws should be applied to the IOTs. All non-judicial powers in applied WA legislation are vested in the Federal Minister for Territories, who has delegated most of these powers between the Administrator of the IOTs, officers of the Commonwealth Department
and officials from the WA Government under SDAs. There are also no democratic arrangements in place where most of the WA State-type services are delivered by the WA State Departments under SDAs to the community of Christmas Island as negotiated and administered between the Commonwealth and the WA Government from time to time, without simultaneous political democratic representation of the community of the IOTs in the WA electoral system.

The practical outcome in almost all cases is that the WA Parliament legislates, and then that legislation applies to Christmas Island despite the fact that Christmas Islanders do not vote for any representatives in the WA Parliament. This was noted in the recent JSCNET Report under a specific heading in chapter 7 of the Report ‘A Democratic Deficit?’ The IOTs effectively have no state-level representation. The IOTs’ federal member and Senators are located in the NT but the territories do not have an NT Legislative Assembly representative. IOT residents are subject to applied legislation from WA, yet they have no representative in the WA Parliament either.

In short, WA laws are applied to Christmas Island without reciprocal democratic voting representational rights for Christmas Islanders in the WA electoral process. As noted by Grayling in his recent publication Democracy and Its Crisis, no constitutional system should allow a partisan group to hijack the interests of the whole since that is primarily contrary to the principle of what the architects of representative democracy intended and fundamentally against the interests of the

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people. This principle is clearly absent in the IOTs because of the application of the WA legislation to the IOTs that not only is representatively undemocratic but also is confusing and not understood by the Island’s community. Further, one of the most important elements within any liberal democracy is the mechanism that holds the government to account and within Australia’s political system, Parliament is the traditional body that does this.

Perhaps for this reason alone, the current applied law model should be repealed or abolished purely on the grounds that it is an undemocratic process that disenfranchises the community of Christmas Island from the fundamental right to vote in the parliament that makes the laws that bind them. Again, Drum and Tate emphasise the importance of voting in Australia for demonstrating the views of the electorate and giving government legitimacy through public support. Saunders reinforces that the most obvious democratic right is the right to vote. Sections 7 (the Senate) and 24 (House of Representatives) of the Australian constitution reflect the necessity of this representation. While the IOTs are represented at the federal level in the NT House of Representatives electorate seat of Lingiari (based in Alice Springs in the NT) as well as the NT Senate, again this principle is absent with the application of WA legislation to the IOTs prohibiting the accountability of the WA Parliament’s actions to the Christmas Island community.

As noted earlier, amendments made from time to time to WA-based legislation by ascension from the WA Parliament have an immediate effect on the Christmas Island community (relevant to the particular legislation) unless the Commonwealth

319 Drum and Tate, 124.
320 Drum and Tate, 206.
321 Saunders, 81.
determines to override the amended legislation. However, the Commonwealth Minister (from time to time) has not exercised this right since the introduction of the *Territories Reform Act 1992*. Accordingly, no accountability process is available to the Christmas Island community by way of consultation in terms of the effect of the particular legislation, nor is there any democratic representational right afforded regarding the process by which the WA Parliament makes such legislative amendments. Recently, an example of this democratic inconsistency occurred where the Shire of Christmas Island enacted a local law in 2013 for the control of its cemeteries. The process was similar to that followed by mainland WA local governments, which are compelled to follow the local law process in accordance with the provisions of Part 3, Division 2, subdivision 2 of the *Local Government Act (CI) 1995*. However, section 3.12 (7) of the *Local Government Act (CI) 1995* provides that ‘the Minister may give directions to local governments requiring them to provide to the Parliament copies of the local laws they have made and any explanatory or other material relating to them’.

In this regard, the WA Minister has no jurisdiction in the IOTs as explained above in relation to the recommendations of the *Islands in the Sun* report. Despite this, the WA Legislative Council Joint Standing Committee on Delegated Legislation required that the Local Law be provided to the Joint Standing Committee for review in accordance with the Directions made in 2010 under the provisions of section 3.12 (7) of the *Local Government Act 1995*. The object of these Directions, given by the WA Minister for Local Government under section 3.12(7) of the *Local Government Act 1995*, is to assist the Joint Standing Committee on Delegated Legislation with its examination of Local Laws and other subsidiary legislation that are subject to section 42 of the WA *Interpretation Act 1984*. The Joint Standing Committee on Delegated Legislation is

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authorised to perform a scrutiny function of the Local Law under its Terms of Reference to assist the Parliament of Western Australia and the Committee, and where part of the process, the Committee may seek an undertaking from a local government to amend the Local Law when failure to comply may render the Local law inoperable. Hence, even though the Shire of Christmas Island complied with all the requirements of the legislation relevant to the procedure in making the local law as prescribed by the provisions of the Local Government Act (CI) 1995 and duly consulted with its community, the local law could have potentially been rendered inoperable because the process of review by the Joint Standing Committee on Delegated Legislation (JSCDL) was not adhered to by the local government.

While this process is acceptable and reasonable in mainland WA local governments in accordance with legislative accountability, it displays an undemocratic process for the local governments of the IOTs because the process requires (WA) parliamentary scrutiny without any democratic representation. Following objections raised by the Shire of Christmas Island to this undemocratic process in 2015, the (then) Commonwealth Department of Infrastructure and Regional Development revised this process and resolved that the process by which the IOTs adopt their local laws are no longer required for referral to the WA Parliamentary Joint Standing Committee on Delegated Legislation. Instead, once the Shire has formally adopted the local law, they are only required to send them to the (now) Commonwealth Department of Infrastructure, Regional Development and Cities (DIRDC) where the local laws will be listed on the Federal Register of Notifiable Instruments.324 This revised process by the Commonwealth (in consultation with the WA Government) serves to highlight the inconsistencies of the applied regime of WA laws that would have (presumably) continued had the Shire of Christmas Island not raised the issue in the context of undemocratic representation.

Further, the *Islands in the Sun* report note that it is axiomatic in a democracy that, to the greatest degree possible, citizens should be empowered to participate in decision-making, particularly that which affects their daily lives.\(^{325}\)

Recommendations five, six and seven of the *Islands in the Sun* report specifically expressed the following:

‘Five: The Committee recommends that the law of Western Australia (as amended from time to time) be extended to Christmas Island to replace the currently applied law in so far as that law has not been developed as a response to a unique or particular characteristic of Christmas Island’.

‘Six: In the absence of the establishment on Christmas Island of a reviewing mechanism, relevant Commonwealth departments monitor the possible application of Western Australia laws to Christmas Island in consultation with the Christmas Island Assembly, to ensure that the particular circumstances of Christmas Island and/or its residents are not adversely affected by the extension of a law’.

‘Seven: The Commonwealth accelerate the development of administrative and political reform on Christmas Island to ensure the progressive development towards the establishment of a local government body on Christmas Island with an expanded role, including direct access to the Minister in respect of laws to apply on the Island, for reviewing Western Australia laws for their appropriateness to the Territory’.\(^{326}\)

These recommendations were based on consideration of five options to address inadequacies identified in the system of laws applying from the time that Christmas Island became an external territory of Australia. The Committee was convinced that

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\(^{325}\) Islands in the Sun, 202.

\(^{326}\) Islands in the Sun, xx.
maintenance of the status quo was unsupportable, even if urgent steps were taken to undertake a detailed program of law reform. As discussed under Option Two of the *Islands in the Sun* report, the laws of Christmas Island are inadequate, past efforts at law reform have floundered and there are swathes of matters that are simply not the subject of appropriate regulation.

While a dedicated law reform process could be expected to address the more obvious deficiencies in the laws, it is valid to question whether the integrity, let alone the identity, of the legal base from which the laws would grow or the level of resources required to achieve real reform would justify this approach. It has long been recognised that it is not wise to build on a base of shifting sand.\(^{327}\) The *Islands in the Sun* Parliamentary Committee’s subsequent preference was for an amalgam of Options Four and Five in the Report where Option Four was posited to apply the laws from time to time applying in WA with the proviso that any law of Christmas Island inconsistent with an applied law is repealed to the extent of any inconsistency and that no laws will be applied without prior consultation with the residents. The application of the laws of a mainland jurisdiction to Christmas Island is obviously, in terms of resource usage and time, an attractive option. Overriding the application of the laws would be the continued existence of the Commonwealth’s plenary powers to make laws for the peace, order and good government of the Territory. In the context of Option Three (which was similar to Option Four except that it proposed the repeal of all existing laws), it is necessary to ensure that those aspects of the extant legal regime that serve a specific purpose are retained and that the residents of Christmas Island are fully consulted and involved in the process of change to a new regime, which are issues of paramount concern.

\(^{327}\) *Islands in the Sun*, 196.
Mechanisms for ensuring that appropriate laws are retained and that genuine consultation occurs, however available, should be insisted upon.\(^{328}\) A final Option Six related to the question of political integration rather than the applied laws system and therefore did not explicitly discuss law reform but incorporation of the Territory within the geographic and political boundaries of either WA or the NT.\(^ {329}\) Had Option Six been pursued and researched more intensely at that time, Christmas Island (and the IOTs) could have been incorporated politically into either the NT or WA and the issue regarding the applied legislative regime would now be irrelevant. That is, the legislation of either the NT or WA would have (automatically) applied simultaneously with electoral representation and therefore provided a democratic process for the community in either the NT or WA Parliament. More importantly, the community of Christmas Island would have had the right to vote in either the NT or the WA (Territory or State) elections thereby providing electoral representation that is fundamental to our democratic principle of government.

As noted earlier with reference to Saunders, representatives of the people perform most of the governing in a democracy. Democratic rights are rights that each community considers necessary to make its democratic arrangements work. The most obvious are the rights to vote and to stand for Parliament or for any elected office.\(^{330}\) This fundamental principle is currently absent in the IOTs at either the WA State or NT level. This principle also implies that the community should be involved and included in the participation and consultation processes that affect their daily lives. The consultation process by the Commonwealth with the community of the IOTs was in fact raised in the submission by the Shire of Christmas Island in its submission to the Joint Standing Committee on National Capital and External

\(^{328}\) Islands in the Sun, 200.

\(^{329}\) Islands in the Sun, 58.

\(^{330}\) Saunders, 81.
Territories (JSCNET) Inquiry in 2005, as the issue of ineffective consultation in the face of insufficient decision-making roles or political representation within the community had been emphasised repeatedly in Government inquiries and reports.\textsuperscript{331}

In the recently released JSCNET Report of 2016, the Shire of Christmas Island reiterated the lack of consultation by the Commonwealth in their submission(s); these were supported by numerous written and oral submissions who all stated that community consultation conducted by the then Department of Infrastructure and Regional Development (DIRD) was inadequate.\textsuperscript{332} One of the most obvious examples of neither the consultative or participatory process occurring is in the application of the SDAs, although the Commonwealth have reacted to the 2016 JSCNET Report outcomes by commencing the SDA renewal process in 2017 even though no significant progress has been made, given how out of date the SDAs are.

The process of extending these SDAs have been undertaken by Commonwealth and WA State Government bureaucrat agencies only and has not included regular consultation or participation with the community of Christmas Island, thereby ignoring and further denying the right of the Island’s community for any say in the legislation that applies and affects their daily lives. For example, currently 37 SDAs that expired in 2011 are applied to the IOTs and these have been consistently extended by the Commonwealth and the WA Government with minimal reference and/or consultation with the community. Further, there are three WA Government Departments providing SDA-type services to the IOTs without any formal SDA in

\textsuperscript{331} Shire of Christmas Island, ‘Our Future in Our Hands’, (Christmas Island: Submission by the Shire of Christmas Island to the Joint Standing Committee on National Capital and External Territories Inquiry, 2005, 45.

\textsuperscript{332} Joint Standing Committee on National Capital and External Territories Inquiry Final Report: Economic Development and Governance, 89.
place at all, and at least two SDAs have been cancelled (Small Business Development Corporation and Lottery West) by the Commonwealth and WA Government without any reference and/or consultation with the community. During the April 2015 JSCNET Inquiry held on Christmas Island, the Shire of Christmas Island President raised this matter again in his submission.\textsuperscript{333}

Notwithstanding the comments above regarding the absence of representative democracy for Christmas Islanders, of equal relevance is the fact that Christmas Islanders are denied the process of responsible government with the application of WA State legislation. That is, responsible government means that all governments must be responsible for their actions to the people who have elected them and the traditional means by which they are held accountable is through Parliament that is the link between government and the people. Without our collective consent, the government would not be legitimate.\textsuperscript{334} Again, this principle is absent in the governance and legislative arrangements applied to the IOTs with the example provided earlier where previously any local law adopted by the IOTs’ local governments required scrutiny by the WA Parliamentary Joint Standing Committee on Delegated Legislation. Therefore, the imposition of this Committee in a process where the WA Parliament has no political and/or electoral jurisdiction is undemocratic and legislatively inconsistent with the application of the WA State Government SDAs. The community of Christmas Island can also not be expected to hold the WA Parliament accountable in accordance with the principle of responsible government when there is no electoral provision to allow such accountability, which in turn denies the community any democratic representation.

\textsuperscript{333} Joint Standing Committee on National Capital and External Territories Inquiry Final Report: Economic Development and Governance, 6.

\textsuperscript{334} Drum and Tate, 112.
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The IOTs were, of course, not part of Australia at Federation and hence not considered in the Constitution apart from section 122, which allowed ‘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 Australian representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.’ The framers of the Constitution gave the Commonwealth wide powers to determine how it would deal with territories as and when they became part of Australia. In the context of section 123 of the Australian Constitution regarding incorporation of a Territory within a State, the Parliament may with the consent of the Parliament of a State and the approval of the majority of electors of the State increase the limits of that State. Therefore, it is possible for an external Territory (such as Christmas Island) to be incorporated within a State.\footnote{Islands in the Sun, 203.}

While Recommendation Eight of the \textit{Islands in the Sun} report is that the Commonwealth initiate discussion with the WA Government in respect to the long-term future of Christmas Island, including its possible incorporation within the State of Western Australia, there is no evidence that this option was pursued to the extent of considering its feasibility for incorporation into either the WA State or the NT at the time. Further, it would be unlikely currently that either the NT or the WA State would consider such an option, if for no other reason than the financial implications.\footnote{Joint Standing Committee on National Capital and External Territories Inquiry Final Report: Economic Development and Governance, 6.}

The 2016 JSCNET Report referred to this noting that previous parliamentary committee reports have discussed the notion of incorporating the IOTs into a state. As early as 1991, the \textit{Islands in the Sun} Parliamentary Committee report recommended that the Commonwealth initiate discussions with the WA Government regarding the long-term future of Christmas Island and the Cocos
(Keeling) Islands, including their possible incorporation into the State of Western Australia.337

Had this option been pursued and indeed implemented as a result of Recommendation Eight of the *Islands in the Sun* report, what would the governance situation on Christmas Island be like today? That is, if for no other reason than alleviating the arduous and complicated process currently in place regarding the imposition of WA applied legislation through the cumbersome SDA process. Hence, the applied legislation of WA to the IOTs and its financial cost is crucial to the discussion of self-determination in regard to democratic representation and responsible government. For example, the financial cost of providing SDAs alone in the 2015–2016 annual financial Commonwealth Budget Book was $35.3 million with the total operational budget of $111.3 million, which is less than that in the 2013–2014 year.338

As aforementioned, the communities of the IOTs are disenfranchised in the process of voting in the WA election cycle and therefore denied the democratic opportunity to vote in a system that simultaneously applies the WA State legislation to their daily lives. The laws of any country in some part govern the daily lives of the ordinary citizen of that country and it is therefore paramount that at the very least the citizens have not only an understanding of these laws but also can participate in the process of applying these laws to their everyday life. This, of course, implies that they (the citizens) must understand to some degree how these laws not only work but also how they are applied, and in the situation regarding Christmas Islanders, this is not

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337 *Islands in the Sun*, 53 and 87.
338 Department of Infrastructure and Regional Development, ‘*Commonwealth 2015/16 Annual Budget Book: Indian Ocean Territories*’, (Canberra: Commonwealth of Australia, Communications Branch, 2014), Table 2 – page 4.
entirely evident. Saunders supports this view in her description of democratic rights where the most obvious expression by a community of the democratic process is the right to vote.

Further, as an important part of this process, people need to know what their representatives have done, are doing and are proposing to do, for deciding who to vote for. They need to be able to talk to each other about these matters and to talk to their representatives. Accordingly, most of the community on Christmas Island have either no idea, or equally no interest in, who the WA political representatives are because they are disenfranchised from the voting system in WA. As noted by Drum and Tate, broad or universal franchise is only one aspect of ensuring that our system is truly democratic. This is particularly relevant where the community of Christmas Island do not qualify for enrolment on the WA Electoral Roll or indeed on any other State or Territory Electoral Roll and are only provided the opportunity to exercise their voting rights through the Federal Electoral Roll process where most of the community of Christmas Island are enrolled in the Federal House of Representatives seat of Lingiari and the Senate in the NT. The establishment of local governments on the IOTs in accordance with the recommendations of the Islands in the Sun report have also indirectly disenfranchised the community in the election process. The existence of the local government authorities on the IOTs is governed in the same context as on mainland Australia as noted by Grant. In the Australian context local governments are overseen by other tiers of government and conceptualized as political/administrative entities, rather than local polities overseeing local administrations.

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339 Saunders, 82.
340 Drum and Tate, 198.
341 Grant and Fisher, 11.
The specific legislation providing for local government elections for the two Shires in the IOTs is governed by the WA *Local Government Act (CI and CKI) 1995* respectively and subsidiary legislation, such as the WA Local Government State Electoral Roll for the Legislative Assembly in WA, and therefore excludes enrolment for residents of Christmas Island. The electoral process used by the local government on Christmas Island (and the Cocos Keeling Islands) is to combine the ‘Owners and Occupiers’ Roll in accordance with section 4.38 of the *Local Government Act (CI and CKI) 1995* with the Federal (Residents) Electoral Roll for Lingiari, to form the Consolidated Roll used for local government elections. Through this process, persons on the Consolidated Roll for the local government (Shire of Christmas Island and Shire of Cocos Keeling Islands) are able to exercise a vote, at least in the local government election process. Simultaneously, the community of Christmas Island, irrespective of whether they were entitled to vote in the local government election process, are afforded due consultation in regard to local legislative matters that do affect their daily lives. For example, the adoption of the Cemeteries Local Law by the Shire of Christmas Island, and more recently (2018) numerous other local laws now registered as Federal Notifiable Instruments that affect the local community demonstrates democratic representation where the authority of the people (at the local level) has been delegated to the elected representatives of the Shire of Christmas Island, who are in turn accountable at every electoral cycle (local government ordinary elections) to the community. The reference by Drum and Tate would seem to be appropriate and applicable (at least at the local level), where the central notion of voting as a means for legitimising government is whether the voting systems we use provide fair representation. Certainly in the case of

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343 Drum and Tate, 206.
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Christmas Island (and the Cocos Keeling Islands), the absence of voting in the WA election process where simultaneous WA laws apply, would clearly appear not to provide fair representation. Saunders reinforces this principle, where in a democracy, representatives of the people perform most of the governing.\(^{344}\)

Most of the academic literature referenced in this study relevant to the democratic rights of people in our society refer to, and have a direct relationship with, the Australian Constitution that was noted in Chapter One of the study. In this regard, the community of Christmas Island should be no different. Section 122 of the Australian Constitution is the applicable constitutional instrument relevant to the non-self-governing Territory of Christmas Island that allows the representation of Christmas Island in either House of the Parliament to the extent and on the terms that it thinks fit.\(^{345}\) However, as aforementioned, Christmas Island is not represented in either the WA State legislature (although WA legislation applies) or in the NT legislature, although federal legislative representation applies. The non-representation of Christmas Island in the WA applied legislative process together with the democratic voting deficit is the most striking anomaly critical to ensuring that Christmas Islanders are afforded fair electoral representation. Further, section 123 of the Australian Constitution applies in regard to the consent being given by the Parliament of the State (WA), and the approval of the majority of the electors of the State voting on the question of including or integrating the non-self-governing Territory of Christmas Island into the State of Western Australia.\(^{346}\) This obvious anomaly will/must be addressed in the outcome of this study where several options will be proposed to provide more equitable and democratic models for the community of Christmas Island to consider.

\(^{344}\) Saunders, 81.

\(^{345}\) The Australian Constitution, 45.

\(^{346}\) The Australian Constitution, 45.
To quote the (then) Hon RJ Withnall, the Minister for the Northern Territory and Independent Member for Port Darwin in 1974 that ‘government cannot be arranged on the instant coffee principle whereby you take 19 elected members, 2 teaspoons of hope and a dash of finance and you can have instant government – of course this is completely ridiculous’. Applied in context to the missed opportunities of the Islands in the Sun report recommendations for the IOTs, this satirical comment may seem appropriate. He was, of course, referring to the proposed constitutional reforms by the Commonwealth Government at the time for the NT regarding the establishment of its Legislative Assembly.

Figure 4.2 Raising of the Australian flag at Smith Point on the proclamation of Christmas Island becoming an Australian non-self-governing Territory on 1 October 1958.
Governance and legislative arrangements in the non-self-governing external Territory of Norfolk Island

In May 2015 Norfolk Island became a non-self-governing external territory. This occurred with the passing of the *Norfolk Island Legislation Amendment Bill 2015* by the Commonwealth Parliament in May 2015 that has resulted in the removal of the Norfolk Island Legislative Assembly to be replaced by a form of Regional Local Government by July 2016 similar to that currently applicable for the IOTs. Accordingly, the Norfolk Island Regional Council commenced as a political entity on 1 July 2016 and held elections for local government councillors shortly afterwards, in accordance with the applied legislation from the State of New South Wales.

The *Norfolk Island Legislation Amendment Bill 2015* that was passed in May 2015 consisted of a package of eight bills to reform the legal and governance framework for Norfolk Island. The Amendment Bill also included *Tax and Superannuation Laws Amendment (Norfolk Island Reforms) Bill 2015*, a new *Tax System (Medicare Levy Surcharge—Fringe Benefits) Amendment Bill 2015*, *Health and Other Services (Compensation) Care Charges Amendment (Norfolk Island) Bill 2015*, *Health Insurance (Approved Pathology Specimen Collection Centres) Tax Amendment (Norfolk Island) Bill 2015*, *Health Insurance (Pathology) (Fees) Amendment (Norfolk Island) Bill 2015*, *Private Health Insurance (Risk Equalisation Levy) Amendment (Norfolk Island) Bill 2015*, and *Aged Care (Accommodation Payment Security) Levy Amendment (Norfolk Island) Bill 2015*, all relevant to the legislative framework on Norfolk Island.348

While this transition was confirmed on the 1st of July 2016, the discussion in this section will concentrate on the historical developments of Norfolk Island that led to

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the establishment of its Legislative Assembly and limited form of self-government with reference to the recent events being made at the end of this section.

Situated some 1,580 kilometres from Sydney and 1,060 kilometres from Auckland, Norfolk Island does not conform to the accepted pattern or idea of a Pacific island and is a distinct and separate settlement. There have arisen political difficulties and differences, some of which have been resolved by the elected Legislative Assembly that was first inaugurated in August 1979. While this brief description by Hillier provides an historical background for this section of the discussion regarding the governance and legislative arrangements in the self-governing Territory of Norfolk Island, other literature will also be referenced to provide the context and relevancy of Norfolk Island’s development to this study.

Following the discovery of Norfolk Island by Captain James Cook in 1774, the island was established primarily as a convict settlement first from 1774 to 1814 and then from 1825 to 1856. The closing of the second penal settlement in 1856 coincided with the arrival of the ‘Pitcairners’ to Norfolk Island, who were the descendants of the Bounty mutineers that had settled on Pitcairn Island in 1790. The closing of the Norfolk Island penal settlement and the transfer of the Pitcairn Islanders to their new home coincided with a constitutional change. By an Act of the British parliament passed in July 1855, followed by an Order-in-Council on the 24th of June 1856, Norfolk was severed from Van Diemen’s Land and created as a distinct and separate Settlement, and the proclamation to this effect was made by Sir William Denison, Governor of New South Wales on the 31st of October 1856.

351 Hoare, 68.
352 Hoare, 72.
No significant legislative or governance changes occurred on Norfolk Island from 1856 until the turn of the twentieth century other than ‘on Island’ laws passed from time to time for administrative purposes. In the early 1900s, a move had been made towards more Commonwealth control of the island, but the government had to attend to more pressing matters. However, around 1910, the possibility was raised again, and many citizens protested against the proposed transfer. With the passing of the *Norfolk Island Act 1913*, which became operative on the 1st of July 1914, the Commonwealth assumed authority of the Territory of Norfolk Island, control being vested in the Governor General of the Commonwealth.\(^{353}\)

The Commonwealth control of Norfolk Island was further confirmed with the (then) Prime Minister of Australia (Andrew Fisher) officially appointing the Island’s first Administrator, Mr M V Murphy.\(^{354}\) The tenure of Murphy as Administrator was not an easy task, and as O’Collins notes, it was undertaken during a period when federal politicians and government departments were preoccupied with Australia’s role in the First World War. Murphy had to contend with the inherent problems of being the first resident Administrator, initially for New South Wales, and then for the Commonwealth.\(^{355}\) Murphy left Norfolk Island in 1919, although he was to return later as Acting Administrator for a short term.\(^{356}\) This could equally apply to the tenure of Administrators on the IOTs; however, Norfolk Island has an earlier and more tumultuous history of experience with Commonwealth appointed Administrators, even to the current day. Whatever the relationship between

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\(^{353}\) Hoare, 113.


\(^{355}\) O’Collins, 114.

\(^{356}\) Hoare, 123.)
Administrators, government departments and the community of Norfolk Island was, there is no doubt that the presence of Commonwealth control on Norfolk Island eventually led to the dissatisfaction by Norfolk Islanders being expressed to the extent where the gradual process for legislative and governance change gained momentum.

Following the passing of the *Norfolk Island Act 1913* that became operative on the 1<sup>st</sup> of July 1914, and the consolidation of the Island’s first Administrator, several legislative and governance instruments were subsequently enacted that continued to reinforce the Commonwealth’s control on Norfolk Island. The *Norfolk Island Act 1935* was passed to amend the 1913 Act. The Executive Council on the Island was replaced by an Advisory Council consisting of eight members elected annually. The *Norfolk Island Act 1957* repealed the *Norfolk Island Acts of 1913 and 1935* but re-enacted the provision for an Advisory Council of eight members to be known as the Norfolk Island Council. This Council assumed the powers of the previous Advisory Council. The Act also provided for the possible grant to it of some executive powers in the future. It should be noted that although the 1957 Act repealed the 1913 Act, such repeal did not affect the effectiveness of the declaration of acceptance of Norfolk Island by the Commonwealth. Hoare notes that by 1954, with exports failing, employment scanty and business unsatisfactory, Norfolk citizens were pressing for more control in local government.

In 1960, it was decided to confer on the Advisory 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.

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358 Hoare, 140.
powers were to be exercised by a fully elected Council with an elected president. It was also 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 by-laws (Local Laws) passed by the Council and second, the Council would have to raise its own revenue, the then Administrator having stated that the traditional sources of revenue would be denied it. The Commonwealth chose to re-establish this process with the newly created Norfolk Island Advisory Council in 2015 that provided legislative functions to transition Norfolk Island from its (previous) self-governing status of a Legislative Assembly to that of a local government-type arrangement. In 1961, the Commonwealth submitted a draft set of proposals to the Council. These proposals would have transformed the Council into an Administrator’s Council and would have given Council power to direct the Administrator concerning those functions listed in section 63 of the Ordinance (i.e., normal powers with regard to local government functions). The Norfolk Island Act 1963 was passed and came into effect in April 1964. It amended earlier Acts to provide for the wish of the Island people not to participate in executive government of the Island and for the 1960 Ordinance to be repealed. It also provided for a large measure of consultancy between the Council and the Administrator.

In 1965, in the case of Newbery v The Queen (Cth), Justice Eggleston held that the Commonwealth Parliament had power under section 122 of the Constitution to enact laws for the Government of Norfolk Island. In 1968, the Norfolk Island Council Ordinance was amended to vary the provisions in relation to eligibility to vote for, and to stand for election to, the Council. In 1970, a proposal was made that the Chairman of the Council should be elected and the Council should exercise some

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359 Hoare, 37.
executive powers. It received little support at the July 1970 Council elections. This legislative and governance process set the scene for significant change. It is against the above historical background that the Australian Government in 1975 sought, through a Royal Commission, to obtain well-informed recommendations relating to the Island’s future status, its constitutional relationship to Australia and the most appropriate form of administration for it.

The 1975 Royal Commission into Matters Relating to Norfolk Island was headed by the Honourable Sir John Angus Nimmo and the subsequent findings of the Royal Commission were known as the ‘Nimmo Report’. It was a Labor Federal Government that commissioned the Royal Commission to commence enquiring into the future constitutional status of Norfolk Island. The Terms of Reference for the Royal Commission were to inquire into the future status of Norfolk Island, its constitutional relationship to Australia and the most appropriate form of administration for Norfolk Island if its constitutional position were changed. The Inquiry and Recommendations were to extend to and take into account:

a) the interests of Norfolk Island residents;

b) the historical rights of the descendants of the Pitcairn settlers, arising from their settlement in 1856;

c) Norfolk Island’s legal position as a Territory of Australia;

d) the present and probable development of the economy of Norfolk Island;

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360 Hoare, 37.
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) 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.

This process was to be undertaken as expeditiously as possible. The Royal Commission concluded in November 1976, and as Hoare notes, the Nimmo Report, carried out in 1975 and 1976 by Sir John Nimmo, was the most extensive and penetrating study of Norfolk Island affairs in the Island’s history. The Nimmo Report made 74 recommendations, including that Norfolk Island be integrated (i.e., annexed) into the Commonwealth of Australia as part of the federal electorate of Canberra and not as a part of any State.

Importantly, Nimmo specifically stated that no referendum on Norfolk Island should be allowed. This specific recommendation had implications for the process by which Norfolk Islanders could seek recourse through the United Nations in regard to determining (by Referenda) their non-self-governing status, and will

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364 Hoare, 151.

365 Richardson, 23.
receive further discussion later in this section, similar to the situation on the IOTs, remembering that (at that time) the Cocos (Keeling) Island had not undertaken the process (this occurred in 1984) and Christmas Island has never been afforded the process. Other recommendations of importance were that the Norfolk Island Council be abolished and replaced by an incorporated body to be known as the Norfolk Island Territory Assembly (not to be confused with the later Norfolk Island Legislative Assembly), and that all social security, all pension and all medical, hospital and other health benefits dispensed by the Commonwealth Government be extended to residents of Norfolk Island as well as all taxation and other imposts as apply in the Australian Capital Territory (ACT) apply to Norfolk Island.\textsuperscript{366} With Australia (through the Nimmo Report recommendations) refusing to allow Norfolk Islanders to conduct a referendum, another way of making their feelings apparent was by Norfolk Islanders signing a ‘Solemn Declaration’ in which 94\% declared that they did not wish to be integrated into Australia, but the Australian Minister responsible (then) for Norfolk Island (Senator Reg Withers) said that the ‘Solemn Declaration’ was totally, completely and utterly valueless.\textsuperscript{367}

Understandably, most Norfolk Islanders were not impressed with the statement by Senator Withers or with the majority of the Nimmo Report recommendations. However, the 1976 Nimmo Report illustrated the dilemmas that have continued to confront Australia in its relationship with Norfolk Island, even to date. As will be noted later, the concerns of the Australian Government could have been addressed adequately without having to resort to methods of diminishing and/or removing governance and legislative arrangements to achieve what appears to be a gradual erosion of self-determination.

\textsuperscript{366} Hoare, 152.
\textsuperscript{367} Richardson, 24.
In 1978, a new Commonwealth Minister, the Hon RJ Ellicott, visited Norfolk Island and announced that the Australian Government had decided not to implement the Nimmo Report. Instead, it would devise a form of self-government, provided that Norfolk Island could support itself from its own resources. Embodying Mr Ellicott’s design, the Norfolk Island Act of 1979 restored a measure of (so-called) self-government to the people of Norfolk Island, although Australia retained many powers, which it promised to review within five years. As O’Collins notes, since Australia was not willing to cast Norfolk Island adrift, alternative reforms had to be devised with the aim of providing a greater degree of self-government. The Norfolk Island Act 1979 incorporated many of the Nimmo Report recommendations and a nine-member Norfolk Island Assembly was established, with the Administrator taking on a more representative role.

In May 1979, Ellicott visited Kingston (Norfolk Island) and unfolded the government’s policy for Norfolk Island. Nimmo’s recommendation for the extension of Australian laws had not been accepted, and in particular, the government had decided not to introduce Australian taxation and social services, for ‘now’. However, the recommendations for the replacement of the Norfolk Island Territory Assembly by a Legislative Assembly with legislative and executive powers had been accepted. Ellicott also said that a decision on representation in the Federal Parliament would be deferred pending discussions with the new Legislative Assembly; exemption from Australian sales tax would continue; workers compensation would not be extended provided a suitable local system was implemented; a land use development plan should be considered within 12 months; upgrading of the airport would be considered; an economic feasibility study would soon begin; a referendum

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368 Merval Hoare, 155.
369 O’Collins, 146.
would not take place; and within five years of the Assembly’s inauguration, an extension of its legislative powers would be considered. In his speech to the Federal Parliament House of Representatives on the 11th of May 1979 (recorded in Hansard), the Hon RJ Ellicott advised the House regarding his visit to Norfolk Island and the government’s policy on Norfolk Island as follows:

‘May I say at the outset that the Government recognizes the special situation of Norfolk Island, including the special relationship of the Pitcairn descendants with the Island, its traditions and culture. It is prepared over a period of time, to move towards a substantial measure of self-government for the Island. It is also of the view that although Norfolk Island part of Australia and will remain so, this does not require Norfolk Island to be regulated by the same laws that regulate other parts of Australia. One of the main recommendations of the Report of Sir John Nimmo on Norfolk Island was that, except in special cases, all laws which applied to other parts of Australia generally should also apply to Norfolk Island. Having considered all the relevant matters the Government has decided not to accept this recommendation but to allow the present situation to continue under which laws of the Australian Parliament only apply to this Island if special provision is made in the particular law’.  

Further, in his speech to the House of Representatives the Minister concludes that in the government’s view no referendum should be held on Norfolk Island.

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370 Richardson, 25.
The Government has also considered the proposals that have been made for a referendum. It has already received a wide expression of views from the Council and the community. In reaching its decisions it has taken those views fully into account. In all the circumstances and having regard to the decisions it has made, the Government has decided that a referendum should not be held.\(^{372}\)

Accordingly, the particular policy on not holding a referendum for the people of Norfolk Island is relevant to the future governance status of Norfolk Island since it appears to have been purposely instigated as a means to remove the Norfolk Islanders from the process of making application to the United Nations in accordance with Resolution 1514 where there was a clear and definite responsibility by the Commonwealth to afford the people of Norfolk Island with the opportunity to consider their self-determination status. Specifically, in accordance with General Assembly Resolution 1514 passed in 1960 by the United Nations regarding the Declaration on the Granting of Independence to Colonial Countries and Peoples, ‘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. Further, 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’.\(^{373}\) Again, it is important to note that Christmas Island appears to have been ignored in this process in the holding of a referendum in accordance with the above United Nations Resolution, and recently, Norfolk Islanders have posited themselves in making application to the United Nations for a referendum now that the Commonwealth has

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\(^{372}\) The Hon RJ Ellicott, Minister for Home Affairs Speech, 2253.

introduced the *Norfolk Island Legislation Amendment Bill 2015* that took effect in July 2016.

The first Norfolk Island Legislative Assembly took office in August 1979, and the nine-member Norfolk Island Legislative Assembly remained in office until the recent reforms by the Commonwealth were implemented in 2015–2016. As O’Collins notes, progress towards complete self-government continued slowly in the years following the establishment of the first Norfolk Island Legislative Assembly and was criticised particularly by those islanders seeking an even greater degree of representation for indigenous people of the Island because they believed they were entitled to a vote for self-autonomy.374 Richardson notes that the Society of Pitcairn Descendants continued to pursue its contention that the Pitcairners are a separate and distinct people and called into question Australia’s behaviour in not extending the two international Covenants to the Pitcairners of Norfolk Island.375 That is, the two international covenants being the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. Undoubtedly, after the enactment of the *Norfolk Island Act 1979*, Norfolk Island enjoyed a degree of self-government not enjoyed by the Cocos (Keeling) Islands and Christmas Island.

However, this was not to the extent that Norfolk Islanders had expected and indeed continued to demand. This resistance was demonstrated when the outcome of the *Islands in the Sun* report became evident in chapter seven of the Report which discussed the legal regime of Norfolk Island. Consideration was specifically given to progress made on Norfolk Island since self-government was introduced in 1979 and

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374 O’Collins, 149.
375 Richardson, 31.
to areas of law in which further action could be taken to ensure that Territory residents have benefits, rights and protection under the laws that are the same as, or at least comparable with, mainland (Australian) standards.\textsuperscript{376}

Until the recent \textit{Norfolk Island Legislation Amendment Bill 2015} that was passed by the Commonwealth Parliament in May 2015, numerous other governance and legislative changes occurred on Norfolk Island since the recommendations of the \textit{Islands in the Sun Report}. Some of these can be summarised by the several JSCNET Inquiry Reports, including the most recent 2014 JSCNET Inquiry Report \textit{Same Country: Different World – The Future of Norfolk Island} that led to the introduction of the \textit{Norfolk Island Legislation Amendment Bill 2015}, the 2011 Road Map and numerous Commonwealth Government Departmental Reports all of which were responded to, and rejected by, the Norfolk Island Legislative Assembly(s) over time. Norfolk Island was given a significant degree of autonomy in 1979. The Legislative Assembly created in that year had plenary legislative power, subject only to a restricted list of matters on which it could not legislate or could do so only with the Federal Government’s consent. Therefore, the Assembly could legislate on many matters that in mainland Australia would have been matters for the Federal Parliament, including immigration, social security, customs, quarantine, postal services and telecommunications.

At a local government level, the island’s democratic institution had authority over a wide range of local matters, such as roads, water and electricity supply, sewerage, garbage, building control and museums. The Assembly could also legislate on matters typically under the authority of a State in the Australian federal system, for example, education, surface transport, firearms, registration of births, deaths and marriages, and public health. In addition, the Legislative Assembly also passed

\textsuperscript{376} \textit{Islands in the Sun}, 12.
many innovative laws, including a statutory social security system, a no-fault workers compensation scheme, a health care scheme, statutory and strategic land planning, and land titles legislation. The Norfolk Island 2013–2014 Annual Report demonstrated the exhaustive list of matters for which the Norfolk Island Assembly was responsible. The recent introduction and passing of the Norfolk Island Legislation Amendment Bill 2015 by the Australian Parliament has effectively removed the delivery of these functions by the Norfolk Island Assembly with the abolishment of the Norfolk Island Act1979. While the Norfolk Island Assembly accepted the legislative changes proposed in the Territories Law Reform Bill 2010 in return for financial assistance that was embodied in intergovernmental agreements, it did not contemplate the abolition of the Assembly or Norfolk Island’s other democratic institutions.

The expressed preference of the Norfolk Island Government was federal-type functions to be assumed by the Australian authorities, leaving state-type and local government functions to be undertaken by the elected representatives of the Island’s community. Instead, the notion that the Norfolk Island Legislative Assembly should be abolished only arose quite recently, in the JSCNET Inquiry Report published in October 2014. That JSCNET Committee’s perspective was that a new legislative framework was required and that state-level type services should be provided by a state government (preferably New South Wales) on a contracted fee-for-service basis. This model mirrors the governance model of Australia’s IOTs, Christmas Island and the Cocos (Keeling) Islands. The response by the Norfolk Island Assembly to this part of the JSCNET Inquiry Report was that it cautioned against

merely adopting another external territory’s model, be it the IOTs or Lord Howe’s and applying it to Norfolk Island.\textsuperscript{379}

Accordingly, Norfolk Island is faced with the prospect of a democratic deficit where the delivery of state-type services, including such essential functions as education and health, are delivered by unelected persons under opaque arrangements of an unknown kind and where they are likely to experience the same problems and issues that the communities of Christmas and Cocos (Keeling) Islands do with the applied legislation model. In seeking to avoid this outcome, the Norfolk Island community was given the opportunity by the (outgoing) Legislative Assembly to express their opinion in a referendum, which was held on the 8\textsuperscript{th} of May 2015, and in which the electors of the Island overwhelmingly expressed their opinion that the Commonwealth Parliament should not pursue the contemplated changes until the Island’s community had exercised their right to freely determine their political status and future. Conversely, the Commonwealth upholds the virtues of what they have imposed, or will impose, on the Norfolk Island community in the recent 2016 JSCNET Report for the IOTs. Political will and determination, devoting adequate resources, having a clear mandate, good leadership and sound execution, together with providing for full community engagement have proved integral to the timely progress of the reforms on Norfolk Island.\textsuperscript{380} In this regard, the political future of Norfolk Island continues to remain precariously balanced, especially given that the community continue to actively pursue their democratic rights through the United Nations process.

\textsuperscript{379} Administration of Norfolk Island, ‘Norfolk Island Legislative Assembly’, (Kingston Norfolk Island: Norfolk Island Administration Publishing November 2014), 1.

\textsuperscript{380} Joint Standing Committee on National Capital and External Territories Inquiry Final Report: Economic Development and Governance, 158.
Governance and legislative arrangements in the self-governing mainland internal territories of the Northern Territory and the Australian Capital Territory

The NT was governed as part of New South Wales until 1858, when it was transferred to South Australia and later to the Commonwealth. An advisory Legislative Council was established in 1947, but NT self-government did not come about until 1978. For the purpose of this section, the study is primarily concerned

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381 Drum and Tate, 95.
with the events that occurred since 1978 concerning self-government for the NT as an internal territory of Australia. The inauguration of the NT Legislative Assembly involved a torturous process. After years of pressure from the Territory, the Liberal and Country Party government in Canberra in 1972 was moving to grant a small reform, including full executive authority over some local functions and revenue areas.\footnote{Jaensch and Marshall, 5.} This was the starting point for the NT having its own form of self-government and even though a change of Federal Government occurred in late 1972 that slowed progress, a unicameral legislative chamber was eventually achieved, although to date, it still does not have full independent legislative powers. That is, the Federal Government retains the right to legislate for the NT and to also overturn any legislation passed by the NT Legislative Assembly. For example, the Federal Government exercised this power when it repealed the Territory’s voluntary euthanasia law in 1996, which it is entitled to do so under section 122 of the Australian constitution.\footnote{Harvey, Longo, Ligertwood and Babovic, 144.}

Despite the landmark event of the formation of the Legislative Assembly, in terms of government and administration, the period from 1974 to 1978 was essentially only a partial ‘Cabinet government’ and very much a transition period. The \textit{Northern Territory (Administration) Act 1974} established an Administrator’s Council of the Administrator and five persons as members of the Legislative Assembly, although it retained the definition that had been previously established for the NT Legislative Council and was interpreted as well short of responsible Cabinet government.\footnote{Jaensch and Marshall, 256.} The \textit{Northern Territory (Self Government) Act 1978} established the first formal Ministry, replacing the previous transition situation; finally, a real Cabinet had been
granted.\textsuperscript{385} Sections 6 to 10 of the \textit{Northern Territory (Self Government) Act 1978} prescribes the role and function of the Administrator of the Northern Territory where the Legislative Assembly has power, with the assent of the Administrator, that every proposed law passed by the Legislative Assembly shall be presented to the Administrator for assent.\textsuperscript{386} This is an interesting difference between the function and role of the Administrator of the Northern Territory, to that of the Administrator of the Indian Ocean Territories (and the recently created Norfolk Island Regional Council), where no such situation is relevant to the IOTs because of their status as non-self-governing external territories. The non-self-governing external IOTs have no capacity to make and/or propose any laws as they are subject to the applied legislation of WA through the SDA process.

The exception to this is the (limited) capacity of the local governments of the IOTs to make local laws (for example Shire of Christmas Island \textit{Cemeteries Local Law 2013}), although this process is still subject to the provisions of the WA applied legislation. In 1998, the NT Government convened a Constitutional Statehood Convention and this Convention subsequently submitted a draft Constitution to the Legislative Assembly that recommended, inter alia, statehood for the NT at the earliest. The draft Constitution was adopted by the Assembly. The subsequent referendum on whether the Territory should become a State was held in the NT later that year, which was narrowly defeated, and it remains an intriguing possibility that the Territory might one day become a State, and in particular, under what conditions they would be admitted to the Federation.\textsuperscript{387} In response to the failure of the referendum, the (former) NT Chief Minister (Denis Burke) wrote in 2003 that a

\textsuperscript{385} Jaensch and Marshall 257.


\textsuperscript{387} Harvey, Longo, Ligertwood and Babovic, 144.
plebiscite on the question of Statehood should be held and it should be made quite clear what exactly is being asked and the kind of state the NT would be, before being voted on. In this regard, it would be far better to have that question out of the way before getting down to the details of the framework and structure of the state.\textsuperscript{388}

At present, the Northern Territory Government consists of a ministry appointed by the Administrator from the elected members of the Legislative Assembly. The Administrator, in turn, is appointed by the Governor General of Australia. The Administrator normally appoints the leader of the majority party in the Legislative Assembly as the Chief Minister and on the advice of the Chief Minister appoints the remaining members of the ministry. That is, while it is the Governor of each Australian State that appoints the Premier of that State, it is the NT Administrator who formally appoints the Chief Minister. The NT is represented in the Commonwealth Parliament by two members in the House of Representatives, those for Solomon and Lingiari, and two members in the Senate. The Member for Lingiari also represents voters from Australia’s IOTs, while the NT Senators represent those voters in the Senate. As Drum and Tate note, one difference between states and territories is the degree of representation in federal politics. Given their small representation (territories), handing them equal Senate representation would be problematic because it would mean that they would be highly over-represented per capita, compared with the larger states.\textsuperscript{389} Financial arrangements for the NT are largely reliant on Commonwealth assistance through the Commonwealth Grants Commission with the capacity of the NT to raise its own revenue limited. The rapid population growth of the NT, and its subsequent demand on infrastructure to


\textsuperscript{389} Drum and Tate, 95.
support this growth, compounds its fiscal problem and its continued reliance on the Commonwealth.\textsuperscript{390} The Commonwealth Grants Commission included the NT in the federal Financial Assistance Grant process in 1988–1989 in the same way as the States and it also received special revenue assistance to smooth its adjustment.\textsuperscript{391} This will be further discussed in the next chapter for comparative purposes with the IOTs.

In summary, the granting of self-government to the NT did not provide an equivalent authority. The Assembly’s authority was local autonomy rather than state-type sovereignty. Its authority was (and is) subject to the oversight and, if it so desired, the direction of the Commonwealth Government. The transfer of powers does not restrict the Commonwealth from enacting laws on any issue. Hence, even if the intention was that the Commonwealth would legislate only to the extent necessary to secure the relevant national policy objective and in consultation with the NT Government, the NT Assembly is, in fact, still subordinate. Even with self-government, the Commonwealth retains a veto power over any Act of the NT Legislative Assembly. The Governor General (on the advice of the Commonwealth Government) retains the authority to disallow any law. The Act (Self-Government) did establish a component of responsible government at the local level, in that the Administrator acts on the advice of the NT Ministers, but the veto power retained in Canberra is a severe formal limitation.\textsuperscript{392} Therefore, this situation is relevant to the final discussion in the conclusion and recommendations of this study regarding Christmas Island.

\textsuperscript{390} Jaensch and Marshall, 322.


\textsuperscript{392} Jaensch and Marshall, 15.
Figure 4.4 Coat of Arms and Flag of the Northern Territory.
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The Australian Capital Territory was created as the seat of national government. After the establishment of Canberra in 1913, Canberra was administered federally, with self-government not granted until 1988. This was in fact consistent with section 125 of the Australian Constitution where colonial delegates flagged a need for a national territory during the Federation Conventions of the late nineteenth century.

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Drum and Tate, 95.
century. That is, section 125 of the Australian Constitution provided that, following Federation in 1901, land would be ceded freely to the new Federal Government. The territory was transferred to the Commonwealth by the state of New South Wales in 1911, two years prior to the naming of Canberra as the national capital in 1913. In the period prior to self-government (1989), the Federal Minister for Territories made all decisions relating to the ACT. Advisory bodies were established to inform the Minister about matters of concern to the residents of the ACT. When the Federal Government decided that the ACT needed its own system of self-government, the Federal Parliament passed the Australian Capital Territory (Self-Government) Act 1988, along with other related legislation that established self-government in the ACT. There were 117 candidates for the subsequent election to the Legislative Assembly, with the poll being held on 4 March 1989. The Assembly met for the first time on 11 May 1989. Unlike other self-governing Australian Territories (e.g., the NT), the ACT does not have an Administrator. The Crown is represented by the Australian Governor-General in the government of the ACT. Until late 2011, the decisions of the Assembly could be overruled by the Governor-General (effectively by the national government) under section 35 of the Australian Capital Territory (Self-Government) Act 1988, although the Federal Parliament voted in 2011 to abolish this veto power, instead requiring a majority of both Houses of the Federal Parliament to override an enactment of the ACT. The Chief Minister performs many of the roles that a state governor normally holds in the context of a state; however, the Speaker of the Legislative Assembly gazettes the laws and summons meetings of the Assembly. Similar to the NT’s voluntary euthanasia legislation, the ACT legislated for same-sex

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394 *The Australian Constitution*, 46.


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civil unions; however, the Commonwealth Parliament overrode this, and thus, while the ACT (and the NT) have some democracy they are still subject to being vetoed by the Commonwealth.\textsuperscript{397} Further, in response to the legislation of euthanasia in the NT, and to ensure the ACT could not contemplate or include its own similar legislation, subsection 1A and 1B were added to section 23 of the \textit{Australian Capital Territory (Self-Government) Act 1988} by the Commonwealth Parliament in 1997 to prevent the enactment of euthanasia laws while permitting palliative care.\textsuperscript{398}

The level of Commonwealth control in the ACT is much greater than that which applies to the NT where the provisions of section 23 of the \textit{Australian Capital Territory (Self-Government) Act 1988} prescribe for the acquisition of property otherwise than on just terms, the provision by the Australian Federal Police of police services in relation to the Territory, the raising or maintaining of any naval, military or air force, the coining of money and the classification of materials for the purposes of censorship.\textsuperscript{399} The Governor General is also empowered to disallow Territory enactments such as that legislated by the ACT for same-sex civil unions under section 35 of the \textit{Australian Capital Territory (Self-Government) Act 1988} and to dissolve the ACT Legislative Assembly under section 16 of the \textit{Australian Capital Territory (Self-Government) Act 1988}.\textsuperscript{400} Accordingly, the potential (and actual) intervention by the Governor General remains an example of the veto control that the Commonwealth has over the ACT. The challenge then for the ACT seems to be to provide a workable ministry and government within the legislative constraints of Commonwealth control with little prospect of any other governance arrangements being contemplated for the ACT. Essentially the ACT was created specifically as the

\textsuperscript{397} Harvey, Longo, Ligertwood and Babovic, 144.

\textsuperscript{398} Australian Capital Territory (Self Government) Act 1988, 13.

\textsuperscript{399} Australian Capital Territory (Self Government) Act 1988, 13.

\textsuperscript{400} Australian Capital Territory (Self Government) Act 1988, 18 and 9.
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location of the Commonwealth Government, and hence, it would be less likely to become a State. To achieve this, section 52(i) of the Australian Constitution, which gives the Commonwealth exclusive power to make laws for the seat of government might also need to be amended. Accordingly, there is little prospect of the ACT ever becoming a new State of the Commonwealth since section 125 of the Australian Constitution also clearly prescribes the seat of government to remain in Commonwealth territory, and therefore, for the ACT to become a State, the Commonwealth would need to determine a new location for the national seat of government within another territory, provided section 125 of the Australian Constitution contemplates such a change, which is highly unlikely.

Both the NT and the ACT have been included in this chapter in a comparative context as internal self-governing territories with the Indian Ocean and (now) Norfolk Island non-self-governing territories that will be summarised in the final chapter when considering governance models for the IOTs. In this regard, the option of considering the NT internal self-government system for Christmas Island seems more appealing, and certainly less constrictive than the ACT for the reasons outlined above.

Goverance and legislative arrangements of Lord Howe Island

It is not intended to provide an exhaustive and comprehensive description of the governance and legislative arrangements on Lord Howe Island but merely a brief description as a contextual background for consideration in the governance options available to Christmas Islanders. In particular this model is considered because some reference to the governance arrangements of Lord Howe Island were included in some of the submissions to the recent JSCNET 2015 IOTs Inquiry and therefore

401 Drum and Tate, 96.
should be considered a possible viable option. Lord Howe Island is situated approximately 760 kilometres northeast of Sydney NSW in the Pacific Ocean.\textsuperscript{402} Lord Howe Island is controlled and managed by a constituted Lord Howe Island Board (LHIB) and an Island Committee that defines their respective powers, authorities, duties and functions; to make provision relating to the tenure of land upon the said Island; to validate certain matters; and for purposes connected therewith of the Act.\textsuperscript{403} The LHIB, established under the \textit{Lord Howe Island Act 1953}, is a statutory body representing the Crown and is charged with the responsibility of administering the affairs of Lord Howe Island.

The seven member Board consists of four elected islanders and three members appointed by the Minister for the Environment. Under the Act, the Minister may appoint any member of the Board as Chairperson. Historically, and currently, a senior departmental representative of the Minister has been appointed to the role of Chair. However, with the adoption of the \textit{Lord Howe Island Amendment Act 1981}, the Board was re-structured in 1982. The Island Committee was abolished. Three of the five members of the Board were elected by the islanders.\textsuperscript{404} This was the first time in its history that Lord Howe Islanders had held the majority of seats on their own Board, and interestingly, the Board took on a semblance of a local government authority. Interestingly, the term ‘islander’ is defined in section 2 of the \textit{Lord Howe Island Act 1953} that gives substance to the definition, similar to the definition applied under the Preamble of the (former) \textit{Norfolk Island Act 1979} whereas the residents of

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Norfolk Island include descendants of the settlers from Pitcairn Island and the Parliament recognises the special relationship of the said descendants with Norfolk Island and their desire to preserve their traditions and culture. That is, not all Lord Howe residents are islanders, but the definition of islander includes certain residential requirements. The Minister may, on the recommendation of the Board made in special circumstances, declare a person to have retained or acquired the status of an islander. Residence means residing in good faith on certain land ‘as his or her usual home, without any other habitual residence’. If, for no other reason, this can be an important model for Christmas Islanders to consider, given that there is already a constituted local government authority on Christmas Island, albeit currently constituted under the provisions of the WA applied legislation model.

Part 4 of the *Lord Howe Island Act 1953* deals with land tenure and this will be subject to more detailed discussion in Chapter 6 of the study. From a legislative perspective in 1953, this was the centrepiece of the Act and is still of major legal and practical importance. However, the constitution of the Board, with its majority of islander members, is now significantly different from its original constitution in 1953 and therefore has implications for the practical application of the legislation. Primarily this is because the Island was placed on the United Nations World Heritage List in the 1980s. This listing has subsequently given the LHIB a weighty responsibility with the *Lord Howe Island Amendment Act 1981* ensuring that future administrative decisions would be compatible with environmental values. Again, in this context a similar parallel can be drawn with Christmas Island concerning its heritage and environmental values, which will be discussed further in Chapter Six.


\[407\] Lord Howe Island Act 1953 Number 39, 11.
Only one of the JSCNET 2015 Inquiry submissions recommended the adoption or incorporation of a Lord Howe Island model to the IOTs. Submission 41 to the JSCNET 2015 Inquiry proposed the formation of a Statutory Authority as an alternative model of governance for the IOTs to consider as an entity similar to the LHIB in NSW, or the Rottnest Island Authority in WA where the LHIB is a Statutory Authority established under the provisions of the *Lord Howe Island Act 1953*. Responsible to the NSW Minister for the Environment, the LHIB comprises islanders selected by the community and members appointed by the Minister. The Board is charged with the control and management of the Island and the islanders’ welfare. Similarly, the *Rottnest Island Authority Act 1987* gives that Authority the power to control and manage the island, reporting to the WA Minister for Tourism. The Board of the Rottnest Island Authority consists of a Chair, appointed by the Governor on the nomination of the Minister for Tourism, and five other appointed members.\(^{408}\)

However, this consideration would presume that WA would have to accept the IOTs if a similar Rottnest Island Authority were to be created in accordance with the provisions of section 123 of the Australian Constitution and as noted in the JSCNET Final Report 2016, this is unlikely to be supported by WA. Further, this proposal was not subsequently supported by the JSCNET 2015 Inquiry, even though establishing the Statutory Authority may be a proposal worth exploring further; The Committee however, could not tell from the information provided to it whether the proposed model for the IOTs along the lines of the LHIB and Rottnest Island Authority could be applied to the IOTs. Establishing another expensive bespoke governance model will not redress the underlying problem: that there is no State level of

\(^{408}\) Joint Standing Committee on National Capital and External Territories Inquiry Final Report: Economic Development and Governance, 144.
government and representation. In this regard, there certainly appears to be some opportunity to further explore this notion since little information has been disseminated to the Christmas Island community regarding the possibility of establishing a Statutory Authority for the IOTs as raised in several JSCNET Inquiry Reports. The outcome of this study can therefore provide further information and should be disseminated as relevant information to the community regarding what constitutes a Lord Howe Island or Rottnest Island Authority model for the IOTs to consider.

**Governance and legislative arrangements of Nauru, Cook Islands and Niue**

The final examples to consider and briefly discuss are the Pacific island nations of Nauru, the Cook Islands and Niue. The case of Nauru is relevant not only because of its unique transition from a self-governing territory of Australia and eventual independence, but also because of its similar economic development with Christmas Island owing to phosphate mining. From the end of the nineteenth century with the discovery of rich phosphate deposits in Nauru and Ocean Islands in the Pacific, and Christmas Island in the Indian Ocean, a thriving mining, shipping and distribution business was created and the political, social and economic destiny of these phosphate-rich remote islands had a common thread binding them together. More recently, there has been an unfortunate similarity between Christmas Island and Nauru owing to the Commonwealth’s immigration policy, or the ‘Pacific Solution’. Nauru is a coral island in the Pacific Ocean some 3,000 kilometres north-east of Australia, with an area of approximately 21.2 square kilometres, and is one of the

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410 Williams and McDonald, xvii.
world’s smallest independent republics. Nauru was originally a part of the German Marshall Islands Protectorate. It was formally incorporated into the European imperial system when it was officially annexed by Germany in 1888. The discovery of commercially exploitable quantities of phosphate a decade later changed the future of Nauru immeasurably even from the beginning. The British Empire emerged as the dominant economic interest on the island when the Pacific Phosphate Company started to exploit the reserves in 1906, under licence from Germany. The importance of the superphosphate fertiliser manufactured from these reserves became vital to Australian agricultural growth. Therefore, when the First World War broke out in Europe, Canberra sent an expeditionary force to seize Nauru in 1914, thus beginning the long association (and interference) by Australia in Nauruan affairs.

After the Second World War, Nauru became a United Nations Trust Territory under the joint authority of Australia, New Zealand and Great Britain, but administered by Australia. Although the United Nations insisted on self-determination for all dependencies, large or small, not even the most critical Eastern Bloc countries (at the time) were prepared to suggest that self-determination for the Nauruans (interpreted as meaning the protection of Nauruan interests) would involve much more than resettlement, an increased return from phosphate for the Nauruans and, perhaps increased powers for the Nauru Local Government Council. All agreed, as the New Zealand representative stated in the Trusteeship Council in 1960, that ‘the Nauruan community cannot be regarded as a nation in embryo; it is in no sense a


412 Herr and Potterin, 201.
potential state’. Therefore, it appeared that Australia, New Zealand and Great Britain were happy to continue treating Nauru as a quasi-colonial territory under the mandate/trusteeship of Australia, which was clearly underpinned by the economic value of phosphate to each country, and saw any attempt at decolonisation as a threat to this economic prosperity. However, this relationship moderated by the United Nations enabled Nauru to hasten the pace of national self-determination at a time that was especially congenial in terms of international expectations of smaller polities. The Nauru Act of 1965 established by the Commonwealth allowed for a Legislative Council, an Executive Council and a judicial system, although the (Commonwealth) Nauru Independence Act of 1967 was to lead to eventual full self-determination and independence for Nauru with Australia declaring that it shall not exercise any legislative, administrative or jurisdictional powers over Nauru.

The export of phosphate ore provided the means in that its reserves, although finite with a projected life span of only 30 to 40 years by the late 1960s, were significant, especially given its small population. Unlike most aspirants for independence in the era of the 1960s, Nauru could actually afford to meet the financial costs of sovereignty provided it was prudent with its income to provide for its own future. There was an element of the ‘chicken and the egg’ argument regarding Nauru’s prospects for financial independence. The islanders would have this capacity if they secured control of their phosphate reserves but would need to achieve their political independence to assert their claims fully. Yet, political independence would not be credible without control of the phosphate. Eventually the Nauruans achieved both together. Contributing substantially to the successful negotiating of these complex and intertwined issues was the fact that Nauru was a United Nations Trust

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413 Williams and McDonald, 466.
414 Herr and Potter, 199.
Territory. While Nauru achieved its independence under very favourable international conditions, it was able to press its claims both because it was a coherent nation and had the resources to pay its own way in the world. The former condition remains but the exhaustion of the phosphate reserves has raised very serious questions as to the latter. In other words, there was a short-term exchange for self-determination and independence at the expense of long-term financial viability of the state. Connell notes that failure has been the exceptional outcome of the ‘resource curse’ scenario. Nauru has moved from considerable affluence, based on the export of phosphate, to penury, where public service salaries cannot be paid and the basic functions of the state have collapsed. It is a history of both tragedy and farce.

Nauru became self-governing in January 1966, and following a two-year constitutional convention period, it achieved full independence from Australia in 1968 that interestingly ignored some of the other self-determination models that Nauru could have considered during this two-year constitutional convention period, especially in its neighbouring Pacific region that still exists currently. For example, there were options available such as that of internal self-government adopted by the Cooks Islands only three years before Nauruan independence. Limited political control did not appeal to the Nauruans because it would not satisfy either their national or financial ambitions. Having the weight of the United Nations (and its deep philosophical commitment to decolonisation) behind them clearly benefited the Nauruans in their pursuit of independence, and this, as much as any other factor, sealed the issue. Conversely, as Hannum notes the Cook Islands and Niue located

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415 Herr and Potterin, 202.
416 Herr and Potterin, 212.
417 John Connell, ‘Nauru: The First Failed State?’, (Sydney: The Round Table, 95 (383), University of Sydney, 2006), 47.
418 Herr and Potterin, 203.
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in the Pacific Ocean are self-governing in ‘Free Association’ with New Zealand and with New Zealand retaining primary responsibility for external affairs in consultation with the Cook Islands and Niue governments after previously being administered by New Zealand and are the only examples of decolonisation by means of free association to have been formally approved by the United Nations General Assembly Resolutions 1514 and 1541 since 1960.\textsuperscript{419} That is, the political and governance status of the Cook Islands and Niue are formally defined as states in free association with New Zealand. This is supported by Prinsen where more recent longitudinal analyses of economic and social indicators have confirmed that non-self-governing islands within the constitutional frameworks of colonial metropoles actually fare better than complete sovereign states.\textsuperscript{420} While New Zealand is officially responsible for the defence and foreign affairs of the Cook Islands and Niue, these responsibilities confer New Zealand no rights of control and can only be exercised at the request of the Cook Islands and Niue governments.

In fact, New Zealand has no legislative power over the Cook Islands on any subject, and in the case of Niue, may only legislate for it if the Niue parliament specifically makes a request, an option the Cook Islands abolished in 1981.\textsuperscript{421} Specifically in the case of Niue, the (Niue) Assembly which is modelled on a ‘village representation’ style, may make laws for peace, order and good government, including the power to repeal, revoke, amend, modify or extend any law in force in Niue. This is supported by Corbett who notes that in Niue, despite some of the 14 representative seats now

\begin{footnotes}
\item[420] Prinsen, 63.
\end{footnotes}
having only a handful of constituents, key architects of the Constitution remain committed to the principle of village representation.\textsuperscript{422} The arrangement between Niue and New Zealand is so permissive that Niue retains the unilateral right to terminate its relationship of free association with New Zealand at any time, assuming that a two-thirds affirmative vote of the Niue Assembly and a two-thirds vote in a popular referendum can be obtained.\textsuperscript{423} In support of their self-governing status, the Cook Islands and Niue have been recognised as sovereign states by some countries, and maintain diplomatic relations under their own name.

In contrast to the alternative, free association therefore implies a (high) level of autonomy, and for a non-self-governing territory, it can be seen as a viable self-governing alternative to emergence as a sovereign independent state (such as Nauru) or full integration with a sovereign state (such as Cocos Keeling Islands). This is especially important when considering ongoing financial viability and sustainability where the example provided earlier regarding Nauru demonstrated that there was a short-term exchange for self-determination and independence at the expense of the long-term financial viability of the (Nauru) state. From a self-governing perspective, both the Cook Islands and Niue have avoided this dilemma in their free association status with New Zealand. Hillebrink proposes that the (free) associated state should have full self-governance, although it may voluntarily delegate certain tasks to the ‘metropolitan’ state (i.e. New Zealand), especially in the fields of foreign affairs and defence; the association should be embraced by the population in an act of free choice observed by the United Nations and the territory should retain the guaranteed right to choose another status in the future.\textsuperscript{424} This

\textsuperscript{422} Corbett, 211.
\textsuperscript{423} Hurst, 387.
\textsuperscript{424} Hillebrink, 85–86.
comment has direct relevance to Christmas Island where no such act of free choice has been afforded to its community by the Commonwealth.

In his Discussion Paper titled ‘Acceleration, Innovation and Self-Determination in Decolonization: Taking Stock and Looking Ahead with Particular Reference to the Remaining Non-Self-Governing Territories in the Pacific’ to the United Nations Special Committee on Decolonization Regional Seminar held in Nicaragua in May 2015, Professor Wolfers noted that as regards preparing for self-determination, much has been said about the need for political education in numerous territories. In this regard, it might even be relevant to ask whether the problem is that people do not know or understand the choice(s) before them, or whether the choices themselves do not address issues of public importance and/or have not been clearly defined. As Spector notes, it is therefore especially important that the community are fully informed and engaged in regard to the negotiation process for considering the option of free association as was demonstrated in the Niue process. Further, not only is it important that free association be the result of a free and voluntary choice by the peoples of the territory concerned (i.e. Christmas Island) and that it be expressed through a democratic process, it also clearly places the onus on the Commonwealth as the principal (metropole) state to show that the choice was the result of a genuinely free choice by the population of the territory and that this was achieved through an informed process.

The free association models of Niue and the Cook Islands and to a lesser degree the previous Norfolk Island Legislative Assembly model provide an interesting lesson


for Christmas Islanders to take into account when considering self-determination models for its own future, if for no other reason than totally discounting the notion of independence as an option to consider where the primary reason, similar to that of Nauru, is one of financial viability and sustainability. In this regard Prinsen notes the financial arrangement and dependency of the Cook Islands on New Zealand where the Cook Islands budget over the 2004 to 2009 period was supported by grants from New Zealand, fluctuating between 16 and 21 percent of the island’s annual public budget.\footnote{Prinsen, 66 - 67.} Therefore even when considering the Cook Islands, Niue or the (previous) Norfolk Island self-determination models, Christmas Islanders should be aware of the financial implications and sustainability associated with pursuing this model or form of self-determination and this should be fully explained to the community.

**Chapter Summary**

From 1991, when the current legislative and governance regime commenced on Christmas Island, to the present day, Christmas Islanders have sought to have the recommendations of the several parliamentary committee reports implemented to fully achieve legal, administrative and political reform. The Commonwealth of Australia has failed to provide any consultation or discussion regarding the level of self-determination for Christmas Islanders to consider as envisaged in these reports. The recent JSCNET 2016 Final Report is no different and many of the Committee comments, issues and indeed recommendations appear to merely repeat those in previous reports and recommendations. Therefore, it can be reasonably expected that the community will have little faith or optimism in them being implemented. In fact, the Report can be interpreted as being benignly paternalistic, while conversely, the Report comments and recommendations have completely ignored the issues raised in various submissions by the community to the Committee. For example,
there is minimal reference by the Committee in chapter seven of the Report about considering self-determination where the Committee does not support a self-governance model operating in any external territory, including the IOTs. This is despite the numerous submissions made by the community to the 2015 JSCNET Inquiry that reiterated the recommendations of the 2006 JSCNET Inquiry Report, such as possible options could include but should not be limited to: maintaining current governance arrangements with some refinement; incorporation into the State of Western Australia; and a form of limited self-government and that it should be in force by 1 October 2018.

Only one of the submission recommendations was actually referenced in the Final 2016 JSCNET Report, namely, incorporation into the State of Western Australia, which, of course, has been discounted in the Committee Report. What is also evident in the Final 2016 JSCNET Report is that there is no reference to conducting any plebiscite or referendum with the Christmas Island community concerning deciding their governance future. This is also despite the numerous submissions to the Inquiry recommending that the Commonwealth do so, for example that the Commonwealth, through consultation with islanders, draw up options for a new model of democratic governance, with a view to putting any such model to a plebiscite on the Islands. Instead, the Final 2016 JSCNET Report recommends consultation with the community after it has written to the NT Government to

429 Joint Standing Committee on National Capital and External Territories Inquiry 2015 Committee Hansard Proof, 6.
ascertain their position in accepting the IOTs as part of the NT. The Committee recommends that the Australian Government seek formal advice from the WA and NT Governments to determine whether they are receptive to the proposal for incorporation of the IOTs into their State or Territory and based upon a positive response to this proposal, the Australian Government should develop an incorporation model for consultation and review.\footnote{Joint Standing Committee on National Capital and External Territories Inquiry Final Report: Economic Development and Governance, 156.} This appears to display a contradictory approach by the Commonwealth in supporting any option by the community to consider the question of self-determination. Therefore, it would appear that the Commonwealth has little intention of adhering to its responsibilities as a member of the United Nations by not progressing the rights of Christmas Islanders to determine their future governance status. This responsibility was defined by Judge Dillard when expressing his opinion in the 1975 Western Sahara case (and as referenced by Weller) regarding Christmas Island where ‘It is for the people to determine the destiny of the territory and not the territory the destiny of the people’.\footnote{Weller, 30.} As discussed earlier in this chapter regarding the notion of self-determination, the community has never been afforded the option of determining its right to self-determination despite recommendation 13 of the JSCNET Report, \textit{Current and Future Governance Arrangements for the Indian Ocean Territories of May 2006,} which supported this position. It reiterated the principle that self-determination should retain its original connotation wherein all peoples freely determine their political, economic, social or other status without a prescription of what form it takes.\footnote{Commonwealth Joint Standing Committee on the National Capital and External Territories, ‘Current and Future Governance Arrangements for the Indian Ocean Territories’, (Canberra: Commonwealth Publishing Service, 2006), 104.} Conversely, the Final 2016 JSCNET Report ignored this
recommendation by stating that the Committee does not support a self-governance model operating in any external territory, including the IOTs.\textsuperscript{434}

This chapter has also reviewed the current governance situation on Christmas Island where the WA applied law system denies the Territory any real say in the laws that apply. This is exacerbated by the fact that the laws apply immediately once they are proclaimed in WA, and therefore, it can be argued that the Commonwealth has ignored its constitutional responsibility in introducing such a system of applied laws. This was referred to in the Final 2016 JSCNET Report as a ‘Democratic Deficit’ and also noted in Chapter One as one of the fundamental principles underlying the Australian Constitution is that of representative government where government is by representatives of the people who are chosen by the people. Grayling purports several reasons for the existence of a democratic deficit that he relates to the current governance arrangements of the European Union, which are dominated by bureaucrats and national politicians rather than by the direct electorate. One reason is the failure of the (political) systems constituting representative democracy to operate as the theory of these intended to prescribe, mainly because those who take control of these systems, initially through the democratic process, deliberately redirect them in ways more convenient for the practice of government. Another reason is the interference and manipulation by (government) agencies with partisan interests, who may resort to undemocratic means to have their own preferred outcomes delivered.\textsuperscript{435}

Clearly, the WA Parliament representatives are not chosen by the people of Christmas Island and therefore cannot be representatives of these people. This is

\textsuperscript{434} Joint Standing Committee on National Capital and External Territories Inquiry Final Report: Economic Development and Governance, 145.
\textsuperscript{435} Grayling, 131–132.
again reinforced in the Final 2016 JSCNET Report which concedes that the IOT effectively has no state-level representation. The IOT federal member and Senators are located in the NT but the territories do not have an NT Legislative Assembly representative. IOT residents are subject to applied legislation from WA, yet they have no representative in the WA Parliament. The obvious solution as proposed by the Final 2016 JSCNET Report to fully address and overcome the issue of state representation is incorporation. It also appears that an underlying theme to the position taken by the Commonwealth towards the community of the IOTs, as reflected not only in the recent Final 2016 JSCNET Report but also in previous reports, studies and inquiries, is that the Commonwealth view Christmas Island (and the IOTs) as strategically important to Australia.

The Committee recognises the ongoing significance of keeping the IOTs in the Australian jurisdiction and that maintaining a presence in the region is important. This is also reinforced by Heng and Forbes, where this remote island in the northeast sector of Australia’s Indian Ocean plays an important role in Australia’s western arc of instability as a ‘listening post’ for potential threats, and not only military ones, emanating from areas north and west of Australia; with so many concerns about national and international security, its strategic location lends it special significance. Further, Kerr notes that at the time when Australia was actively considering the transfer of sovereignty of Christmas Island from Singapore to

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439 Heng and Forbes, 81 and 69.
Australia in the 1950s, it was suggested that, for the benefit of defence and to assure phosphate supplies, it would satisfy Australia if the United Kingdom were to detach Christmas Island from Singapore and retain it under British control. That is, both articles support the view that retaining the IOTs under Commonwealth control is of strategic importance to Australia’s interests.

In summary, this chapter has focussed on considering the underlying social, administrative, political and economic aspects of non-self-governance that are applicable to Christmas Island currently as a framework or context in which better governance models can be developed to inform the community. This requires discussion and consideration of the current character of these arrangements where the Commonwealth Government has acted indifferently regarding past and current governance arrangements despite several reports, studies and inquires, which have proposed that some dialogue with the community is necessary to address this indifference, and suggest/recommend options that could consider a move towards any new governance arrangements for Christmas Island. This is actively promoted by the United Nations whereas key underlying aspect must be a move away from a colonial form of non-self-government that currently exists (on Christmas Island), to a more progressive move towards greater self-determination by which the community is equipped with the knowledge and information to effectively decide their future. Accordingly, the governance models predicated on the discussion in this chapter will be proposed more succinctly for consideration by the community in the final chapter of this study and the Final Report of the 2016 JSCNET Inquiry will therefore be beneficial to informing the conclusion and summary of this study, together with the literature cited in this chapter and the submissions by the community to the numerous JSCNET Inquiries.

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Kerr, 322.
No. 41 of 1958.

AN ACT

To provide for the Acceptance of Christmas Island as a Territory under the Authority of the Commonwealth and to provide for the Government of that Territory.

Assented to 3rd September 1958

Figure 4.6 Christmas Island Act, No. 41 of 1958 (Acceptance).
Figure 4.7 Christmas Island (Request and Consent) Act, No. 102 of 1957.