

Delegated Legislation and the Democratic Deficit: The Case of Christmas Island¹

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Introduction

This article argues that the current delegated applied legislation regime on Christmas Island is undemocratic. In doing so, it will also discuss how the applied delegated legislation of Western Australian laws to Christmas Island is complex and unworkable and excludes the community from having input into the laws that govern their daily lives. The key underlying principle of democratic representation, that communities' elect individuals to represent them and help make binding decisions, has been cemented in the liberal democratic tradition for centuries. Hanna Pitkin points out that representative democracy has usually been adopted instead of the direct democracy alternative because of the impossibility of assembling large numbers of people in a single place. Therefore, while representation is a substitute for direct participation, it is a preferable substitute.² Michael Jackson similarly argues that direct democracy is difficult in large communities and widespread citizen participation in politics is hard to achieve, so representative democracy has evolved as a result.³

The definition of representative democracy must include the notion that citizens have genuine choices among alternative candidates at the time of an election. As Cheryl Saunders notes, in a democracy the people are governed by their representatives, and democratic rights are of vital importance. The most obvious of these is the right to vote.⁴ M. Harvey *et al*, among many others, point out that responsible government in Westminster systems means that government functions are carried out or overseen by ministers who are responsible to the electorate via their accountability to Parliament.⁵ As Martin Drum and John Tate argue, the concept of representative and responsible government implies that the government has the right to make decisions that affect citizens because those citizens have elected them to undertake that role. These basic principles underlie democratic political systems, including Australia's.⁶

These fundamental democratic elements are absent on Christmas Island. Instead, a specific governance model exists in which the majority of legislation applicable to the Island is delegated by Australia's Commonwealth Government to the Western Australian State Government. This is despite the fact that Christmas Islanders do not vote in Western Australian state elections. Under an arrangement with the Commonwealth, most key public services on Christmas Island are delivered by the Western Australian Government through Service Delivery Agreements (SDAs). This article will explain how the current situation has developed, what it means in practice, and how this has created an Australian jurisdiction in which a 'democratic deficit' exists.

¹ Kelvin Matthews spent six and half years as the Chief Executive Officer for the Shire of Christmas Island until October 2016.

² H. Pitkin, *The Concept of Representation*. Berkeley, The University of California Press, 1967, p. 191.

³ M. Jackson, 'Democratic Theory and Practice' in R. Smith and L. Watson (eds), *Australian Politics*. Sydney: Allen and Unwin, 1989, p. 33.

⁴ C. Saunders, *It's Your Constitution*. Leichhardt: The Federation Press, 2003, p. 81.

⁵ M. Harvey, M. Longo, J. Ligertwood and D. Babovic, *Constitutional Law*, Sydney, Lexis Nexis, 2010, p. 63.

⁶ M Drum and J. Tate, *Politics in Australia: Assessing the Evidence*, Melbourne, Palgrave MacMillan, 2012, pp. 112, 124, 134.

The Christmas Island Context

Christmas Island is located in the Indian Ocean, approximately 2650 km northwest of Perth, Western Australia, 360 km south west of Java, Indonesia. It is 980 km north east of the Cocos (Keeling) Islands, which with Christmas Island form the Australian non self-governing external Indian Ocean Territories. Christmas Island was developed for its phosphate resources, with the Clunies Ross family and then the British Phosphate Commissioners mining the Island using indentured 'coolie' labourers brought in from China, Malaysia and Singapore. In 2011, the Island's population was approximately 2072, with a cultural composition and character that reflects its labour history. Ethnic Chinese and Malaysians comprised approximately 85 percent of the population, with those of European and other descents making up the remaining 15 percent.⁷



Figure 1. Google map showing the location of Christmas Island

The history of Christmas Island tells three key stories. The first is the economic and social dominance of phosphate mining since the late nineteenth century, which continues to the present day. The second is the relatively recent introduction of Australian conditions to the Island, despite the formal annexure in 1958. The third is the unique culture created by the remarkable social composition of the community and its unusual administrative and institutional arrangements.

The Development of the Christmas Island Governance and Legislative Framework

The historical social, economic and legislative arrangements for Christmas Island amounted to its governance by the British as a dominion of the Empire. The transfer of rights in October 1958 from the British Straits Settlement (Singapore) authority by virtue of section 122 of the Australian Constitution provided a limited form of sovereignty.⁸ Australia has asserted sovereignty over Christmas Island since it was deemed by the Queen and accepted by the

⁷ Australian Bureau of Statistics, *2011 Census Data: Expanded Community Profile*, Table X01f.

⁸ Joint Standing Committee on the National Capital and External Territories, *Current and Future Governance arrangements in the Indian Ocean Territories*. Canberra: Parliament of the Commonwealth of Australia, May 2006, p. 8.

Commonwealth as a Territory of Australia.⁹ Neither the excision of Christmas Island from the Colony of Singapore nor its transfer to Australia involved any consultation with the people living on the Island. This lack of consultation extended to decisions about applicable laws for the Island, as has been noted in several Inquiry Reports of the Joint Standing Committee on the National Capital and External Territories (JSCNET).¹⁰

The Commonwealth Sweetland Royal Commission Inquiry Reports of 1980 and 1982 provided a critique of past discriminatory practices by the Government towards the Christmas Island community. These practices contributed to the community's desire for equal recognition and participation in all affairs of the Island. Writing about the political, industrial and social conditions on Christmas Island between the period of transfer to Australia in 1958 and the implementation of the *Islands in the Sun Report* in 1992, Les Waters notes that Recommendation 14 of the Sweetland Report refers to residents of Christmas Island being able to qualify for citizenship in exactly the same manner as foreign nationals who took up permanent residence on the Australian mainland, regardless of their original ethnicity.¹¹ Following the adoption of the majority of the Sweetland Report's recommendations, Christmas Islanders were afforded full formal citizenship rights. In 1991, the Parliament of the Commonwealth of Australia's House of Representatives Standing Committee on Legal and Constitutional Affairs reviewed the legal regimes of all Australia's External Territories. Both Indian Ocean Territories Islands achieved representation in the Australian Commonwealth, and with it the right to become Australian citizens. As part of this citizenship status, they could vote federally for a Northern Territory House of Representatives seat (currently the electorate of Lingiari) and for the Senate as Northern Territory voters.

The *Islands in the Sun* Parliamentary Inquiry into the legal regimes of Australia's External Territories released in March 1991 envisaged the introduction to the Island of an applied legislative system within a broader package of initiatives and actions to ensure that laws were applied in a manner acceptable to the Island's community. It was evident to members of the Inquiry that the laws of Christmas Island were anachronistic, incomplete and not readily identifiable. The prospect of retaining the status quo was quite untenable.¹² Some political and administrative reforms occurred as a result. The *Territories Law Reform Act 1992* amended the *Christmas Island Act 1958*, whose provisions had been largely based on the laws of Singapore. The new Act represented a major advance for the Territory.¹³ It included provisions in the *Christmas Island Act 1958* and the *Cocos (Keeling) Islands Act 1955*, which meant that Western Australian laws applied in the Territories as if they were Australian Government laws.

Crucially, there was no suggestion in the *Islands in the Sun Report* that the preferred option of applying the Western Australian legislative regime to Christmas Island (and the Indian Ocean Territories more generally) would disenfranchise members of the Christmas Island community, removing their democratic representation and voting rights in the state of Western Australia, where the applicable laws would be made. The enacted recommendations of the *Islands in the Sun Report* persist today, with little modification or amendment some 25 years after their introduction. The resulting system of applied legislation is complex. It creates difficult interactions between different pieces of legislation, and uncertainty in the administration of that legislation.

⁹ Commonwealth of Australia, *Islands in the Sun*. Parliamentary Inquiry Report on the Governance of Christmas Island. Canberra: Commonwealth of Australia, 1991, p. 41.

¹⁰ Joint Standing Committee on the National Capital and External Territories, Review of the Annual Reports of the Department of Transport and Regional Services and the Department of the Environment and Heritage. Canberra: Parliament of the Commonwealth of Australia, 2004, p. 10.

¹¹ L. Waters, *The Union of Christmas Island Workers*. St. Leonards: Allen and Unwin, 1983, p. 147.

¹² Commonwealth of Australia, *Islands in the Sun*, p. 195.

¹³ E. Heng and V. Forbes, 'Christmas Island: Remote No More', in D. Rumley, V. Forbes and C. Griffin (eds), *Australia's Arc of Instability: The Political and Cultural Dynamics of Regional Security*. Dordrecht: Springer, 2006, p. 74.

The Democratic Deficit and Delegated Legislation

Delegated legislation refers to laws made by persons or bodies to whom parliament has delegated law-making authority. Where Acts are made by parliament, the principal Act can make provision for subsidiary legislation such as regulations to be made and will normally specify who has the power to make these. Accordingly, delegated legislation can only exist in relation to an enabling or principal Act. In the case of Christmas Island, section 8A of the *Christmas Island Act 1958* allows for delegation by the Commonwealth Minister for the application of Western Australian laws. That is, subject to the Act, relevant provisions of existing and future laws of Western Australia come into force in the Territory. This could be interpreted as a process by which the Commonwealth has delegated its legislative power to the Western Australian Government, so that Western Australian legislation can be applied to the Christmas Island community. This process does not imply that the Commonwealth has delegated its entire law-making process for the Island to the Western Australian Government, given the provisions in the (Commonwealth) Act that identify where Commonwealth law prevails, particularly in regard to any inconsistencies between Western Australian and Commonwealth law. Nonetheless, the process does not have democratic legitimacy because Christmas Islanders are excluded from the democratic process of voting for members of the Western Australian Parliament, from among whom the ministers who apply the legislation are drawn.

The Western Australian Joint Standing Committee on Delegated Legislation exists to scrutinise subsidiary legislation (such as local laws). The Western Australian Minister for Local Government may direct local governments to provide to Parliament copies of local laws that they have made, along with any explanatory or other related material.¹⁴ The *Western Australian Local Government Act 1995* therefore requires a local government to submit the local laws it has adopted for review and gives the Committee the power to render the local laws inoperable. Under the Act, the Committee may also amend or insert provisions in local laws if they wish. This occurs despite the fact that Island residents elect the Shire of Christmas Island, and the Committee consists of elected Western Australian parliamentarians for whom Island residents cannot vote. A democratic deficit therefore lies in the fact that Western Australian laws apply despite there being no Island representation in the Western Australian Parliament. For the purpose of clarification, the terminology of 'Local Laws' is defined and prescribed in accordance with Division 2, Subdivision 1 of the *Western Australian Local Government Act 1995*. This states that a local government may make local laws that are required or permitted to be prescribed by a local law, or are necessary or convenient to be so prescribed, for a local government to perform any of its functions under the Act.

There are also disallowance provisions in the relevant Commonwealth legislation, such as the *Territories Law Reform Act 1992* and the *Christmas Island Act 1958* (as amended 2010); however, these provisions have rarely been used. In effect, the Commonwealth has substantially delegated its legislative making power to the state of Western Australia without any ensuing democratic representation. The Western Australian Parliament purports to have the legislative right to amend or veto democratically adopted local laws on Christmas Island, despite the fact that Christmas Islanders cannot vote for Western Australian parliamentarians. Responsible government means that all governments must be accountable 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 the people's collective consent, the government is not legitimate.¹⁵ Comparative overseas experience also makes it clear that the democratic legitimization of secondary

¹⁴ Western Australian 1995 Local Government Act, s 312 (7).

¹⁵ Drum and Tate, *Politics in Australia*, p. 112.

legislation can also be secured by involving the public in its approval, at least indirectly through elected representatives.¹⁶

In the case of Christmas Island this has never occurred. On this basis, the delegated legislation regime applied by the Western Australian Government has no democratic legitimacy. The arrangement between the Commonwealth and the Western Australian Government excludes the fundamental principles of responsible government and representative democracy. The process of Western Australian parliamentary committees overriding local laws is acceptable and reasonable for mainland Western Australian local governments in accordance with legislative accountability. However, this is an undemocratic process for the Indian Ocean Territories' local governments because it requires Western Australian parliamentary scrutiny without any democratic representation by the Islanders. The *Islands in the Sun* Report pointed out that, to the greatest degree possible, citizens should be empowered to participate in decision making, particularly on issues that affect their day to day lives.¹⁷ In this regard, the accountability of the Western Australian Parliament and the elected members who comprise it are accountable to the Western Australian electors who voted for them, but they are not accountable to Christmas Islanders, who are presently denied the right to vote for them. Clause 7.38 of the recent Commonwealth Joint Standing Committee on National External Territories (JSCNET) 2016 *Final Inquiry Report* reinforces this point, noting that the Indian Ocean Territory residents are subject to applied legislation from Western Australia, yet they have no representative in the Western Australian Parliament.¹⁸

These legislative and governance arrangements mean the Indian Ocean Territories are different from the rest of Australia. The lack of a regional level government means that residents have less access to parliamentarians and ministers and face increased complexity and representation costs compared to other communities. The decentralised administrative processes and the variety of service arrangements further complicate matters, because the delivery of state services is not the core business of Australian Government agencies. This is the primary reason the Commonwealth has 'outsourced' state service type functions through Service Delivery Agreements (SDAs). The *Islands in the Sun* Report recommended that the community of Christmas Island be consulted regarding the effects that the Western Australian legislation has on them. In particular, Recommendation Seven was intended to ensure that the community was consulted as much as possible through the Shire of Christmas Island. The Shire was to have direct access to the appropriate Commonwealth Minister to provide a review mechanism on behalf of the Christmas Island community to the Commonwealth.¹⁹ Accordingly, in 1993 the Commonwealth funded the establishment of a permanent law reform officer within the (newly created) Shire of Christmas Island. This role was created to facilitate Community Consultative Committee (CCC) meetings, distribute information to the community, and collate feedback for the Commonwealth.

The CCC became the focal point for consultation about the delegated applied legislative system, and Service Delivery Agreements (SDAs) were the mechanism developed to allow state services to be delivered by relevant Western Australian government agencies.²⁰ Under this system, impact statements are prepared that include lists of suspended and repealed laws, and the Commonwealth is required to publish Annual Reports in regard to the progress of the delegated applied legislation regime and the performance of the SDAs. The approach adopted is resource intensive, because each service requires an agreement with the Western

¹⁶ H. Pünder, 'Democratic Legitimization of Delegated Legislation—A Comparative View on the American, British and German Law', *International and Comparative Law Quarterly*, 58(2), 2009, p. 353.

¹⁷ Commonwealth of Australia, *Islands in the Sun*, p. 202.

¹⁸ Joint Standing Committee on National Capital and External Territories (JSCNCET), *Final Inquiry Report: Economic Development and Governance*, Canberra, Commonwealth of Australia, March 2016, p. 134.

¹⁹ Commonwealth of Australia, *Islands in the Sun*, pp.57-58.

²⁰ Department of Infrastructure and Regional Development, *Annual Report 2014/15*, Canberra, Commonwealth of Australia, 2015.

Australian provider that includes monitoring and performance reporting processes. The service providers must also consult with Christmas Island community members to ensure that the providers understand the requirements and the environment in which the services are to be delivered. These arrangements are complex, costly and inefficient compared with the current structures for the states and even the Northern Territory.

The Commonwealth now rarely consults formally with the community of Christmas Island. The current situation ignores the original intention of the process, as well as the recommendations of the *Islands in the Sun Report* and subsequent JSCNET Inquiry Reports that the Commonwealth and the Western Australian Government were to consult regularly with the community about the impact of the delegated applied legislation and SDAs. Notwithstanding this, the Shire of Christmas Island has retained and funded the CCC to carry out its functions, as it is the only legitimate mechanism available to the community to consider the various effects of the Western Australian delegated legislation regime.

It should be noted that Christmas Island is not alone in this regard. The Commonwealth has recently enforced a similar delegated legislative regime for the governance of Norfolk Island as a response to JSCNET inquiries. This includes applying a governance model to Norfolk Island that is identical to Christmas Island: it applies delegated legislation from the NSW State Government but does not allow Norfolk Islanders the democratic right to vote in the NSW election process. Norfolk Islanders are represented federally in the Australian Capital Territory (ACT), with whom it can be argued that they have no 'community of interest,' in a similar sense that Christmas Islanders have no community of interest with Northern Territory residents.²¹

Alternative Governance Options

While the current arrangements are unlikely to be found unlawful or unconstitutional, they create a democratic deficit for Christmas Islanders because Christmas Islanders cannot vote in Western Australian elections. What are alternative governance possibilities that would remove this democratic deficit? Some of these alternative options were originally raised in the *1992 Islands in the Sun* report and have subsequently been discussed in JSCNET reports. Options in the 1992 report included (i) retaining the current governance arrangement, (ii) incorporating the Island into Western Australia or the Northern Territory, or (iii) enhancing the powers of the Christmas Island Council by giving it greater responsibilities for specific domestic laws.²² The feasibility of these options is unclear. Being incorporated with the state of Western Australia, for example, would be constitutionally complicated, as was noted in JSCNET's 2016 Report. JSCNET dismissed this proposal, given the complexities of Section 123 of the Australian Constitution in regard to Western Australia, although JSCNET did look favourably on the possibility of incorporation of Christmas Island in the Northern Territory.²³

The options in the original *Islands of the Sun Report* did not include Christmas Island applying to the United Nations for some form of limited self-government under Clause 2 of Resolution 1514 (XV) of 1960 (the Declaration on the Granting of Independence to Colonial Countries and Peoples). Since the *Islands in the Sun Report* was released, the Shire of Christmas Island has been instrumental in agitating for greater self-determination. This has included asking the United Nations to consider the issue. One option is that the Christmas Island community could enter into a Free Association model similar to the arrangement currently operating in the Pacific Island nations of Niue and the Cook Islands with New Zealand. The Commonwealth has generally been opposed to self-determination options, a position that was reinforced in the 2015 JSCNET Inquiry Report, which was released in March

²¹ Department of Infrastructure and Regional Development, *Norfolk Island Reform*. 2017. Available at http://regional.gov.au/territories/norfolk_island/reforms/

²² Commonwealth of Australia, *Islands in the Sun*, p. 193.

²³ JSCNET, Final Inquiry Report: Economic Development and Governance, p. 149.

2016. The Commonwealth stated that the Committee does not support a self- governance model operating in any external territory, including the IOTs.²⁴

Conclusion

Christmas Islanders have long harboured the hope of greater involvement in their governance. This is evident from submissions made by the community to JSCNET inquiries over a long period of time. The progressive devolution of democratic rights to Christmas Islanders by the Commonwealth is effected through mechanisms such as an applied delegated Western Australian legislative regime which does not allow Christmas Islanders to vote in Western Australian State elections, even though state legislation is applied. This approach continues to increase the Islanders' determination to seek alternative options. Integral to these continued aspirations is the social and cultural demography of Christmas Island community, particularly the Chinese and Malay inhabitants, who have been part of the historical development of the Island for more than 100 years. It is therefore essential to respond to the Island's different cultural elements if the goal of bringing the Island's community into a more mainstream way of Australian life is to be successful. As early as the mid-nineteenth century, the desire for representative and responsible government permeated the Australian community and gradually this was achieved by Federation in 1901. Australia is a democratic nation, in which governments are elected by popular vote. A healthy democracy requires that all members of the community have equal access to the political process that governs their lives. Yet in 2017, the community of Christmas Island does not enjoy this equal access and has still not achieved representative and responsible government.

²⁴ JSCNCET, Final Inquiry Report: Economic Development and Governance, p. 145.