Christmas Island: A question of self-determination

Kelvin Matthews
Chapter 7: Part One – Future Direction

The future of Christmas Island should be in the hands of the people. The fundamental premise of this study has been to identify and discuss the underlying governance problem on Christmas Island where the community is denied their democratic right to vote in a political system that applies delegated legislation from WA through an arrangement between the commonwealth and the state government. As noted in the Introduction of the study, the purpose of the research has been to explore and investigate the different options for the governance of the Territory of Christmas Island. In doing so, the study sought to draw a link between theories on democratic representation, responsible government and self-determination, and the current governance arrangements on the island. Ultimately, some form of meaningful consultation with Christmas Islanders and potentially a referendum on the island may be required to realise any proposed change. This thesis has emphasised the need for residents to be informed of their options and for decision-makers to be guided by their feedback. To consider potential options, this thesis has sought to examine the historical, cultural and political aspects of the island, with a view to examining how the past and the present translate currently into the political aspirations of the island’s residents.

The design of the thesis has been intended to ensure that the process flows logically, coherently and succinctly within a framework that examines the democratic concepts of representative democracy, responsible government, self-determination and federalism as applied to Christmas Island. Where current (and past) applied governance arrangements are unaccountable through a lack of consultation with the community, this has led to demands for self-determination or at the very least being heard in regard to how they are governed, which reinforces the thesis question. The approach of the thesis is to outline various arguments that identify the problem and
provide viable and realistic alternative governance options for the community to consider.

A democratic deficit exists on Christmas Island since islanders are denied the right to vote in the WA parliamentary system for the representatives that apply the legislation through the existing legislation regime arrangement between the Commonwealth and the WA Government. Not only does this manifest itself in the implicit absence of voting in the WA parliamentary process for islanders, but also in the various ways in which the Commonwealth and WA Government deliver the functions. That is, there is a lack of transparency and accountability, bureaucratic decision-making and inadequate participation by the community in specific island policy-making affecting them.

These issues and concerns have been highlighted throughout the study, from examples where the transfer of sovereignty in 1958 was undertaken to recent examples where the Commonwealth immigration refugee policies and decisions were enacted, without any reference or consultation with the community. However, the most prominent example of such instances is the application of SDAs, which were applied as a result of the recommendations of the 1992 *Islands in the Sun* report, with minimal consultation. This example is significant not only since the SDA regime was applied as noted in recommendation 5 of the Report, which also noted that the community be involved in the reviewing process, but also because it continues despite the community (and local government) raising the requirement for such involvement in several JSCNET Inquiries and/or directly with the Commonwealth. These arrangements deliver WA State-type services to Christmas Island through SDAs in accordance with the applied delegated legislation that democratically disenfranchises the Christmas Island community. In particular, the fundamental procedural aspects of democracy reflected in the mechanisms of representation and decision-making are absent in the SDA arrangements. The SDA
Chapter 7

process is an expensive arrangement as noted in earlier chapters of this study and also does not properly consult with the community of Christmas Island in regard to the terms (and conditions) of the SDAs that apply. As reiterated throughout this study, democracy is fundamental to Australia’s political system and is underpinned by the notions of representative democracy and responsible government, as reinforced by Saunders, where in a democracy most of the governing is by representatives of the people and the right to vote for those representatives is the most obvious and democratic way of expressing this notion.\(^{518}\)

Christmas Island is unique, not only geographically but also demographically (as noted in Chapter Three), since the majority of the permanent population descend from Chinese and Malay origins in South-East Asia. This uniqueness makes it important that the community be afforded the opportunity to determine their own affairs and manage their governance future. Hence, the notion of self-determination for Christmas Islanders is critical to the principle of managing their own (governance) affairs. Christmas Islanders can demonstrate they conform to the United Nations key criteria regarding self-determination, namely, that they are geographically separated from mainland Australia and have no community of interest with the mainland, have an identifiable ethnic and/or cultural distinctiveness and most importantly, have been subjected to colonialism. In this regard, the history of Christmas Island is one of colonisation and the minimal changes to governance arrangements since the transfer in sovereignty in 1958 have not led to any meaningful input by the community regarding the control of their own affairs, which is a fundamental democratic right in Australian society. The only minor exception in the changes to governance arrangements has been the establishment of the local government in 1992 as result of the *Islands in the Sun* report. It was established in accordance with the applied delegated legislation regime where the

---

\(^{518}\) Saunders, 81.
local government was/is constituted under the WA *Local Government Act (CI)* 1995 as part of the SDA process thereby rendering the local government legislatively subservient to the WA governance process. This then is the essence of the problem, where the applied delegated legislative regime on Christmas Island has created a democratic deficit that disenfranchises the community of Christmas Island and denies them the right to determine their own governance future.

Accordingly, this final chapter will serve to outline how we have arrived at a position of recommending new options for the community to discuss and consider in the future governance arrangements for Christmas Island. These options are necessary because Australia’s Commonwealth Government has not provided islanders an opportunity at any stage to determine their (governance) future. As discussed in Chapter Four, these options are put forward in a manner consistent with the recommendations contained in the *Islands in the Sun* report. In particular, Recommendation 12 of the Report stated that the Commonwealth should ensure that in its administration of Christmas Island, the Territory will ‘not assume’ the characteristics of a non-self-governing external Territory within the terms of Chapter X1 of the United Nations Treaty.\(^{519}\) Chapter Four of this study outlined the details of this recommendation and discussed other recommendations, including the possibility, following consultation with each resident of the Territory, of its inclusion within the boundaries of WA.\(^{520}\) This specific consultation with the residents (community) of the Island regarding the recommendations of the *Islands in the Sun* report has not occurred. These options include retaining the status quo, incorporating the existing geographical and political boundaries into WA, incorporating the existing geographical and political boundaries into the NT and

\(^{519}\) Islands in the Sun, 59.

\(^{520}\) Islands in the Sun, 204.
enhancing the powers of the Shire of Christmas Island by giving it greater powers and responsibility for specified domestic laws.521

The Islands of the Sun report did not identify options that considered Christmas Island applying to the United Nations under clause 2 of Resolution 1514 (XV) of 1960 for some form of limited self-government. This option has arisen subsequent to the Island in the Sun report because of recommendation 13 in the JSCNET Report of 2006. This recommendation, along with the original recommendations of the Islands in the Sun report (noted above), have been included in this study as a viable option for the community to consider. The Shire of Christmas Island has also been instrumental since the Islands in the Sun report was first released, in agitating for greater self-determination and subsequent consideration by the United Nations. Also included for discussion and consideration is a hybrid alternative mixed delivery model of governance from one or all of the above options as well as from some of the submission responses that are included from several previous JSCNET Inquiry Reports.

The self-determination options

United Nations Free Association

As noted in the Introduction and Chapter One of this study, several studies, reports and inquiries have been conducted on the Island for many years and a recurring theme of these has been repetitive assessment of the legal regime operating on Christmas Island with no definitive change having occurred. In this regard, a particular territory’s status as a non-self-governing Territory is as declared by the United Nations General Assembly Resolution 1514 (XV) of 1960 in clause 2, where all peoples have the right to self-determination; by virtue of that right, they freely

521 Islands in the Sun, 193.
determine their political status and freely pursue their economic, social and cultural development.\textsuperscript{522} Thus, Australia is obligated to follow United Nations Conventions, treaties and resolutions regarding non-self-governing territories as a member of the United Nations. As Sterio notes, the United Nations defines non-self-governing territories by their geographical separateness, ethnic and/or cultural distinctiveness and political subordination owing to historical, administrative, political and/or economic elements.\textsuperscript{523} The United Nations monitors a ‘decolonisation’ process until the self-government process is decided and/or achieved. The Cocos (Keeling) Islands underwent a ‘plebiscite referenda’ process in 1984 that was subject to United Nations scrutiny. The result, although initially questionable according to the United Nations, was that Cocos Islanders voted for integration with Australia. On 6 April 1984, the smallest act of self-determination ever conducted took place under auspices of the Australian Electoral Commission and observed by the United Nations mission, with electors voting overwhelmingly for integration with Australia.\textsuperscript{524} As noted in Chapter Four, Christmas Island has never attracted this status, which prompted to some degree the ‘unofficial’ referendum the Shire of Christmas Island held on the 6\textsuperscript{th} of November 1999 in conjunction with their ordinary council elections. The results were an overwhelming vote by islanders (63\%) in favour of a form of limited self-government similar to that enjoyed by Norfolk Islanders (at the time) with their own Legislative Assembly.\textsuperscript{525}

The ‘integration’ of Christmas Island with Australia, although it occurred unasked and with no consultation with the community, would seem to have gone some way towards reducing the possibility of United Nations involvement in the Territory.


\textsuperscript{523} Sterio, 22.

\textsuperscript{524} Tahmindjis, 192.

Further, with the cessation of the Australian Government schemes to encourage Christmas Islanders to leave the Territory (either through repatriation or resettlement on the mainland), a permanently settled population with a distinct ethnic and cultural identity was likely to develop that still had some identifiable cultural historical links to the early population of the island. This was particularly demonstrated in Chapter Three, and therefore, Christmas Island might arguably have the status of a non-self-governing territory. As noted in the submission by the Centre for Comparative Constitutional Studies to the House of Representatives Standing Committee on Legal and Constitutional Affairs in 1989, if Australia does not wish to accept the international obligations that go with this status, then further measures would seem to be called for to ensure that the residents of the Territory enjoy a meaningful form of self-government.526

Conversely, the (then) Commonwealth Attorney-General’s Department and the Department of Foreign Affairs and Trade did not accept the conclusions in the Centre for Comparative Studies submission and the former’s disagreement was primarily based on its view that ‘Christmas Island has no indigenous population and therefore cannot be regarded as being distinct ethnically and/or culturally from Australia’.527 This was one of the reasons why the Shire of Christmas Island commissioned the University of WA (UWA) to undertake the Report on Christmas Island’s Ethnic and Cultural Distinctiveness in June and July 2016. Importantly, the findings of the UWA study noted that the historic accounts and archaeological investigations contend that no extant indigenous population lived on Christmas Island prior to the establishment of permanent settlement in 1888 and that (as a


527 The Centre for Comparative Constitutional Studies, 46.
result) Christmas Islanders have developed a common culture that is distinguishable from that of mainland Australia. Further, Christmas Island has a diverse language base as well as a diverse range of religions. In this regard, the Commonwealth’s (Attorney-General’s Department) contention would appear to have been (recently) disproved, given that the UWA Report aligns with the criteria as defined by the United Nations and these comply with the criteria in regard to their geographical separateness and ethnic and/or cultural distinctiveness. The question of political subordination owing to historical, administrative, political and/or economic elements can also be substantiated in the UWA Report (as well as numerous other reports over a long period), which noted that currently some significant differences were still evident through the governance structures that applied, with the resultant limitation on Christmas Islanders’ democratic rights. The Centre for Comparative Constitutional Studies submission to the Islands in the Sun Inquiry also noted that Christmas Island had certainly not attained a full measure of self-government and was quite definitely in a position of subordination owing to historical, administrative and economic elements. Thus, this study contends that the situation for Christmas Islanders remains the same.

As previously noted, the Attorney-General’s Department also placed significant weight on the assumption that Christmas Island had not at any time been the subject of a report to the United Nations, an assumption at odds with the previous British practice in relation to Christmas Island prior to its transfer to Australia, as reported by the Centre for Constitutional Studies in its 1991 submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry.

---

528 University of Western Australia, ‘Report on Christmas Island’s Ethnic and Cultural Distinctiveness’, (Crawley: School of Social Sciences, UWA Press, 2016), ii.

529 University of Western Australia, ii.

530 The Centre for Comparative Constitutional Studies, 23.
Chapter 7

Into the Legal Regimes of Australia’s External Territories. Christmas Island, along with the Cocos (Keeling) Islands, was reported on prior to 1958 as part of the Colony of Singapore, which was accepted by Britain to be a non-self-governing territory. When the Cocos (Keeling) Islands were transferred to Australia in 1955, the Australian Government assumed reporting obligations. However, when Christmas Island was transferred in 1958, Australia did not continue the British practice of reporting.

The Australian Government’s position was that Christmas Island could not be considered a non-self-governing territory since it did not have a permanent indigenous population.531 While the Cocos (Keeling) Islands did not have an indigenous population either, it did have a permanently settled and relatively cohesive population consisting of the descendants of the original Malaysian, Indonesian, Chinese, African and other workers brought to the Islands in the 1820s and 1850s. Conversely, the Christmas Island population was largely composed of phosphate mine employees recruited from China, Malaysia, Singapore and the Cocos (Keeling) Islands, some of whom resided there permanently, but many of whom were there for the duration of their (renewable) contracts and still had families in Singapore or Malaysia.532 The Department of Foreign Affairs and Trade also responded to the Centre for Constitutional Studies Report, noting that their suggestion (the Centre’s) raises a number of difficulties, principally in determining whether a distinctive ethnic and cultural identity exists or is likely to develop on Christmas Island that has the status of ‘political subordination’. Further, the Department advised that the suggestion contained in the Centre for Comparative Constitutional Studies submission also raises legal considerations. The question arises, for instance, how much weight may be given to the criteria contained in the

531 The Centre for Comparative Constitutional Studies, 22.
532 The Centre for Comparative Constitutional Studies, 23.
Annexure to the United Nations General Assembly’s Resolution 1541 (XV) where Australia’s traditional view has been that resolutions of the General Assembly are not binding under international law. Moreover, Australia and all other administering powers abstained or voted against this particular resolution.

However, as the submission further notes, there can be no guarantees that inscription of Christmas Island on the United Nations list of non-self-governing territories will not be sought, if there is a political will on the part of other members of the United Nations to do so. This, of course, brings the debate full circle where the community of Christmas Island must also have the political will to pursue this option with the United Nations through the process described in this study, particularly in the context of the free association model. The Centre for Comparative Constitutional Studies submission also noted in contrast to the Attorney-General’s and Department of Foreign Affairs and Trade’s contention that it is clear that merely because Australia believes it has no obligation to report on Christmas Island to the United Nations, since it considers there is no indigenous population on the island, it is not dependent on either the initiative of the administering power (Australia) or its consent. That is, if a particular territory falls within the definition of non-self-governing territories developed under international law, and if the question of that Territory is brought before the United Nations General Assembly by any member state, then the General Assembly may refer it to the Special Committee of 24 and the administering State (Australia) would then be expected to comply with the undertakings set out in Article 73 of the United Nations Charter. This again has been the consistent approach by the Shire of Christmas Island on behalf of its community in the numerous submissions it has made to Commonwealth Standing Committee Inquiries and (as noted above) the reason for the informal on-

533 The Centre for Comparative Constitutional Studies, 44.
534 The Centre for Comparative Constitutional Studies, 22.
island referendum held in November 1999. Obviously, it is to be expected that the Commonwealth would vigorously argue against any such position, given the historical approach it has consistently taken since Christmas Island was transferred to Australia in 1958, and that it opposes any form of self-determination by islanders to determine their governance future as expressed in the March 2016 JSCNET Final Report.

In this regard, several Commonwealth Inquiries have considered the arguments about whether or not the circumstances on Christmas Island warranted non-self-governing status, as noted above and in Chapter Four. However, these Inquiries did not make any recommendation(s) directly on this question, noting that the case was arguable, and, as noted above, that Britain had reported to the United Nations about Christmas Island when it was a non-self-governing territory as part of the Colony of Singapore. Rather, the Commonwealth concluded that legal, administrative and political reform were crucial to ensuring that Christmas Island did not attract formal United Nations listing as a non-self-governing territory. This could be or may be interpreted as an admission by the Commonwealth that they have abrogated their responsibilities in allowing Christmas Islanders to determine their (political) future. As the recent 2015 JSCNET Inquiry Report released in March 2016 reveals, the Committee has clearly stated that it does not support a self-governance model operating in any external territory, including the IOTs.\textsuperscript{535} Minor as the recommendation may appear in the Report, especially given that Christmas Islanders have historically raised the matter over decades and the JSCNET Report devoted only one short sentence (recommendation) to the matter, the implications for Christmas Islanders are major. This sentence also appears contradictory to the recommendation contained in the 2006 JSCNET Report where it was 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 by the end of June 2009. However, this contradiction does substantiate to some degree that any recommendation(s) from JSCNET Inquiry Reports are not necessarily binding on the Government to implement. This would certainly appear to be the case where the recommendation from the 2006 JSCNET Inquiry was not implemented by 2009 and the 2015 JSCNET Inquiry made a recommendation in its 2016 Final Report not to support any referendum for Christmas Islanders to determine their governance future.

However, the 2016 JSCNET Report does support some of the original recommendations of the 2006 JSCNET Report where possible options could include, but should not be limited to, maintaining current governance arrangements with some refinement and incorporation into the State of Western Australia.536 In this regard, some discussions appear to have occurred between the Commonwealth and the WA State Government in January 2017 as media reports reveal that the (then) Premier of WA had discussions with the Commonwealth with a view to incorporating the Cocos (Keeling) Islands with WA; however, no such reference was made to include Christmas Island.537 This discussion did not develop any further following the election of the Labor Government in WA in March 2017, and the new Premier (Mark McGowan) made it quite clear that WA was not interested in assuming any territorial responsibility for the Cocos (Keeling) Islands.538 It appears


538 David Weber, 'Labor Dumps Bid to Take Over Cocos Islands.' The West Australian, (19 June 2017), page 12.
then that the Commonwealth are not only reluctant to support any referendum on self-determination for Christmas Islanders in accordance with the 2006 JSCNET Report recommendation, and are content to allow the status quo to continue with regard to denying Christmas Islanders any say into what governance and political future they may have. Hence, the community must consider the options outlined in this study themselves since the Commonwealth appear to have no intention of supporting such a move or even facilitating dialogue relating to Christmas Islanders pursuing such options.

Chapters Two and Three of the study discussed the historical background and cultural composition of Christmas Island and inform the study of the reason that the population developed on Christmas Island with its origins from Asia. The chapters also confirmed the various demographics and cultures of the Island that were/are built upon the historical facts and experiences, which are still evident in the Christmas Island community. Related to the criteria that Sterio and other authors referenced in the study that were discussed, the notion of self-determination can be clarified in a context that applies to Christmas Islanders. That is, the final outcome of this clarification applies to the definition provided by the United Nations Resolution 1514(XV) that 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.539 Further, Chapter Four reinforced the discussion regarding the historical and cultural development of the island’s community by discussing its colonial subjugation, first under Great Britain (and the Singapore Straits Colony) and then under the Australian Government. While Chapter Two discussed the historical background of Christmas Island and the manner in which the island was settled, one of the main criteria when considering applying the

Thesis Summary

concept of colonisation to Christmas Island is that there were no recorded inhabitants of the Island prior to Great Britain declaring sovereignty of the Island for establishing phosphate mining. The Report on Christmas Island’s Ethnic and Cultural Distinctiveness undertaken by the University of Western Australia in June and July 2016, as commissioned by the Shire of Christmas Island and released in September 2016, notes that historic accounts and archaeological investigations contend that no extant indigenous population was living on Christmas Island prior to the establishment of permanent settlement in 1888.540

Further, on the basis of the historic accounts and archaeological investigations, there is no evidence to suggest that the island was permanently inhabited prior to settlement from 1888 onwards by the labour workforce required for the mining of phosphate, who were ‘imported’ from neighbouring Asian countries under the subjugation and control of the (then) British colonial administration to the extent that the majority of the Asian population now living permanently on Christmas Island are (mostly) direct descendants of these early ‘imported’ inhabitants.541 Hence, it can be argued that colonisation on Christmas Island occurred progressively (as described in Chapter Two) to the extent where there was an orchestrated migration pattern to Christmas Island arranged by the colonisers. They (the British) kept their strong links with the (then) British Empire 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 purpose of providing economic services to the colonisers. As Weller notes, while there is no formal definition of what constitutes a colonial territory, 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

540 University of Western Australia, ii.
541 University of Western Australia 7.
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{542} This interpretation appears applicable to Christmas Island and is certainly how the Christmas Island community perceive themselves (as expressed in various reports and studies as well as in numerous JSCNET Inquiry submission responses) as being colonised, which further underpins their continued desire for some form of self-determination tangibly distinct from colonial subjugation.

Chapter Three also discussed the meaning of peoples and minority groups and the importance of this meaning for determining the classification of the community of Christmas Island. Sterio supports and elaborates on 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, and should be, 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, which is traditionally determined using a two-part test. The first part of the test is ‘objective’ and seeks to evaluate the group to determine the extent to which 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’. The second part 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{543} Further, it necessitates that a community explicitly express a shared sense of values and a common goal for its future. This analogy could be equally applied to Australia in general terms, where

\textsuperscript{542} Weller, 34.

\textsuperscript{543} Sterio, 16.
Australia is described as a sovereign nation and where the people express themselves as having a shared sense of values and a common interest as Australians, irrespective of their ethnic origins. 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, 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.544

Chapter Three also discussed and demonstrated the reasons that the community of Christmas Island would, in part, meet the objective test as described above by Sterio and Scharf. Namely, even though separately distinct cultural minority groups exist on the Island, such as the Chinese and Malay communities, they appear to partly meet the first part of the test by sharing a common racial background, ethnicity, language, religion (partly), history and cultural heritage as well as territorial integrity of the area they may claim. While only partly meeting the aforementioned ‘objective’ test, undoubtedly, the Christmas Island community would completely meet the ‘subjective’ test. That is, Christmas Islanders do perceive themselves as a collective distinctive group (from mainland Australia) 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 where the cultural and ethnic groups are equally represented.

544 Scharf, 379.
In addition, the UWA study supports this position by definition that an ethnic group can be defined as a ‘named human population with myths of common ancestry, shared historical memories, one or more elements of a common culture, a link with homeland, and a sense of solidarity’ along with shared core cultural values. Using this definition, the UWA Report argues that Christmas Islanders are: (a) an identifiable ethnic group; and (b) distinct from Australians in the key dimensions of ethnicity, including ancestry, culture, links to homeland, group solidarity, group identity and core cultural values. Further, and in support of Sterio’s classification of distinct identity, the UWA Report states that the Christmas Islander identity is further reinforced by feelings of difference from mainland Australia and while Christmas Island is considered legally part of Australia, the long-lasting effects of segregation, perceptions of weak and dispersed institutions, maltreatment and unequal participation in Australian social and political life make Christmas Islanders feel as though they are not part of the Australian nation. Thus, the Christmas Islander identity is preferred and takes precedence.

The final discussion regarding the notion of self-determination concerns the concept of ‘internal and external’ self-determination and the ways in which the meaning of either can be applied to Christmas Island as a model of self-determination to consider. 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. Scharf also supports this view where the right to self-determination can take different forms that

---

545 University of Western Australia, 12.
546 University of Western Australia, 13.
547 Sterio, 18.
are less intrusive on state sovereignty than is secession.\textsuperscript{548} Conversely, Weller argues 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.\textsuperscript{549}

Agreeing solely with this definition of self-determination limits its scope and usage to independence or secession only, and this narrow application of the definition would not be palatable to, or even accepted by, the Christmas Island community, and presumably also by the Commonwealth of Australia. This view was also supported in several submissions to the various JSCNET Inquiries where there was a general consensus among these submissions that self-government created concerns. Submission 4 of the 2015 JSCNET Inquiry notes that self-government along the lines of Norfolk Island is unlikely to succeed. The IOTs, like Norfolk Island, have small populations and very limited own source financial capacity. Given the Government’s announcements about changes to Norfolk Island, this option seems to have limited value in considering further along the lines of Norfolk Island and is unlikely to succeed.\textsuperscript{550}

Accordingly, the meaning of self-determination should retain its original connotation wherein all peoples freely determine their political, economic, social or...

\textsuperscript{548} Scharf, 379.

\textsuperscript{549} Weller, 27.

other status without a prescription of what form it takes. In this regard, applying the notion of self-determination to the Christmas Island community is, and should be, based on confirming the meaning(s) provided above (as extrapolated from the various literature sources) that: (1) the community perceive themselves as being colonised, (2) they qualify as a people and (3) the concept of internal self-determination is applicable, given that the community qualify as a people and see themselves as being colonised. Given the above, this study therefore recommends that the option for Christmas Islanders to pursue self-determination through the United Nations process of Resolution 1514 (XV) clause 2 be confined to choosing Free Association with the mother State (Australia) and not any of the other forms of self-determination as prescribed by the United Nations. That is, it would not only be impracticable for Christmas Islanders to pursue independence, secession or full sovereignty but also not politically, economically and financially viable. Putting this in the context of the ‘free association’ option for Christmas Islanders, the most appropriate examples can be found in the arrangements that the Cook Islands and Niue have with the (mother) country of New Zealand, as explained in Chapter Four. The community of Christmas Island should have this option fully explained to them for them to understand and consider it seriously, especially given that the arrangement between Niue and New Zealand is so permissive (and therefore arguably successful) 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.551

Hence, the Cook Islands and Niue are prime examples of the attainment of a full measure of self-government by formerly colonised territories. Under the model of

free association, the Islands have achieved virtually unlimited executive, legislative, and judicial competence over their own affairs and easily satisfy Hannum’s rough criteria for what constitutes a ‘fully autonomous’ territory. In both cases, and in spite of the failure to hold a direct referendum in the Cook Islands, the United Nations General Assembly approval was obtained for their respective outcomes. The process by which the principal state sought popular consent to a new political status vis-a-vis New Zealand was successful, at least in part, because at least one of the options available had been seriously worked out in advance with the meaningful participation of opposing sides, and the United Nations remained actively involved.552

These two models are then contemporary and successful examples for the community of Christmas Island to discuss and consider for application as the United Nations Free Association option for Christmas Island. Included in this consideration by Christmas Islanders should be which of the United Nations Decolonisation Special Committee of 24 member countries should be approached for support and sponsorship, noting that the United Nations have some previous knowledge of the IOTs where prior to 1984, it regularly scrutinised the affairs of the Cocos (Keeling) Islands under Chapter XI of the United Nations Charter. In fact, as noted earlier, Australia continued to report on the status of the Cocos (Keeling) Islands to the United Nations prior to the referendum conducted by the Australian Government and observed by the United Nations in 1984. After Australia assumed sovereignty over the Cocos Islands in 1955, it submitted regular reports as required under Article 73(e) of the United Nations Charter, and the information was subject to the scrutiny of the United Nations Committee on Decolonisation.553 This reporting process was


553 Islands in the Sun, 270.
not granted to Christmas Island, which therefore further supports the argument in this study that the Commonwealth has, in part, abrogated its responsibility to the community of Christmas Island under the provisions of the United Nations process. As Spector also notes, ‘free association’ denotes a very high level of autonomy, and for a non-self-governing territory (such as Christmas Island), it can be seen as a self-governing alternative to emergence as a sovereign independent state or full integration with a sovereign state.\(^{554}\) This then seems the most practical (and acceptable) course of action for Christmas Islanders should they decide that ‘free association’ is the most appropriate means by which to express their optional preference for self-determination through the United Nations process.

The first phase of the process, as outlined in Chapter Four, is gaining support/sponsorship through the United Nations Special Decolonization Committee of 24 and approaching some of these committee member countries. The Special Committee 24 annually reviews the list of Territories to which the Declaration is applicable and makes recommendations as to its implementation. In this regard, the Commonwealth (as the mother state) has an obligation to Christmas Islanders to develop self-government, to take due account of the political aspirations of the peoples (Christmas Islanders) and to assist them in the progressive development of their free political institutions according to the particular circumstances of the territory and its peoples and their varying stages of advancement.\(^{555}\) Hence, this study recommends that the option of seeking free association be discussed and considered by the Christmas Island community.


Incorporation with Western Australia

The discussion in Chapter Four also referred to the options originally detailed in the *Islands in the Sun* report for incorporation into WA or the NT, which require summary discussion and clarification. That is, 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 (Christmas Island) within the geographic and political boundaries of either WA or the NT. The recent 2015 JSCNET Inquiry Report has dismissed this notion, given the complexities of section 123 of the Australian Constitution concerning incorporation with WA, although it has favoured the possibility of incorporation with the NT. As noted in Chapter One, the framers of the Australian Constitution gave the Commonwealth wide powers to determine how it would deal with territories as and when they became part of Australia. Section 123 of the Australian Constitution prescribes:

> ‘the Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected’

Accordingly, in the context of section 123 of the Australian Constitution regarding the incorporation of a Territory (Christmas Island) within a State (WA), the Parliament may with the consent of the Parliament of a State (WA) and the approval of the majority of electors of the State (WA) increase the limits of that State.

---

556 *Islands in the Sun*, 313.

557 *The Australian Constitution*, 45.
Therefore, it is possible for an external Territory (such as Christmas Island) to be incorporated within a State.

While Recommendation Eight of the *Islands in the Sun* report originally recommended that the Commonwealth initiate discussion with the WA Government regarding possible incorporation within the State of Western Australia, there is no conclusive evidence that this option has been pursued to the extent of considering its feasibility since the *Islands in the Sun* report. Having said this, the 2016 JSCNET Inquiry Report noted in clause 7.121 that in its interim report of 2015, the Committee had approached the WA Government to make a written submission to the Inquiry and appear before it in Perth but that both invitations were declined.\(^{558}\) It appears the Commonwealth and the WA Government did have some preliminary discussions as a result of the 2016 JSCNET Final Report; the WA State Government noted that discussions between the Commonwealth and the WA State had recently commenced in regard to the possibility of incorporating the Cocos (Keeling) Islands into WA.

While addressing the citizenship ceremony Premier Barnett stated:

‘There may well be some people who have visited those islands and many Malays from there live now in Western Australia. Mr Barnett said the measure would do a lot for the economy of the islands, currently an Australian Territory. There have been discussions between the state and the Commonwealth over the past year. I am certainly enthusiastic about the prospect of Cocos and Keeling Islands become part of Western Australia. It’ll do a lot for the economy of the Cocos Islands, at the moment there is a mixture of Commonwealth and state laws that apply, West Australian laws. The local government there is set up as a state local government. The state also has

\(^{558}\) Joint Standing Committee on National Capital and External Territories Inquiry Final Report: Economic Development and Governance, 149.
responsibility for education, health, policing and other services, but for the people of the Cocos Islands to become part of Australia would be terrific’.  

However, the (then) Premier did recognise (in one small paragraph) the complexities of section 123 of the Australian Constitution when he noted that should the discussions progress positively over the next year, then it would be the intention of the Commonwealth and the WA State Government to hold the required referendum in conjunction with the 2021 WA State election.

From this statement, it would appear that the (then) Premier of WA was receptive to the prospect of incorporation, at least to the extent of Cocos (Keeling) Islands, which therefore raises the question: What about Christmas Island? With the WA State election in March of 2017 and a change in government, the new WA Premier (Mark McGowan) subsequently stated that his government would not pursue the discussions that the former Premier (Barnett) had with the Commonwealth regarding the incorporation of the Cocos (Keeling) Islands with WA. Accordingly, the recommendations of the 2016 JSCNET Final Report appear to be just that, recommendations only.

Notwithstanding the position of the new Labor Government in WA, the Commonwealth should continue to pursue this option on behalf of the Christmas Island community. Representation from the community of Christmas Island could also be made to the WA Parliament to initiate the possibility of incorporation aimed at soliciting support for the process. In doing so, the Commonwealth would be expected to financially support the cost of conducting a referendum, as well as the

cost of advertising and marketing the process to the electors of WA, with the WA Electoral Commission or the Australian Electoral Commission conducting the process. For this reason, as well as for the ongoing financial cost noted in Chapter Five, perhaps the Commonwealth has been reluctant to pursue this process. However, regardless of the option of self-determination that eventuates (even retaining the status quo), there is (and will be) an inherent responsibility and ongoing cost to the Commonwealth to maintain the viability of the IOTs, and under the incorporation with WA option, it could be reasonably expected that more fiscal responsibility for the IOTs would be (progressively) transferred to WA. Certainly, the overwhelming preference by Christmas Islanders is for incorporation with the State of WA, given the well-established community of interest that islanders have had with WA since introduction of the applied laws regime in 1992. This was emphasised by several submissions to the 2015 JSCNET Inquiry and summarised in the 2016 Final Report, which stated:

‘We would like to see the Shire of Christmas Island with a Mayor under Western Australia and the communities of interest that exist between WA and IOT are powerful arguments in favour of this option’.561

As noted in Chapter Four, clause 8 (c) of Schedule 2.2 of the *Local Government Act 1995 (CI)* describes the factors for consideration regarding local government wards and representation and prescribes that the community of interest factor must betaken into account. In this regard, even though the interpretation of the community of interest factor can be broadly applied to the review of established local government wards and boundaries as well as physical topographic features,

demographic trends and economic factors, it is reasonable to expect that a community and the area/region they reside in has a relationship with the laws that apply to them, being either local, state or Commonwealth. Further, the community interest factor can be specifically applied to the everyday interaction the community have with information and services they access, such as flight schedules, shipping or motor vehicle registration, all of which are WA-oriented. Importantly, the community have established extended family, education, housing, aged care and health relationships with WA (and particularly the Perth metropolitan area), which have developed progressively since the introduction of the WA applied laws regime in the early 1990s. Thus, it can be reasonably expected that the community would be reluctant to consider any other incorporation options (such as the NT), given the establishment of these relationships.

The support for the establishment of the IOTs within WA is substantiated by the recent (and past) submissions to JSCNET Inquiries where the best possible outcome would be for WA to take responsibility for the IOTs, and for the IOT to be part of WA in the long-term. A majority of the submissions made to the 2015 JSCNET Inquiry and reflected in the final 2016 report substantiate this position. For example, clause 7.113 notes that WA has long been considered the logical choice for incorporation because the laws of WA apply as state-type laws and there are well-established links, including accessing health and education services. Critically, the air service operates out of Perth. Many IOT residents have ties in WA, with family members seeking work and educational opportunities there, and property and business interests.


Another important aspect about incorporation with WA is that it would provide Christmas Islanders the direct right to vote in the (WA) State election process, irrespective of the WA electorate in which the island would be placed. This then overcomes the current ‘democratic deficit’ as highlighted in Chapters One and Four, where the right to vote is a fundamental principle of representative democracy underlying our democratic system in Australia that makes our government responsible to us. Further, one of the most important elements within any liberal democracy (such as Australia) is the mechanisms that hold the government to account and within Australia’s political system, Parliament is the traditional body that does this. This principle is clearly absent in the IOTs because of the application of the WA legislation to the IOTs that not only is undemocratic but also is confusing and not understood by the Island’s community. This issue was raised and acknowledged by the members of the JSCNET 2015 Inquiry together with submissions made and reflected in the 2016 JSCNET Inquiry Final Report where the Committee identified that a democracy deficit exists in the IOTs and there needs to be state representation in the IOTs.

While the community can vote in federal elections by virtue of being in the NT Federal Seat of Lingiari (as noted in Chapter Four), they have no right to vote in WA elections even though the laws of WA are applied. The anomaly then is quite clear, and certainly, the community are quite aware of the democratic deficit that exists and desire that the situation be rectified. The example provided in Chapter Four regarding the adoption by the Shire of Christmas Island of its Cemeteries Local Law in 2013 (and gazetted in the WA State Law Publisher, early 2015) substantiates the

564 Drum and Tate, 134.
565 Drum and Tate, 124.
notion that a democratic deficit exists. That is, the WA Parliamentary Joint Standing Committee on Delegated Legislation insisted upon reviewing the Local Law made by the local government authority (in 2013) in accordance with the legislation (WA Local Government Act 1995 (CI)), which may have eventuated in rendering the Local Law (and process) inoperable should the Committee so decide. The WA Parliamentary Joint Standing Committee on Delegated Legislation comprises WA parliamentarians whom Christmas Islanders do not vote for and who are elected by the WA electors, and not by Christmas Islanders.

Apart from any disallowance provisions in Commonwealth legislation, such as contained in the Territories Law Reform Act(s) of 1992 and 2010 and the Christmas Island Act 1958 (as amended), and notwithstanding the fact that these provisions have never been used, the Commonwealth has still substantially delegated its law-making power to the State of WA without any democratic representation. As noted in Chapter Four, the Commonwealth recently introduced the mechanism of ‘Notifiable Instruments to the Register of Legislation’ for the purpose of applying adopted local laws to the IOTs, which replaces the process by which the IOT local governments are compelled to refer their adopted local laws to the WA Parliamentary Joint Standing Committee on Delegated Legislation. However, this merely alleviates the problem for the Commonwealth regarding the process of registering the local laws and does not entirely address the underlying issue where the process is still subject to the WA applied laws regime. That is, the process still requires scrutiny (and amendment) in accordance with the provisions of the WA Local Government Act (CI) 1995 by the WA Department of Local Government in the same way that applies to other WA mainland local governments. The issue, of course, is that the IOT local governments are required to adhere to the WA legislative process and provides an example of the inconsistency of the WA applied legislation regime to Christmas Island. As Drum and Tate note, 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, which is the link between government and the people. Without our collective consent, the government would not be legitimate.\(^{567}\)

Therefore, by applying this analogy to Christmas Island, it could be argued that the WA applied legislation regime has no legitimacy, given that the arrangement between the Commonwealth and the WA State excludes the notion and fundamental principle of responsible government and representative democracy. Clause 7.38 of the JSCNET 2016 Inquiry Final report reinforces this point, noting that the IOTs effectively have no state-level representation. The IOT’s 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.\(^{568}\) Submission number 19, 22 and 39 of the Final JSCNET 2016 Report noted:

‘The difficulty that most residents are unable to reconcile is that, decisions are made in Canberra/WA regarding which services/projects are to be implemented in the IOT with very little input requested from the local communities. The problem is further exacerbated in the fact we are unable to voice our frustration through the ballot box, as there is no state type election for the residents’.

with other submissions reinforcing this point by stating that:

‘we believe this fails the basic test of representative democracy in that Christmas Islanders are not giving their consent to laws which bind them and the right to directly elect representatives who make laws which apply to you

---

\(^{567}\) Drum and Tate, 112.

is one of the few rights which are explicit in the Australian Constitution, the right to vote’.\textsuperscript{569}

In this regard, the accountability of the WA Parliament and the elected members who comprise the WA Parliament is to the WA electors who voted for them at the relevant election cycle, and not to Christmas Islanders who are presently denied the right to vote for them.

WA is electorally divided into 59 Legislative Assembly districts and six Legislative Council regions. The boundaries of the districts and regions are determined by the conduct of an electoral distribution, which occurs approximately 18 months after a State election. That is, in accordance with section 16E of the \textit{WA Electoral Act 1907}, a review of the 2013 WA State election was undertaken and concluded by the end of 2014 in preparation for the 2017 WA State election.\textsuperscript{570} A distribution review of electorate boundaries following the 2017 WA State election is scheduled for completion by the end of 2018, which is intended to ensure the number of electors in districts or regions is maintained as the population moves and changes over time, and is carried out by the Office of the Electoral Distribution Commissioners. This would then be the process that applies should the IOTs be accepted into the State of WA in terms of determining the WA electorate that would be applicable. The most probable of the two WA electorates for consideration by the Christmas Island community (and the IOTs) concerning the electorate they could be placed in would be either the Pilbara or Kimberley electorates, given the proximity of the two electorates to the IOTs. The Pilbara Legislative Assembly electorate is 404,244 km\textsuperscript{2} and within the Mining and Pastoral Region (Upper House) with an electorate voting

\textsuperscript{569} Joint Standing Committee on National Capital and External Territories Inquiry Final Report: Economic Development and Governance, 135.

\textsuperscript{570} State Government of Western Australia, ‘\textit{West Australian Electoral Act 1907}’, (Perth: State Law Publisher, updated version of amendments August 2016), section 16E.
population of 17,292 that comprises 1.22% of the total WA State voting population. The Kimberley Legislative Assembly electorate is 419,452 km² and also within the Mining and Pastoral Region (Upper House) with an electorate registered voting population of 16,387 that comprises 1.16% of 0.69% of the WA State voting population.\textsuperscript{571}

In this regard, the Legislative Assembly electorate of North West Central could be considered a feasible option, given its low electorate voter base and that the combined population of the IOTs of approximately 2,200, in accordance with the ABS census data and as noted in Chapter Three, would increase this figure closer to the electorate of Kimberley. The ABS data in 2016 indicated that of this total IOT population, there were currently 1,843 people living only on Christmas Island on census collection night and that this figure has decreased from the 2011 ABS data owing to the decreased activities of the IDC on the Island.\textsuperscript{572} Notwithstanding this and in accordance with the ABS 2016 data for Christmas Island, the total combined population of the IOTs could still be included in a WA State electorate, which would increase the voting population of that electorate and, more importantly, provide Christmas Islanders with representation in the WA Parliament and the right to vote. Having said this, there is still the dilemma of community of interest where it is quite clear there is little in common between the IOTs and any of the WA electorates of Kimberley, Pilbara or North West Central. The exception is perhaps the Kimberley electorate with its similarity to the demographic populations of the IOTs and in particular Broome with a background of historical Asian migration owing to the pearling industry. However, this anomaly is not specific to only these three


electorates since the community of interest factor would equally apply to any WA electorate.

As noted in Chapters One and Four and the beginning of this chapter, the key issue to consider in any change to governance arrangements that involves incorporation with the State of WA is the Australian Constitution where section 123 of the Australian Constitution is the basis for any potential change to the current arrangements. Despite the complexities of the required referendum process in accordance with the Australian Constitution, incorporation into the State of WA has the support of the community as reflected in the numerous JSCNET Inquiry submissions together with the strongly established links between the Island community and WA. Further, the informal referendum on the Island in 1999 saw 62% of voters supporting greater self-government, including the possibility of incorporation with WA. However, the Commonwealth have been historically reluctant to progress any form of self-government for Christmas Island (noting the referendum for Cocos Keeling Islands in 1984 as the exception) despite the numerous reports, inquiries and recommendations made for this to occur. Therefore, it can be reasonably assumed that any realistic chance of the matter progressing at the instigation of the Commonwealth is extremely low. Notwithstanding this, should a referendum proceed, it would be the people of WA who would have a say in such incorporation via a referendum in accordance with the Constitution requirements, which would (ironically) not include the community of Christmas Island.

The Commonwealth could, of course, give Christmas Island residents the right to have a say, although the question of the power of such a say (as contrasted to a constitutional right) would need to be established in similarly unequivocal terms. This is reinforced by the unofficial referendum on the island conducted in 1999.

---

where the result was quite explicit as noted earlier. Unfortunately, it can be reasonably assumed that the chances of a positive referendum in WA on the question (as required by the Australian Constitution) are low, given that overall, Australia does not have a strong record of saying yes in referenda, irrespective of the issue. The other perplexing issue is that the WA Government would need to accept any referendum proposition, and while they are currently being paid by the Commonwealth to provide services to the Island under applied laws regime (SDAs) as noted in Chapter Five, the question could be raised as to why the WA Government would want to change a cost-neutral (and possible cost-beneficial) arrangement to that of a possible cost burden.

In this regard, discussions between the WA Government and the Commonwealth could still seek the views of the community with the local government authority (Shire of Christmas Island) representing the community to pursue the matter, which may enable further progress of a referendum. It would also be reasonable to expect that should the possibility of a referendum become realistic, then the Commonwealth (and not WA or the Shire of Christmas Island) would be similarly expected to pay for the referendum process and associated cost as any such referendum could be included simultaneously with a Commonwealth election that would defray the costs.

Despite the complexities, clearly this option is potentially available, which warrants further investigation and dialogue between the State of WA, the Commonwealth and the Shire of Christmas Island representing the community with the fundamental principle being the level of political representation the Island would have in the WA State Parliament. In this regard, and as early as the Islands in the Sun report, planning for the future administration of Christmas Island should not exclude the possibility, following consultation with the community, of its inclusion into the boundaries of
WA. As noted earlier, some preliminary discussions have occurred with the WA Government as a result of the recent 2016 JSCNET Report in accordance with recommendation 19 where the Committee recommended 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.

While the media article by Premier Barnett did not make any reference to Christmas Island, and this in itself is inconsistent with the JSCNET Inquiry recommendation that clearly included the IOTs and not just Cocos (Keeling) Islands, it did initially offer the opportunity for Christmas Island to be included in the discussions at some point, either at the preliminary discussion stage of the process or at the conclusion after the outcome of discussions are known. Either way, it would have provided valuable information to the community of Christmas Island concerning the opportunity of incorporation with WA. Unfortunately, no further action appears to be realistic in regard to WA, given the new WA State Government’s position, and in any event, these preliminary discussions did not include Christmas Island. Accordingly, should the prospect of incorporation with WA not progress any further, as evident in the WA Government’s recent position, the Christmas Island community can revert to the option of approaching the United Nations regarding ‘free association’ on the basis that they have the right to self-determination in accordance with the principles of the United Nations Charter. This study therefore recommends as a viable option that the Shire of Christmas Island instigate discussions with the community about incorporation with WA that will overcome

---

574 Islands in the Sun, 204.

Chapter 7

the current democratic deficit situation and lack of political representation at State level.

Incorporation with the Northern Territory

The issue of political representation has long vexed the Commonwealth as well as the Christmas Island community. Placement of the IOTs and Christmas Island in the NT in 1984 for ‘electoral purposes only’ was considered the best arrangement available at the time, although not ideal. This arrangement is unsatisfactory because of the lack of any community of interest factor, as noted in Chapter Four. The electorate of Lingiari based in Alice Springs is approximately 3,300 km from Christmas Island.576

The discussion in Chapter Four also referred to the options originally detailed in the Islands in the Sun report for incorporation into the NT, which require some further discussion and clarification. That is, 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 (Christmas Island) within the geographic and political boundaries of the NT.577 The recent 2016 JSCNET Inquiry Report favoured the possibility of incorporation with the NT, as noted in clause 7.122 of the Report. This was pursued because the option to incorporate the IOTs into WA required a referendum, and hence was potentially unviable. Therefore, an alternative is to incorporate the IOTs into the NT.578 Further, Recommendation 19 of the JSCNET 2016 Final Report notes:


577 Islands in the Sun, 313.

'that 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 Indian Ocean Territories into their State or Territory'.

In April 2016, this recommendation progressed to the point where the (then) NT Senator (Nigel Scullion) representing the Commonwealth visited Christmas Island to meet with the community, the Shire of Christmas Island and the Administrator to inform and discuss with the community that it was the Government’s intention to commence formal discussions with the NT Chief Minister regarding possible incorporation. This process was subsequently suspended owing to the NT elections in August 2016 and the subsequent change of Government. The change of government in the NT in 2016 may be the reason that no further developments have occurred to date and that the Commonwealth have (reportedly) commenced discussions with the WA State Government. However, it seems likely the Commonwealth will retain its focus on incorporation of the IOTs (including Christmas Island) with the NT since it is the easiest to achieve procedurally.

Incorporation of a territory (Christmas Island) into a mainland Australian territory, be it the ACT or the NT, does not fall within the parameters of section 123 of the Australian Constitution (requiring a referendum), and the IOTs are already federally represented through the seat of Lingiari and have been since 1984, which would not change. However, while incorporation does not require a territory referendum it would be a matter of sound policy practice to ideally consult with, and consider, the views of the people both in the IOT and in the potential recipient territory. As noted earlier, it appears unlikely that the Commonwealth and WA State

---


Chapter 7

Government will proceed with their discussions, albeit initially confined to Cocos (Keeling) Islands, regarding the incorporation of the Cocos (Keeling) Islands with WA even if only for discounting the constitutional viability of the process. Hence, it would be reasonable to expect the Commonwealth to simultaneously continue its discussions with the NT regarding the possible incorporation with the latter, which, of course, does not provide any constitutional impediment.

The community of interest factor becomes critical to any proposal to incorporate Christmas Island (and the IOTs) with the NT. This was an underlying factor in the numerous submissions received by the JSCNET 2015 Inquiry. The following is the response by Mr Jon Stanhope, former Administrator of the IOTs, who noted in his submission:

‘that the overwhelming majority of residents, from my observation and discussions with them, have serious reservations about the Federal electoral arrangements. A primary issue is the obvious absence of any connection or community of interest between the IOTs and the Northern Territory let alone Alice Springs and the electorate of Lingiari’.

In his submission directly to the JSCNET 2015 Inquiry, Mr Steve Clay also noted that incorporation into the NT or ACT would be less desirable for legislative, administrative and social reasons and that changing the airline service from Perth to Darwin could prove costly. The 2016 JSCNET Final Report also acknowledged that IOT residents have longstanding family, education, work and investment links with WA, which have arisen because of the governance and administration arrangements

in place for the past three decades. Similar submissions by Hansard to the JSCNET Committee directly from senior departmental bureaucrats noted further problems and complications regarding incorporation with the NT. While Christmas Island’s distance from Darwin is almost the same as that from Perth, the flights are out of Perth for reasonably good operational reasons. Changing the flights to go from Darwin would be considerably more expensive because the Cocos (Keeling) Islands are substantially further from Darwin than they are from Perth. Other practical problems include the cost of change associated with incorporation, the question of the ability of the NT Government to deliver the services and disruption to the reasonably significant expatriate IOT communities that exist in WA. The Islands are used to operating under the applied WA law scheme and changing it would not be a simple task. A very wide range of delegations would need to be changed. The local government acts are not the same. The people of the communities would need to understand how NT law worked, because these are not identical to WA law. Should services and flights be from the NT, those people, both on the Islands and expatriates in/from WA, would find maintaining links very difficult. Both of the above submissions directly to the Committee and recorded in Hansard are from former senior Commonwealth Department officials who appear to be of the view that incorporation into the NT would be more regime challenging than into the WA. The submissions also assume that the community are content with the current WA applied laws, whereas the many submissions from the community demonstrate this is not necessarily the case. In this regard, clause 7.44 of the JSCNET Inquiry 2016

Final Report notes that while acknowledging there is representation through the electorate of Lingiari in the NT, Mr Matthews questioned the extent to which ‘community interest’ could be represented through this means and must be questioned.586

Thus, a clear anomaly seems to exist given that the Commonwealth proposal to discuss possible incorporation with the NT Government in the first instance is detrimental to the interests of the community and the Commonwealth intend to progress the proposal irrespective of the community of interest factor. This proposal appears to have Commonwealth bipartisan political support, including from NT Senator Nigel Scullion, who visited Christmas Island in 2016 to meet the community, and also from the Labor Member for Lingiari, the Hon Warren Snowdon, who has noted his support for incorporation of the IOTs into the NT in numerous JSCNET Inquiry Reports. For example, the Hon Warren Snowdon stated, as a member of the 2015 JSCNET Inquiry, that prior to the 1980s, the IOT was incorporated with the NT and he would obviously support a return of the IOT incorporation with the NT.587 Some support from the Commonwealth bureaucracy exists, noting submissions by former public servants Mr Julian Yates and Mr Steve Clay that there is an inherent advantage in having the state services and federal representative aligned in the same territory (ie, NT) and options for closer alignment with the NT could include full incorporation, or be achieved through a SDA with the NT Government and NT law


being applied.\textsuperscript{588} In this regard, the community should be consulted in the first instance as to specific details of the proposal and not merely be advised. Therefore, as a matter of transparency the Commonwealth should develop an incorporation model for consultation and review by the community as noted in Recommendation 19 of the JSCNET 2016 Final Report.

In addition, crucial to any NT incorporation proposal is the electoral distribution of the IOTs. Similar to the WA incorporation proposal is the question of which electorate they would be inserted into and the broader question of how would the IOTs be represented in the NT Parliament. The NT is electorally divided into 25 Legislative Assembly districts.\textsuperscript{589} In its 2016 Final Report, the JSCNET Committee recognises that there are only about 2,000 people presently living in the IOTs and notes that the recent review of the redistribution of the NT Legislative Assembly electoral boundaries determined that the quota of electors for each division in the NT is 5,140 people. Therefore, consideration of IOT representation in the NT Legislative Assembly would need to be subject to a review by the NT Electoral Commission.\textsuperscript{590} Notwithstanding the data provided in the JSCNET 2016 Final Report, the Northern Territory Electoral Commission Redistribution Report of February 2015 provides statistical data that the average division representation of enrolled electors is 5107.\textsuperscript{591} The electoral representation ranges from a maximum number of enrolled

\textsuperscript{588} Joint Standing Committee on National Capital and External Territories Inquiry Final Report: Economic Development and Governance, 151.


\textsuperscript{590} Joint Standing Committee on National Capital and External Territories Inquiry Final Report: Economic Development and Governance, 155.

electors of 6110 in the seat of Blain to the minimum number of enrolled electors of 4140 in the seat of Greatorex.\footnote{Northern Territory Electoral Commission, 8 - 9.} Again, the community of interest factor needs to be considered, given that there is no community of interest now with the IOTs being in the federal seat of Lingiari, and therefore, electoral representation in any of the NT Legislative Assembly seats would presumably result in the same situation.

Given the submissions and Hansard comments made in the JSCNET 2016 Final Report and the electoral boundary redistribution requirements, it is quite clear that incorporation of the IOTs with the NT is not a palatable option without further qualified information being provided to the community prior to any agreement or arrangement being made and decided upon between the Commonwealth and the NT Government. The Christmas Island community should be consulted in the first instance as to the specific details of any proposal, and therefore, as a matter of transparency the Commonwealth should develop an incorporation model for consultation and review by the community. This was reflected in part in submissions made to the 2015 JSCNET Inquiry and noted in clause 7.134 of the JSCNET 2016 Final Report where the IOT communities will need to know the meaning, in a practical sense, of being part of WA or the NT, with possible consultative mechanisms following incorporation being canvassed, such as the Advisory Board model in the (NT) Tiwi Islands.\footnote{Joint Standing Committee on National Capital and External Territories Inquiry Final Report: Economic Development and Governance, 152.} However, contrary to this suggestion, this process should be undertaken first, before the Commonwealth and NT Governments discuss and negotiate the specific details of any such proposal of incorporation with the NT. The Commonwealth should be upfront with the WA and NT Governments as well as the IOT community about this being an information-gathering exercise, prior to a joint decision by the Commonwealth and preferred jurisdiction. It should canvass
options and opinions before any serious consideration is given to relinquishing the IOTs. Accordingly, this study recommends as a viable option that in the first instance, the Shire of Christmas Island instigate discussions with the community concerning incorporation with the NT, which includes the Commonwealth’s endorsement that the local government represent the community in discussions with the Commonwealth and the NT Governments. This should be based on the principle that the community will ultimately decide on any proposal the Commonwealth has in regard to incorporation of Christmas Island (and the IOTs) with the NT. The underlying principle in these discussions is that an outcome suitable and acceptable to the community of Christmas Island needs to be based on overcoming the current democratic deficit situation and the lack of political representation to avoid further disadvantaging the community.

Other Governance Models

As noted in the Introduction and subsequent relevant chapters, the option of developing a ‘hybrid’ or combination of the above governance models is also a possibility for the community to consider. Several submissions to the recent JSCNET Inquiry made reference to this possibility, which included considering an ‘internal territory’ model, such as the NT or the ACT, or a Regional Statutory Authority model similar to the (NSW) Lord Howe Island Board (LHIB) or the (WA) Rottnest Island Authority Board. For example, submission 41 to the 2016 JSCNET Inquiry noted that while the option of creating a Statutory Authority was less desirable than incorporation, it has the advantage of providing more say to the IOT community on many of the State responsibilities being rolled out in the IOTs. The model would constitute a formal IOT Administration with an elected Advisory Board chaired by the Administrator and comprise a number of Directorates, such as health, education,

state services (SDAs), municipal services, community/economic development and corporate services functions. The Board could be serviced by the Department and receive advice, research, capacity building and Government liaison support. A Commonwealth entity such as this would be subject to the relevant provisions of the Public Governance, Performance and Accountability Act 2013 and would need its own enabling legislation noting that a number of these entities already exist. However, the Authority (IOTs) would be a closer model to the WA Rottnest Island Authority. Municipal services and the management of SDAs would come under the Board’s control while simultaneously enhancing the role of the Administrator.\textsuperscript{595} Nevertheless, any possible establishment of a Rottnest Island Authority or LHIB would require concurrent approval by the concerned State relevant to accepting the IOTs as a Statutory Authority and therefore the Statutory Authority Board concept has some merit as regards its composition and application to the IOTs.

Fundamentally inherent to this study has been the issue of democratic deficit that even the JSCNET Inquiry Final Report 2016 acknowledges. In this regard, submission number 41 by Mr Steve Clay advocates that a Statutory Authority Board model under the jurisdiction of a mainland State would be a realistic option where it has the advantage of providing more say to the IOT community than they currently have on many of the State responsibilities being rolled out in the IOTs.\textsuperscript{596} However, the only impediment to considering this model is that the community are unlikely to accept a Statutory Board if it means replacing the current local government structure and enhancing or even retaining the IOT Administrator’s role. Several submissions to the 2016 JSCNET Inquiry advocated for the abolition of the Administrator role on

---


\textsuperscript{596} Joint Standing Committee on National Capital and External Territories Inquiry Final Report: Economic Development and Governance, 151.
the basis that the role is anachronistic and undemocratic. For example, submission number 8 by the Christmas Island Women’s Association argued that the Administrator role became obsolete when local government was introduced to the IOT. It asserted that the responsibilities and decision-making powers of the Administrator should be reassigned to democratically elected local government representatives.597

Further, the Malay Association of Christmas Island questioned the fairness of empowering an unelected government official to direct the administration of the territories’ communities noting that if this person were to be given more decision-making powers that would give a single unelected Commonwealth official power, as opposed to assumingly several faceless Department public servants. While it might speed up decision-making, it poses some questions on democracy and fairness.598 The 2016 JSCNET Report Committee Comment 7.97 noted that the Committee recognises the vital functions that local governments perform in small communities, such as the IOTs, providing municipal services and serving the community in a range of ways. This fact is also supported by submission number 4 by Mr Julian Yates to the Inquiry where he does not think the Statutory Authority Board model is worth further consideration because of the very limited chance of it being accepted by the community.599 Primarily for these reasons, this study does not recommend the Statutory Authority Board model for the IOTs as a realistic governance option to be considered by the community.

Chapter 7

There are two internal self-governing territories in Australia, the NT and the ACT, which have some degree of self-government although less than that of the states. Within these (internal) self-governing territories, the Australian Parliament retains the full power to legislate and can override laws made by the territorial institutions, which it has done on rare occasions. 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.\textsuperscript{600} 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 does not have full independent legislative powers.

In a comparative context with the IOTs regarding the role of the appointed Administrator, 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{601} 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 where no such devolution is relevant to the IOTs because of their status as non-self-governing external territories. In short, the non-self-governing external IOTs have no capacity to make and/or propose any laws since they are subject to the applied legislation of WA through the SDA process in accordance with the arrangements between the Commonwealth and the WA State. This point was

\textsuperscript{600} Drum and Tate, 95.

made by the former Administrator of the Indian Ocean Territories Mr Brian Lacy in his submission number 39 to the JSCNET 2015 Inquiry where he advocated strengthening the role of the Administrator. Further, the 2016 JSCNET Final Report referred to the myriad frustrations experienced by former and current Administrators regarding their perceived and actual executive powers, which were less functional than those of the NT. However, this point was also made in the context of retaining the current applied laws regime with more direct authority given to the role of the appointed Administrator, which is contrary to the expressed views of many community JSCNET Inquiry submission responses, such as those from Christmas Island Women’s Association, Malay Association of Christmas Island, the local government and individuals.

Conversely, the ACT was created as the seat of national government and following its establishment in 1913, it was administered federally with self-government not granted until 1988. Unlike the NT, the ACT does not have an Administrator and the Crown is represented by the Australian Governor-General in the government of the ACT. Further, the ACT was created specifically as the location of the Commonwealth Government, and hence, it would be less likely to become a State. Given the fundamental constitutional reasons for the creation of the ACT as an internal self-government together with the absence of an Administrator, the ACT

---

605 Drum and Tate, 95.
606 Drum and Tate, 96.
model cannot be applied to the IOTs. Hence, the option of considering the NT internal self-government system for Christmas Island seems more appealing to the Commonwealth, and certainly less constrictive than the ACT. It can also be assumed that the ACT is an unacceptable incorporation option, especially given the recent decision by the Commonwealth to incorporate Norfolk Island federally into the ACT with applied laws from NSW being implemented effective July 2016. However, it appears unlikely that IOTs can realistically proceed along the same path of internal self-government as that of the NT, given the long process involved and the alternative governance options outlined in this study being more palatable and realistically achievable within a shorter timeframe. Further, and as noted in the ABS 2016 data, the (combined) populations of the IOTs are relatively small in comparison with either of the other internal territories. Therefore, and for the reasons outlined above, this study does not recommend that the Christmas Island community consider internal self-government as an option.

As noted in Chapter Four, some discussion and consideration should be given to legislatively transferring the ‘right to vote’ for Christmas Islanders in the WA electoral system, especially given the expressed desire by Christmas Islanders (as noted in several JSCNET Inquiry submissions) for incorporation with WA. The complexities and obstacles presented by section 123 of the Australian Constitution regarding the requirement for parliamentary support and the required referendum could be overcome with an ‘electoral legislative arrangement’ that allows Christmas Islanders to vote in WA. This arrangement would then support the applied legislation regime that currently applies together with the Commonwealth’s SDA


process in place with the WA State Government. Moreover, the ‘democratic deficit’ issue would be overcome with Christmas Islanders being able to vote for WA parliamentarians who (from time to time) make the laws that affect the former’s daily lives.

Electoral reform in Australia is possible as noted by Dr Economou from Monash University in the *Australia Parliamentary Review Journal 2016* article, who argues that in 1983 the *Commonwealth Electoral Act (1918)* was overhauled by the newly elected Hawke Australian Labor Party government where the process had commenced with a Joint Standing Committee on Electoral Affairs (JSCEWM) Inquiry.609 While this article primarily explores the relationship between the reform of Australia’s Senate voting system and the diversification of party representation in the upper house, it does provide an opportunity to (further) investigate the possibility of amending (and reforming) the *Commonwealth Electoral Act (1918)* and the *Electoral Act 1907 (WA)* to include the possibility of Christmas Islanders voting in the WA election process.

Reform of State based legislation is, of course, possible through amendments to the *WA Local Government Act 1995*. An important question that should be subject to further investigation and research during a proposed reform process may well be whether any ‘electoral legislative arrangement’ would allow section 123 of the Australian Constitution to be avoided. It may be that a court would consider the substance of the arrangement and decide that it is not possible to move the people without also—in substance—moving the territory, and any arrangement that attempts to separate the two runs the risk of being seen as a legal fiction designed to circumvent section 123 of the Australian Constitution, which could therefore be

problematic. As summarised by Economou, changes to electoral systems will always have the potential to affect representational outcomes.\textsuperscript{610}

Representatives of the community through the Shire of Christmas Island could petition the relevant WA Parliamentary Committee through the Speaker and Members of the WA Legislative Assembly of the Parliament of Western Australia in accordance with the Standing Orders where they must request a Member to present the petition to the House on their behalf.\textsuperscript{611} An obvious difficulty in this process is for the petition to be presented through a Member of the Legislative Assembly where Christmas Island has no WA parliamentary representation. Presuming the petition is accepted, it may be referred by motion to the Standing Legislation Committee of the WA Legislative Council. Simultaneously, a petition can be presented to the Commonwealth requesting a review and amendment to the \textit{Commonwealth Electoral Act (1918)} that would support the petition to the WA Parliament to amend the \textit{WA Electoral Act (1907)} and allow Christmas Islanders to vote in the WA election process. The terms of the petition must include the reasons for petitioning the Commonwealth and a request for action to repeal or change existing legislation. For example, the petition could request that section 56A of the \textit{Commonwealth Electoral Act (1918)} regarding inclusion of the Territories in the NT Divisions be amended to include the Territories (IOTs) into a Western Australian Division and that this Division be determined by the Electoral Commissioner in consultation with residents of the IOTs.\textsuperscript{612}

---

\textsuperscript{610} Economou, 128.


\textsuperscript{612} Commonwealth Attorney General’s Department, ‘Commonwealth Electoral Act 1918’, (Canberra: Commonwealth Government Publishing Service, updated version of amendments October 2016), section 56A.
Presuming the petition process is successful to the extent where the *Commonwealth Electoral Act 1918* and the *WA Electoral Act 1907* are both amended then the question arises as to which WA Electoral Division IOTs residents would qualify to be enrolled in. The *WA Electoral Act 1907* prescribes the manner in which electors qualify to be enrolled to vote in WA elections. In short, clause 17(1) of the *WA Electoral Act 1907* prescribes that subject to the provisions of this Act, any person, ‘who is –

(i) an Australian citizen; or

(ii) a person (other than an Australian citizen) who would, if the relevant citizenship law had continued in force, be a British subject within the meaning of that relevant citizenship law and who was at some time within 3 months, immediately preceding 26 January 1984, an elector of the Assembly or an elector, under a Commonwealth Act, of the Commonwealth Parliament;

and

(a) who has attained 18 years of age; and

(b) who has lived in the same district or sub-district for at least one month immediately before the enrolment,

is entitled –

(c) to be enrolled as an elector for the Council and the Assembly; and

(d) when so enrolled and while they continue to live in that district or sub-district, to vote at any election in the region of which the district or sub-district forms part; and any election in the district or the district of which the sub-district forms part’. 613

Clause 17 of the Act was amended in 2009 when clause 17B was inserted which prescribes the following:

---

Chapter 7

‘Elector with no fixed address on a Commonwealth Roll to allow for the enrolment on the WA Roll –

(1) If

(a) a person fulfils the requirements of section 17(1)(a) and (b) but does not live in any particular district or sub-district in the State; and

(b) the person’s name appears on a Roll maintained under the Commonwealth Electoral Act 1918 in respect of an address in a Commonwealth subdivision in the State with which the person has established a connection under section 96 of that Act; and

(c) the Commonwealth roll referred to in paragraph (b) is annotated to indicate that the person is an itinerant elector under the Commonwealth Electoral Act 1918 section 96,

then the person is to be enrolled on the roll for the district or sub-district in which the address referred to in paragraph (b) is situated’.614

Section 96 of the Commonwealth Electoral Act 1918 refers to an ‘itinerant elector who is;

(1) A person who:

(a) is in Australia; and

(b) is not entitled to be enrolled for any Subdivision because:

(i) the person does not reside in any Subdivision;

(ii) or the person is a homeless person;

614 Western Australia Electoral Commission, clause 17B.
may apply to the Electoral Commissioner for enrolment under this section for a Subdivision’.615

The purpose of providing the above legislative extracts from the *WA Electoral Act 1907* and the *Commonwealth Electoral Act 1918* is to highlight by example the possibility of amending both legislative Acts to reflect the insertion of these amendments to allow Christmas Islanders to be enrolled and therefore vote in an existing or newly identified WA electoral district. Understandably, a legislative process must be undertaken to propose any amendment to the Act(s), which must also be based on the support of both the Commonwealth and the WA Governments. As noted earlier, the mechanism for undertaking any legislative amendments is by introducing the proposed amendment into the (WA) Parliament by way of petition mirroring the process of introducing a Bill for assent. The difference is that the amendment would be in the form of an ‘insertion’ into the existing *WA Electoral Act 1907*. For example, clause 17C could be inserted into the existing *WA Electoral Act 1907* allowing for ‘an elector residing on Christmas Island who appears on the Commonwealth Roll to be enrolled on the WA Electoral Roll’.

The current impediment to this wording is that the person is to be enrolled on the WA Roll for the district or sub-district in which the address referred must be on the Commonwealth Roll. As noted in Chapter Four, Christmas Islanders are currently on the Commonwealth Roll of Lingiari, which is situated in the NT, and therefore, consideration must be given to the transfer of Christmas Island from the federal seat of Lingiari to that of a WA (federal seat) Commonwealth Roll. For example, the federal seat of Durack. This would then allow for a choice of several WA State

---

districts that fall within the boundaries of the federal seat of Durack to be available, such as Kimberley, Pilbara or North West Central. Notwithstanding these identified obstacles, the primary focus and intent of considering this proposal is to avoid the arduous process of incorporation into WA, which involves complex constitutional issues, and to also overcome the democratic deficit factor that will allow for Christmas Islanders to be enrolled and vote in WA State elections that simultaneously allow for the continuation of WA applied legislation. Of course, the matter of incorporation into the NT does not require any consideration of section 123 of the Australian Constitution but simultaneously does not consider the community of interest factor where several JSCNET Inquiry submissions clearly noted that the community did not favour incorporation into the NT and preferred incorporation with WA. Therefore, the notion of ‘responsible government and representative democracy’, both of which are absent from Christmas Island as a result of the WA applied legislation regime between the Commonwealth and the WA State Government, should be of paramount importance. The right to vote is a fundamental principle of representative democracy that underlies our democratic system in Australia, which makes our government responsible to us. Further, the principle of representative government places primary political authority in the Parliament on the basis that it is the body that represents the will of the people through elections and that the principle of responsible government requires the executive to be responsible to the people through Parliament.

Finally, and as stated in Chapter Four of this study, the current delegated applied legislation regime of WA laws on Christmas Island is undemocratic and creates a democratic deficit where Christmas Islanders cannot vote in the WA electoral system.

616 Drum and Tate, 134.

from where the WA laws are applied. The concept and principle of democratic representation, that is, the notion that communities elect individuals that represent them and help make decisions that bind them has been cemented in the liberal democratic tradition for centuries. The definition of representative democracy must include the notion that citizens have genuine choices among alternative candidates at the time of relevant election cycles. Christmas Islanders are denied this principle, a fact which is acknowledged by Commonwealth parliamentarians through various JSCNET Inquiry Reports. In this regard, the system that applies the WA legislation by ‘delegation’ from the Commonwealth to the WA State Government can be questionable in itself, which was also discussed in Chapter Four. The term delegated legislation in its broad sense is the term usually referred to as those laws made by persons or bodies to whom parliament has delegated law-making authority. Further, where Acts are made by parliament, each principal Act makes provision for subsidiary legislation (such as Regulations) to be made and will normally specify who has the power to do so under that Act. Therefore, delegated legislation can only exist in this context in relation to an enabling or principal Act that allows for the delegated process.

According to Hotop, the expression delegated legislation (or subordinate legislation) is the name given to legislative instruments made by a body (usually within the administration) expressly authorised so to do by an Act of Parliament.\(^618\) Part Three, Division One of the Christmas Island Act 1958 (amendment number 41 December 2010) refers to the Laws of the Territory and the application of the WA laws.\(^619\) In particular, section 8A of the Act also allows for the delegation by the

---


(Commonwealth) Minister for the application of WA laws. That is, subject to this section of the Act, section 8G and Part IVA, the provisions of the law of WA (whether made before or after this section’s commencement) as in force in WA from time to time are in force in the Territory.\textsuperscript{520} This could subsequently be interpreted as the process by which the Commonwealth has delegated its legislative power to the WA State Government for them (WA Government) to apply the WA legislation to the community of Christmas Island. While this process does not imply that the Commonwealth has delegated its entire law-making process for the island to the WA Government (noting the provisions in the Act that differentiate where Commonwealth law shall prevail especially in regard to any inconsistency), it does nonetheless mean that the process does not carry any democratic legitimacy in its application because Christmas Islanders are excluded from the democratic process of voting for parliamentarians in the WA State Government from where the legislation is applied. In addition, the principle of representative democracy tells us that legislative norms achieve validation and legitimacy through the expression of consent in the legislature itself, and the right to vote accordingly.

As Saunders notes, in a democracy, representatives of the people perform most of the governing, democratic rights are the rights that each community considers necessary to make its democratic arrangements work and the most obvious rights are the rights to vote.\textsuperscript{621} Further, Drum and Tate note the concept of responsible government implies that the government only has the right to make decisions that affect us because we elected them to undertake that role.\textsuperscript{622} Christmas Islanders do not vote in the WA State electoral system and therefore the WA State Government


\textsuperscript{621} Saunders, 81.

\textsuperscript{622} Drum and Tate, 112.
cannot/should not apply any of its legislation that it has amended and/or inserted of its own accord to its own WA legislation. As noted in Chapter Four and earlier in this chapter, where such amendments were made to its subsidiary legislation that compelled local governments in WA to refer their local laws to the relevant WA Parliamentary Committee and where the WA Joint Standing Committee on Delegated Legislation assumed that this applied to Christmas Island, the situation for Christmas Island (and the IOTs) was overcome with the Commonwealth directly referring any IOT local laws to the Commonwealth Register of Legislation Notifiable Instruments.

Presuming that the process by which the Commonwealth has delegated its legislative power to the WA State Government through section 8 of the enabling Act (Christmas Island Act 1958 amended) is upheld as not being ‘ultra vires’, then Hotop notes that delegated legislation could still be invalid on grounds such as uncertainty, improper purpose or unreasonableness.623 Similarly, the test of unreasonableness cannot be established, given that the Commonwealth has no capacity to directly administer (legislatively) the Territories of Christmas and the Cocos (Keeling) Islands, which would then allow for the process of unreasonableness to be negated.624 Finally, uncertainty will invalidate delegated legislation only where it is such that the delegated legislation does not constitute a proper exercise of the power conferred by the enabling Act, and in this regard, the enabling Act is quite explicit in its intention to apply the WA legislative laws to the Territory of Christmas Island.625

Notwithstanding that, delegated legislation may be invalid if it is inconsistent with the ‘general law’ where the general law comprises fundamental constitutional

---

623 Hotop, 153.
624 Hotop, 158.
625 Hotop, 159.
principles embodied in the common law—for example, principles conferring fundamental rights and freedoms.626 This in turn can imply that the fundamental principle of having the right to vote as enshrined in the Australian Constitution is denied to Christmas Islanders where simultaneously the WA delegated legislation applies by virtue of the enabling Act that provides for this delegation. Effectively, Hotop is referring to the principle of legality, which provides that the Courts will interpret legislation consistently with fundamental common law rights and freedoms and will only interpret legislation in a way that infringes those rights if the legislation does so in clear and unambiguous language. Moreover, it is a rule that accepts Parliament can infringe common law rights but requires that if it is going to do so, it bears the political cost by doing so unambiguously. In terms of delegated legislation, the consequence is that delegated legislation can only infringe common law rights and freedoms if the empowering statute provides that power unambiguously. According to the traditional view, there is a major problem in trying to find a test that will define and separate legislative, executive and judicial powers.627 This is also supported in the article written by Dan Meagher and Matthew Groves, The Common Law Principle of Legality and Secondary Legislation, where they note that secondary (delegated) legislation must be read down to protect the rights, freedom or principle in play or it is ultra vires as law-making if that is not interpretively possible.628 Further, governments have long used secondary or delegated legislation but the concept of legislation made by a body other than parliament does not sit easily with the notions of parliamentary sovereignty or democratic accountability.629

626 Hotop, 146.


As early as the mid nineteenth century, the desire for representative and responsible
government permeated the Australian community and gradually this was achieved
by the time of Federation in 1901. Australia is a democratic nation where
governments are elected by popular vote. A healthy democracy ensures that all
members of the community have equal access to the political process that governs
their lives. Yet, in 2018, the community of Christmas Island do not enjoy this
equal access, have still not achieved this level of representative and responsible
government and are being denied the right to vote in a jurisdiction (WA State) where
delegated legislation has been applied that disenfranchises them and affects their
daily lives. In this regard, the delegated applied legislative regime of WA laws on
Christmas Island is a central discussion point for the purpose of this study, and
therefore, it is recommended that the local government authority (Shire of Christmas
Island), make a strong representation to the Commonwealth in addressing this
governance and democratic inequality as part of an overall review of the delegated
applied legislation regime and, indeed, as being inclusive of discussions with the
community when considering the options available to them regarding their self-
determination future.
Chapter 7: Part Two – Thesis Summary

The thesis has sought to answer the research question regarding the governance arrangements on Christmas Island being democratic and, in particular, where the current model of limited self-governance has been in operation since the major governance arrangements changed in 1992 because of the Island in the Sun report.

The chapters of this thesis were methodically arranged to provide a contextual framework to the governance situation on Christmas Island and the self-determination debate. The purpose of Chapter One was to discuss the notion of democratic governance that is central to the subject regarding any consideration (by the community) of self-determination and the subsequent models of self-autonomy that would/could be implemented where the key principles of democratic governance, such as responsible government and representative democracy, in the context of federalism and the Australian Constitution are important aspects of the thesis discussion. To fully understand as much as possible the notion of self-determination that Christmas Islanders have long harboured, Chapter Two discussed the historical habitation and settlement of the island where the geographical and economic importance of Christmas Island has played a significant role in shaping its social history. This includes an examination of how the cultural development of the inhabitants historically evolved and how it’s economic and industrial conditions and the community played an integral part in the Island’s historical development.

Chapter Three built upon Chapter Two by further exploring and discussing the demographic cultural and social nature of the island’s people not only a sociological perspective but also how industrial conditions shaped the demographic environment of the island. Most importantly, it was intended to consider how any proposed changes to the governance and legislative arrangement for Christmas Islanders would affect the social fabric of the community. A key element of this is
how the archaic industrial social conditions, such as cost of living and wage parity, eventually shaped the cultural attitude of the islanders, given the historical ‘colonial’ conditions they endured since colonisation of the island in the late nineteenth century.

Chapter Four is crucial to the study because it explored in more detail the governance and legislative arrangements relevant to the current situation on Christmas Island as well as discussing the various models for consideration and application to its future governance. In particular, it focused on the current WA applied legislation arrangements to the island through the ‘Service Delivery Agreements’ between the Commonwealth and the WA State Government that occurred without direct consultation with the community and how this governance arrangement disenfranchises the Christmas Island population from voting in the WA electoral process. Discussion and consideration was also given to the option of free association in accordance with clause 2 of the United Nations General Assembly Resolution 1514 (XV) of 1960 and, in particular, the choice of ‘free association’ as the preferred model in contrast to either total integration or secession. Chapter Four also reviewed numerous JSCNET enquiries, which featured submissions by the community that which were in turn reflected in subsequent JSCNET Final Report recommendations to the Commonwealth Government.

Chapter Five was an important component of the study, given the current financial dependency of the Territory of Christmas Island on the Commonwealth and the Island’s own means of raising enough revenue to meet its expenditure requirements and obligations. The chapter discussion included the financial arrangements and funding dependency for the administration of Christmas Island that is currently the responsibility of the Commonwealth DIRDC. The Department administers its operations financially from offices on Christmas Island (that also serve Cocos Keeling Islands) as the ‘Indian Ocean Territories Administration’ and also has an
office located in Perth WA with the head office being located in Canberra. The Shire of Christmas Island receives operational financial grants (known as Federal Assistance Grants) from the Commonwealth by way of the WA administered Grants Commission process that applies normally to all WA State based local government authorities. Funding for capital grant projects that are normally directly available to mainland state-based local government authorities are considered under the ‘state-type grant’ process that requires assessment approval by the Commonwealth. Previously, this assessment process also included the relevant WA State Government agency; however, this arrangement was changed in 2014 and now the Commonwealth makes any such consideration directly.

Chapter Six discussed the current land tenure and asset ownership arrangements on the island, especially as regards defining the ownership and responsibility of various government agencies. In this regard, there are clear synergies with other chapters in the study where, for example, the vesting of religious sites and its infrastructure on the island require ownership identification and funding maintenance. The current ‘Land Disposal Policy’ of the Commonwealth is both cumbersome and erratically implemented, dependent on influencing circumstances, such as financial availability and commitment by the Commonwealth to projects intended for the use of the land and/or the political will and commitment by Canberra to any project requiring land availability. A comprehensive review of the Commonwealth’s CLMP was undertaken in 2016 with the final report released by the (then) Commonwealth Minister for Local Government and Territories, the Hon Fiona Nash MP, in March 2017. In doing so, the Minister called for investors to register their interest in land on Christmas Island, noting that the CLMP will free up land for new businesses in the
central business district as well as new sites for houses and industrial use. The newly released and revised CLMP is intended to provide a framework to guide uses of Crown land on Christmas Island and will support the release of land for development over the short term and long term with a dedicated ‘Registration of Interest’ process being mandatory for the purchase or lease of Crown land on the island. However, it remains to be seen if the newly revised Plan will remove some of the cumbersome regulations and processes that have previously impeded the disposal of Commonwealth Crown Land on Christmas Island.

The self-determination options - summary

In its 1973 report on *United Nations Involvement with Australia’s Territories*, a Senate Select Committee on Foreign Affairs and Defence agreed with the Australian Government’s assessment that Christmas Island was not a non-self-governing territory but considered it possible that the United Nations Special Committee of 24 on Decolonization might become interested in the Territory. To minimise the risk of this occurring, it recommended that appropriate steps be taken to consolidate the relationship between Australia and Christmas Island. Further, the submission by the Centre for Comparative Constitutional Studies noted that in 1981, the Australia-New Zealand Christmas Island Phosphate Commission was replaced by the wholly Australian Government-owned Phosphate Mining Company of Christmas Island. In 1984, the Company was divested of its non-mining functions, which were split between Commonwealth Departments or the Administration and the newly established Christmas Island Services Corporation (CISC). Several Commonwealth Acts that were extended to the Cocos (Keeling) Islands as part of that Territory’s


631 The Centre for Comparative Constitutional Studies, 44.
integration package were also extended to Christmas Island. The representative Christmas Island Assembly, which was empowered to direct the Christmas Island Services Corporation in the performance of its functions, was established in 1985. These, and other measures, were designed to ‘bring the Island and its community into the mainstream of Australian life’.

The Shire of Christmas Island, as the only level of democratic representation available to the community on the Island, has been a strong advocate for a change in governance arrangements and has supported this position in the many submissions it has made to Commonwealth-related Inquiries. Therefore, it is logical that they take charge of the process, or at the very least play an active role in the process in regard to providing information and guiding the community in discussions to determine the best option of self-determination for the community to consider and pursue. As early as November 1999, the Shire held an unofficial referendum in conjunction with the Australian republic referendum questions where voters (on Christmas Island) were asked in general terms if they supported greater self-government or the retention of the status quo. In all, 63% of voters were in favour of ‘greater self-government’. Notwithstanding this option of greater self-government, incorporating Christmas Island into WA or the NT would still allow for the continuation of the Shire of Christmas Island in conjunction with a State or Territory type level of government. Therefore, in accordance with the intent and purpose of this thesis study, it is strongly recommended that the following options be thoroughly discussed with the community of Christmas Island so that a thoughtful process of consideration and engaging debate can be undertaken. It is only through this process where the community can fully digest and understand the implications of each option that a meaningful direction can be proposed for the future direction of

the Island’s governance. These options, as noted in the Introduction of this study and that have now been fully explored and discussed are:

a) **Becoming an autonomous self-governing region.** For the reasons outlined in Chapters One, Four and Seven of this study, the only realistic and viable option of being autonomous is that of the *free association* model in accordance with the principles of the United Nations Charter. Hence, the examples of the ‘free association’ arrangements that the Cook Islands and Niue have with New Zealand in the Pacific Ocean should be studied in more detail, to the extent where a delegation from Christmas Island visits both Islands to specifically observe how these arrangements practically operate. The option of considering a current Norfolk Island Assembly model of self-government is no longer viable, given that the Commonwealth abolished the Norfolk Island Assembly in 2016 and replaced this with an arrangement similar to that of the IOTs where the applied legislation of NSW has been imposed together with relevant SDAs.

b) **Incorporating into the West Australian or Northern Territory legislative arrangements.** Incorporation into the State of Western Australia is constitutionally complicated. It relies on agreement between the Commonwealth and the State of Western Australia (and bipartisan WA parliamentary support), and more importantly, on a referendum being held in accordance with section 123 of the Australian Constitution where the approval of the majority of the electors of the State of Western Australia voting upon the question to accept Christmas Island as part of WA is required. Incorporation with the NT is less complicated, certainly from the Commonwealth’s and NT’s perspectives and does not involve section 123 of the Australian Constitution since the NT is not a State. The only impediment to this option is the community of interest factor where the community of Christmas Island has little in common with that of the NT. The community
has had, and continue to have, a strong community of interest with the State of Western Australia as outlined in this study and the numerous JSCNET Inquiry submission responses, and therefore favour incorporation with the State of Western Australia as their preferred option.

c) Developing an alternative mixed delivery model of governance as one of the above or as identified from the thesis study, such as an ‘internal territory arrangement’ or Regional Statutory Authority Board. This study discussed the option of an internal territory arrangement that has subsequently been dismissed for the reasons outlined in Chapters Four and Seven. A Regional Statutory Authority Board arrangement, such as that of Lord Howe Island (NSW) or Rottnest Island (WA) is feasible. However, both these examples include being a part of the respective state government legislation. Therefore, the Regional Statutory Authority Board arrangement either would be under the jurisdiction of the Commonwealth similar to the current arrangement of Jervis Bay, or would be constituted as a Statutory Authority Board under the jurisdiction of the relevant State, such as for Lord Howe Island. While this is less desirable than incorporation, it has the advantage of providing more say to the community on many of the state-type services and responsibilities being provided on Christmas Island. This model would constitute a formal Christmas Island Territory administration with an elected Advisory Board, although possibly chaired by the Administrator, which may not necessarily be palatable to the community.

d) Remaining with the status quo. This option should include discussions about the current delegated legislative applied laws regime and in particular, that some consideration be given to exploring the notion that Christmas Islanders can vote in the WA State election cycle. This was discussed in Chapters Four and Seven of this study where amendments to the Commonwealth Electoral Act 1918 and the WA Electoral Act 1907 were possible considerations that would address the ‘democratic deficit’ issue regarding voting and the imposition of
the WA applied laws regime. Another hybrid option in retaining the status quo involves delegation of certain powers to an established Regional Council together with consultation to ensure community approval for both the SDAs and any legislative changes required. As a minimum, there needs to be restoration of funding for services, such as the Community Consultative Committee which provides a structure for an ongoing consultative process. Access to the WA Lottery West program also needs to be restored; this would enable applications from the community, which were removed by cancellation of the relevant SDA without community consultation and replaced by the ‘on-island’ Administrators Regional Development Program that was of significantly less value and is apportioned between both IOT communities.

The creation of Australia in 1901 was through the vote. While the road to Federation was long and hard in the latter part of the nineteenth century, it was ultimately achieved deliberately and consciously by the Australian people at the ballot box. The movement towards Federation gathered pace in the late nineteenth century, and the Federation cause was debated and dissected at public meetings and gatherings all around Australia. In other words, information was constantly provided to the people so that when the time came to exercise their vote, they were reasonably well informed. In town and shire halls, schools, trade halls and on street corners—from pub balconies and parks in the cities to shearing sheds and mining camps in the outback—the people of Australia argued about this new Constitution. Most importantly, the movement towards Federation came from referenda’s in each colony (state) to approve the document that ensured the people were informed. This was democracy in action, which created the nation. It put an Australian stamp on the way we were to govern ourselves in the future. Christmas Islanders should be afforded the same process and fundamental right to choose how they wish to govern themselves. In other words, it is for the people to
determine the destiny of the Territory and not the Territory the destiny of the people.\textsuperscript{633} Therefore, whatever outcome transpires for Christmas Islanders it should be because of them having had the opportunity to consider the options outlined in this study that will ensure they can make a fully informed decision. Only through this process can the choice of self-determination for Christmas Islanders be interpreted as a truly democratic process.

\textit{END}

\textsuperscript{633} Weller, 30.