Parliament of the Commonwealth of
Australia

Islands in the Sun

The Legal Regimes of Australia's External Territories and the Jervis Bay Territory

Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs

March 1991

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FOREWORD

The Parliament of the Commonwealth of Australia has an overriding responsibility for assuring the peace, order and good government of the external territories and the Jervis Bay Territory. This Report presents the results of the first phase of an inquiry by the House of Representatives Standing Committee on Legal and Constitutional Affairs into the adequacy of the laws and legislative structure of those territories.

The Committee thanks all interested individuals and organisations for their assistance and support during the inquiry. The co-operation and courtesy of the many officers of the Department of the Arts, Sport, the Environment, Tourism and Territories who assisted the Committee during the course of the inquiry is, in particular, gratefully acknowledged.

The Committee is also grateful for the hospitality and assistance it received from the residents of Christmas Island, Cocos (Keeling)Islands, the Jervis Bay Territory and Norfolk Island during visits to those Territories.

As inquiry Chairman I would like to thank my fellow Committee Members for the time and effort they devoted to the inquiry. Thanks are also due to the members of the Secretariat involved with the inquiry, Mr Jon Stanhope, Ms Anne Hazelton, Ms Sue Morton, Ms Louise Carney and Mr Jason Sherd.

This Report proposes a number of reforms designed to ensure that the residents of the external territories and the Jervis Bay Territory receive the same benefits, rights and protection under the law as other citizens of Australia, a situation which the Committee has found does not currently pertain.

The Report also highlights the need for a review of the desirability of retaining the subject Territories as such.

Duncan Kerr, MP
Sub-committee Chair

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TERMS OF REFERENCE

INQUIRY INTO THE LEGAL REGIMES OF AUSTRALIA'S EXTERNAL TERRITORIES AND THE JERVIS BAY TERRITORY

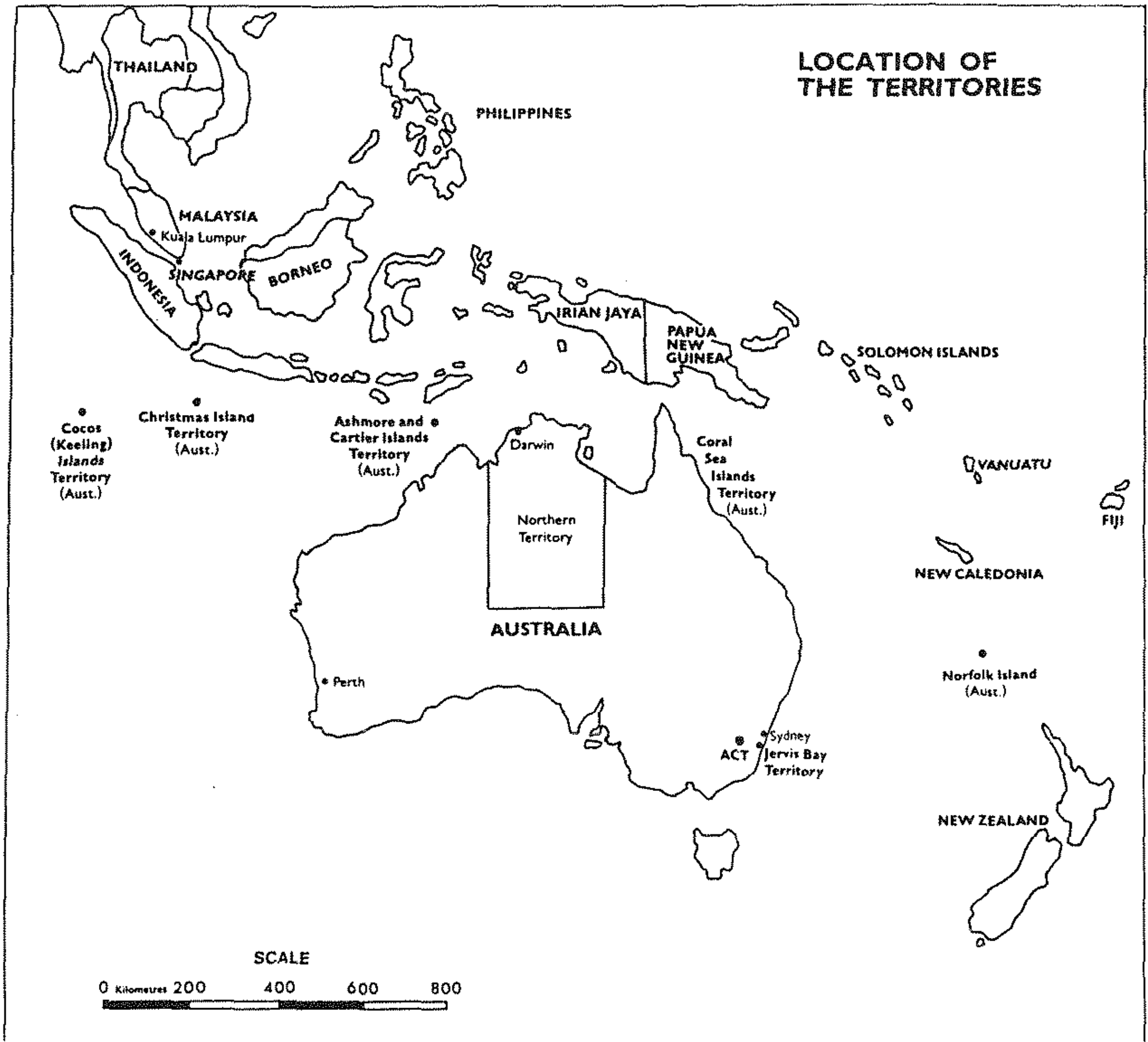
To examine, inquire into and report on the adequacy of the laws and legislative structure of Australia's external Territories and the Jervis Bay Territory with particular reference to:

(1) the degree to which the citizens of the Territories receive the same benefits, rights and protection under the law as other citizens of the Commonwealth of Australia; and

(2) the extent to which the laws of the Territories have been identified, are applicable to the circumstances of the Territories and are administered.

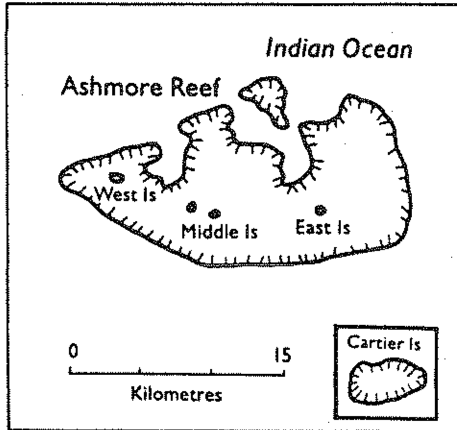
ABBREVIATIONS

ACF	Australian Conservation Foundation
AG's	Attorney-General's Department
ANPWS	Australian National Parks and Wildlife Service
BHP	BHP Petroleum
CISC	Christmas Island Services Corporation
DASETT	Department of the Arts, Sport, the Environment, Tourism and Territories
DFAT	Department of Foreign Affairs and Trade
DIR	Department of Industrial Relations
DPIE	Department of Primary Industries and Energy
DPP	Director of Public Prosecutions
ICCPR	International Covenant on Civil and Political Rights
ILO	International Labour Organisation
LACWA	Legal Aid Commission of Western Australia
NPWC	National Parks and Wildlife Conservation (Act)
RRT	Resource Rent Tax
UN	United Nations

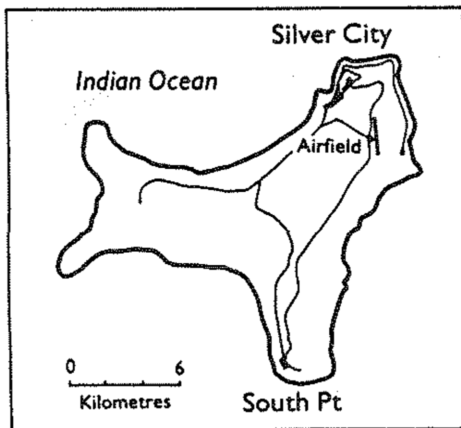


Source: Department of Territories, Annual Report 1986-87

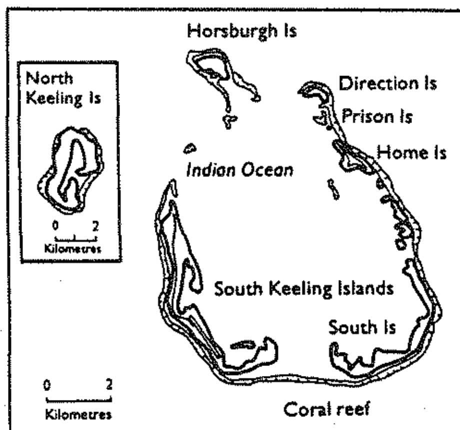
Ashmore and Cartier Islands Territory



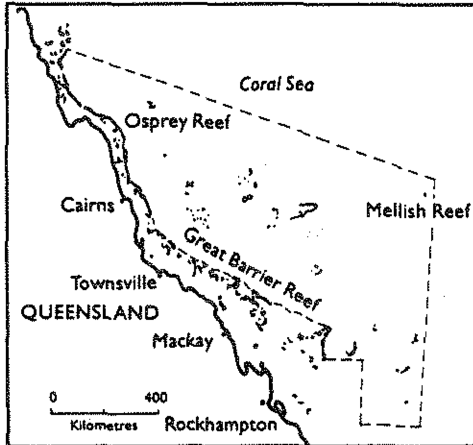
Christmas Islands Territory



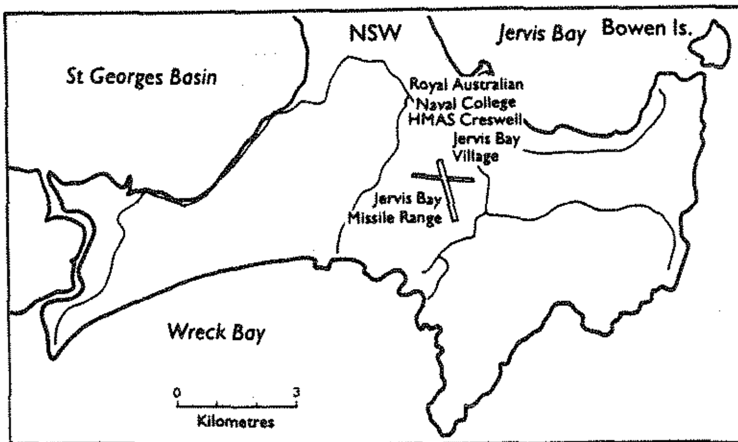
Cocos (Keeling) Islands Territory



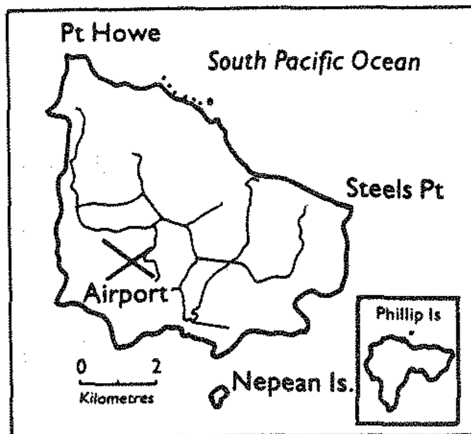
Coral Sea Islands Territory



Jervis Bay Territory



Norfolk Island



SUMMARY OF RECOMMENDATIONS

TERRITORY OF ASHMORE AND CARTIER ISLANDS

RECOMMENDATION 1

The Committee recommends that, the Ashmore and Cartier Islands Acceptance (Amendment) Act 1985 having been proclaimed, the Commonwealth initiate negotiations with the Northern Territory Government with a view to assuring the existence of mutually acceptable arrangements for the administration of the Ashmore and Cartier Territory in accordance with the current legal regime. (para 2.5.24)

RECOMMENDATION 2

The Committee recommends that the ANPWS, having regard to the individual circumstances of each of the external territories, work towards the standardisation, to the greatest degree possible, of legislation relating to nature conservation in the territories, by way of regulations under the NPWC Act. (para 2.6.7)

RECOMMENDATION 3

The Committee recommends that the ANPWS ensure, through the promulgation of wildlife regulations under the NPWC Act if necessary, that regimes of wildlife legislation exist for the proper protection of wildlife in the Ashmore and Cartier Territory. (para 2.6.8)

RECOMMENDATION 4

The Committee, noting Commonwealth interests, recommends the incorporation of Ashmore and Cartier Islands into the Northern Territory. (para 2.8.9)

TERRITORY OF CHRISTMAS ISLAND

RECOMMENDATION 5

The Committee recommends that the law of Western Australia (as amended from time to time) be extended to Christmas Island to replace the currently applied law *in so far as that law has not been developed as a response to a unique or particular* characteristic of Christmas Island. (para 3.10.13)

RECOMMENDATION 6

The Committee recommends that, in the absence of the establishment on Christmas Island of a reviewing mechanism, relevant Commonwealth Departments monitor the possible application of Western Australian laws to Christmas Island in consultation with the Christmas Island Assembly, to ensure that the particular circumstances of Christmas Island and/or its residents are not adversely affected by the extension of a law. (para 3.10.15)

RECOMMENDATION 7

The Committee recommends that the Commonwealth accelerate the development of administrative and political reform on Christmas Island to ensure the progressive development towards the establishment of a local government body on Christmas Island with an expanded role, including direct access to the Commonwealth Minister in respect of laws to apply on the Island, for reviewing Western Australian laws for their appropriateness to the Territory. (para 3.10.17)

RECOMMENDATION 8

The Committee recommends that the Commonwealth initiate discussion with the Government of Western Australia in respect to the long term future of Christmas Island including its possible incorporation within the State of Western Australia. (para 3.10.19)

RECOMMENDATION 9

The Committee recommends that the Commonwealth initiate action designed to overcome the breaches of human rights identified by the Human Rights and Equal Opportunity Commission. (para 3.10.21)

RECOMMENDATION 10

The Committee recommends that the Commonwealth arrange for the provision of a formal legal aid service for the residents of Christmas Island. (para 3.10.23)

RECOMMENDATION 11

The Committee recommends that the Commonwealth ensure that, consistent with the particular circumstances of Christmas Island, as many as possible of the ILO Conventions ratified by Australia are applied to Christmas Island. (para 3.10.25)

RECOMMENDATION 12

The Committee recommends that the Commonwealth ensure, in its administration of Christmas Island, that the Territory not assume the characteristics of a non-self-governing Territory within the terms of Chapter X1 of the United Nations Treaty. (para 3.10.27)

RECOMMENDATION 13

The Committee recommends that the Commonwealth review the Administration Ordinance 1968 with particular reference to the title, functions and powers of the Administrator. (para 3.12.5)

RECOMMENDATION 14

The Committee recommends that, in applying the law of Western Australia, priority attention be given to the application of appropriate laws and the development of education programs in respect to domestic violence. (para 3.15.8)

RECOMMENDATION 15

The Committee recommends that the Family Law Act 1975 be applied to Christmas Island. (para 3.15.9)

RECOMMENDATION 16

The Committee recommends that the ANPWS ensure, through the promulgation of regulations under the NPWC Act if necessary, that a regime of nature conservation legislation exists for the proper protection of Christmas Island's wildlife and environmental values. (para 3.16.5)

TERRITORY OF COCOS (KEELING) ISLANDS

RECOMMENDATION 17

The Committee recommends that the laws of Western Australia (as amended from time to time) be applied in Cocos to replace the currently applied law, in so far as the currently applied law has not been developed to a unique or particular characteristic of the Cocos (Keeling) Islands Territory. (para 4.11.17)

RECOMMENDATION 18

The Committee recommends that the Commonwealth, ensuring, consistent with human rights considerations and Australia's international obligations, that the local culture and traditions of the Cocos Malay community continue to be be taken into account, foster the development of further self-government in the Territory, including enfranchisement of <u>all</u> residents of Cocos (Keeling) Islands in respect of matters affecting the Territory generally. (para 4.11.19)

RECOMMENDATION 19

The Committee recommends that the Commonwealth, in consultation with Territory residents, develop a mechanism, such as a local government body with an expanded role, including direct access to the Commonwealth Minister in respect of laws to apply on Cocos (Keeling) Islands, for reviewing Western Australian laws for their appropriateness to the Territory. (para 4.11.21)

RECOMMENDATION 20

The Committee recommends that, in the absence of the establishment on Cocos of a reviewing mechanism, relevant Commonwealth Departments monitor and report on the possible application of Western Australian laws to the Territory, in consultation with Territory residents, to ensure that the particular circumstances of the Cocos (Keeling) Islands Territory and/or its residents are not adversely affected by the extension of a law. (para 4.11.23)

RECOMMENDATION 21

The Committee recommends that the Commonwealth institute discussions with the Western Australian Government in respect of the long-term future of Cocos (Keeling) Islands including their possible incorporation within the State of Western Australia. (para 4.11.25)

RECOMMENDATION 22

The Committee recommends that the Commonwealth initiate action designed to overcome the breaches of human rights identified by the Human Rights and Equal Opportunity Commission. (para 4.11.27)

RECOMMENDATION 23

The Committee recommends that the Commonwealth arrange for the provision of a formal legal aid service for the residents of the Cocos (Keeling) Islands Territory. (para 4.11.29)

RECOMMENDATION 24

The Committee recommends that the Commonwealth ensure that, consistent with the particular circumstances of Cocos, as many as possible of the ILO Conventions ratified by Australia are applied to the Cocos (Keeling) Islands Territory. (para 4.11.31)

RECOMMENDATION 25

The Committee recommends that the Commonwealth review the Administration Ordinance 1975 with particular reference to the title, functions and powers of the Administrator. (para 4.13.2)

RECOMMENDATION 26

The Committee recommends that, in applying the law of Western Australia to Cocos, priority should be given to the application of the criminal law of Western Australia to the Territory. (para 4.14.5)

RECOMMENDATION 27

The Committee recommends that, in applying the law of Western Australia to Cocos, priority attention be given to the application of appropriate workers' compensation laws in the Territory. (para 4.15.9)

RECOMMENDATION 28

The Committee recommends that North Keeling be declared a park or reserve under the provisions of the NPWC Act. (para 4.17.6)

RECOMMENDATION 29

The Committee recommends that the ANPWS ensure, through the promulgation of Regulations under the NPWC Act, if necessary, that a regime of nature conservation legislation exist for the proper protection of the environment, including the waters, of the Cocos (Keeling) Islands Territory. (para 4.17.7)

CORAL SEA ISLANDS TERRITORY

RECOMMENDATION 30

The Committee recommends that the Commonwealth identify the laws currently applying in the Coral Sea Islands Territory, in particular those applying pursuant to section 4 of the Coral Sea Islands Act 1969. (para 5.2.8)

RECOMMENDATION 31

The Committee recommends that the Commonwealth institute formal discussions with the Queensland Government in relation to the future status of the Territory, the possible application of Queensland law and its possible incorporation in Queensland. (para 5.7.7)

RECOMMENDATION 32

The Committee recommends that wildlife regulations under the NPWC Act, currently applying in Commonwealth waters, be extended to the Territory. (para 5.8.11)

RECOMMENDATION 33

The Committee recommends that a full-scale assessment be undertaken to determine the feasibility of declaring the whole of the Coral Sea Islands Territory and surrounding territorial waters a park or reserve under the provisions of the NPWC Act. (para 5.8.12)

RECOMMENDATION 34

The Committee recommends that the status of Elizabeth and Middleton Reefs be reviewed with the object of assessing the feasibility of incorporating them within the State of New South Wales. (para 5.9.11)

JERVIS BAY TERRITORY

RECOMMENDATION 35

The Committee recommends that the Aboriginal Land Grant (Jervis Bay Territory) Act 1986 be amended to secure for the Aboriginal residents the right to control their land and access to it. (para 6.11.5)

RECOMMENDATION 36

The Committee recommends that discussions be held between the Commonwealth and the NSW Governments in relation to the future status of the Jervis Bay Territory, the application of NSW law, and the Territory's possible incorporation within the State of NSW. Further, that these discussions be subject to assurances from the NSW Government that:

1. existing parks and other environmentally sensitive areas are protected;

2. the Village area not be substantially extended;

3. the policing of the Territory be continued by offiers sensitive to the needs of the community, especially the Wreck Bay community, and that consideration be given to policing the Wreck Bay community by the Australian Federal Police on a contract basis. (para 6.14.7)

RECOMMENDATION 37

The Committee recommends that, as an interim measure, and to facilitate the local administration of the Territory, discussions also be held between the Commonwealth and NSW Governments in relation to the possible administration of Jervis Bay Territory by the Shoalhaven City Council. (para 6.14.8)

TERRITORY OF NORFOLK ISLAND

RECOMMENDATION 38

The Committee recommends that lists or tables showing exactly which Commonwealth Acts extend to Norfolk Island and which Imperial statutes have been received, be compiled and published and made generally available. (para 7.5.10)

RECOMMENDATION 39

The Committee recommends that the Commonwealth Parliament amend the Commonwealth Electoral Act 1918 to give optional enrolment rights to the people of Norfolk Island; the electorate to which the voters would be attached to be determined on the advice of the Australian Electoral Commission. (para 7.10.7)

RECOMMENDATION 40

The Committee recommends that the Department of the Arts, Sport, the Environment, Tourism and Territories exercise a coordinating role to overcome delays in assent to legislation. The Committee also recommends that the Commonwealth Government consider adopting a policy to require responses within a fixed period of receipt of notification from the Norfolk Island Administrator of legislation requiring assent. (para 7.11.3)

RECOMMENDATION 41

The Committee recommends that Australian citizenship be a requirement for eligibility to stand for election or to vote in Norfolk Island Legislative Assembly elections, for all new enrollees registering on the Norfolk Island electoral roll on or after a commencement date to be determined before the end of 1991. (para 7.12.8)

RECOMMENDATION 42

The Committee recommends extending the operation of the Administrative Appeals Tribunal, Ombudsman Act and the Freedom of Information Act to an appropriate range of decisions, but only as an interim measure, pending the development by the Norfolk Island Government of an independent Administrative Review Tribunal. (para 7.13.8)

RECOMMENDATION 43

The Committee, recommends that the Commonwealth continue to work closely with the Norfolk Island Legislative Assembly to ensure that all the industrial relations legislation of Norfolk Island be developed to the point where Australia's obligations under International Labour Organisation Conventions are met. (para 7.15.10)

RECOMMENDATION 44

The Committee recommends that the Commonwealth adopt, in principle, an increasing cost recovery approach. (para 7.16.6)

RECOMMENDATION 45

The Committee recommends that the Department of Social Security establish a formal review mechanism to monitor the adequacy of social security provisions on Norfolk Island. (para 7.19.6)

RECOMMENDATION 46

The Committee recommends that the Commonwealth Grants Commission undertake a review of the living standards, social security provisions and economic base of Norfolk Island. (para 7.20.5)

CHAPTER 1

INTRODUCTION

1.1 Conduct of the Inquiry

1.1.1 On 22 September 1988, the then Attorney-General, the Hon. Lionel Bowen, QC, MP, requested that the House of Representatives Standing Committee on Legal and Constitutional Affairs (the Committee) of the 35th Parliament conduct an inquiry into the legal regimes of Australia's external territories. The Terms of Reference for the inquiry are set out at page xv.

1.1.2 Following consultations between the Chairman of the Committee and the then Minister for the Arts, Sport, the Environment, Tourism and Territories, Senator the Hon. Graham Richardson, the Committee agreed to undertake the inquiry in two phases. It was agreed that the first phase would cover the Territories of Ashmore and Cartier Islands, Coral Sea Islands, Christmas Island, Cocos (Keeling) Islands and Norfolk Island. The Australian Antarctic Territory and the Territory of Heard Island and McDonald Islands were to be included in the second phase to commence in 1990.

1.1.3 A Sub-committee was formed to conduct the first phase of the inquiry.

1.1.4 The Terms of Reference were advertised in Australia's national daily newspapers, and by radio and in news journals in the inhabited external territories of Christmas Island, the Cocos (Keeling) Islands and Norfolk Island.

1.1.5 On 4 May 1989 the Minister for the Arts and Territories, the Hon. Clyde Holding, MP, requested that the Committee include the Jervis Bay Territory, an internal territory, within the scope of the first phase of the inquiry.

1.1.6 The inclusion of the Jervis Bay Territory in the inquiry was advertised in national press as well as the major regional newspaper in the Jervis Bay region.

1.1.7 The inquiry had not been completed when the 35th Parliament was dissolved in February 1990. With the aim of completing the inquiry following the appointment of the Committee in the 36th Parliament, the inquiry was referred to the Committee by the Attorney-General, the Hon. Michael Duffy, MP, on 15 May 1990. The Committee had access to the inquiry evidence and records of the Committee of the 35th Parliament pursuant to Sessional Orders.

1.1.8 A Sub-committee was formed to take further evidence in relation to the inquiry.

1.1.9 Throughout the inquiry, submissions have been received from numerous individuals and organisations with an interest in Australia's territories including a significant number of the residents of the inhabited territories. A list of all submissions received by the Committee is provided at Appendix A. A list of exhibits is provided at Appendix B.

1.1.10 As part of its program of public hearings and inspections in respect of the inquiry, the Committee of the 35th Parliament visited the Territories of Norfolk Island, Christmas Island and the Cocos (Keeling) Islands. Evidence was also taken by the Committee at a number of public hearings in Canberra as well as at public hearings in Perth and Darwin.

1.1.11 During its visits to Norfolk Island, Christmas Island and the Cocos (Keeling) Islands, the Committee met with residents and with their representative organisations to discuss matters of concern and of relevance to the legal and administrative machinery operating within each Territory.

1.1.12 Following resumption of the inquiry in the 36th Parliament, further evidence was taken at public hearings in Jervis Bay. In addition, the Committee prepared and distributed, as a basis for discussions, a paper detailing a number of options for reforming the law and legal regimes of the Territories of Norfolk Island, Christmas Island and the Cocos (Keeling) Islands. Prior to visiting these Territories, the Committee extended a general invitation to any resident of a Territory to meet with the Committee to discuss or raise issues relevant to the inquiry. The

discussions which ensued were a significant determinant of the Committee's final views in relation to the inquiry. The Committee appreciates the co-operation and assistance extended to it by the residents, local organisations and the Administrations of the respective Territories.

1.1.13 A list of witnesses who appeared at public hearings in respect of Phase I of the inquiry is provided at Appendix C. The options papers are included at Appendix D.

1.1.14 Several editions of the Committee's newsletter have also been prepared and distributed, for the information of the wider community, as well as interested participants. The newsletters have included details on the progress of the inquiry as well as highlighting relevant issues.

1.1.15 The submissions authorised for publication and the transcripts of evidence from the public hearings are available from the House of Representatives Committee Office, the Parliamentary Library and the National Library of Australia.

1.2 Background to the Inquiry

1.2.1 In deciding to conduct an inquiry into Australia's external territories and the Jervis Bay Territory the Committee was aware of developments and, to a greater degree, a perceived lack of progress, in the provision of an appropriate administrative and legal framework for the territories.

1.2.2 In particular, the Committee was mindful of difficulties which arose during 1987 and 1988 in connection with the prosecution for a murder on Christmas Island. The prosecution of this matter highlighted the fact that the laws of Christmas Island and the Cocos (Keeling) Islands had not, at the time, progressed sufficiently to ensure the residents of those Territories a right to trial by jury.

1.2.3 The fact that the legal regimes of both Christmas Island and the Cocos (Keeling) Islands remained structured around the law of Singapore applying in the mid 1950s raised immediate questions about the adequacy of the laws and the extent

to which the residents of these Territories enjoyed the same rights, benefits and protection as other Australian citizens.

1.2.4 It is also relevant to note that the inquiry was announced exactly twelve years after the presentation, by the Hon. Sir John Nimmo, CBE, O.St.J, of the Royal Commission Report into matters relating to the future of Norfolk Island (the Nimmo Report).

1.2.5 The Nimmo Report was followed by the enactment of the Norfolk Island Act 1979. The Act is the basis of Norfolk Island's legislative, administrative and judicial system.

1.2.6 The Commonwealth, of course, retains ultimate responsibility for Norfolk Island. In the absence of representation of the residents of Norfolk Island in the Commonwealth Parliament and after 10 years of operation of the Norfolk Island Act, the Committee believed it appropriate and timely for a review of the adequacy of the legal regime which has evolved in the Territory.

1.2.7 The attainment of self-government for the Australian Capital Territory (ACT) has to some extent broken the nexus between the ACT and the Jervis Bay Territory. It also negates a rationale for basing the legal regimes of the Jervis Bay Territory and the Coral Sea Islands Territory on the laws of the ACT.

1.2.8 It was principally due to the change in the status of the ACT that the then Minister for the Arts and Territories requested that the Committee include the Jervis Bay Territory in the inquiry.

1.2.9 The above factors, together with the minimal legislative activity in the territory of Ashmore and Cartier Islands and the Coral Sea Islands Territory convinced the Committee of a need for a concentrated and full review of the current status of the law and administrative machinery of all of Australia's remote territories.

1.3 The Inquiry as a Catalyst

1.3.1 The inquiry has served a useful purpose in focussing attention, particularly that of Commonwealth agencies, on Australia's responsibilities in the territories. The Committee became aware during the inquiry of the extent to which the affairs of the territories under review, and of their residents, were not of pressing interest or concern to major policy Departments or Commonwealth instrumentalities.

1.3.2 The Committee has also noted with approval the formation, as a response to the announcement of the inquiry, of a working group within the Department of the Arts, Sport, the Environment, Tourism and Territories (DASETT) to oversight a program of law reform for the territories. The Committee commends DASETT for its commitment to the need for reform as evidenced by the formation of the working group.

1.3.3 The Committee is hopeful that the working group will, subject to acceptance by the Government of the Committee's recommendations, be in a position to implement reforms without delay.

1.3.4 Other notable developments during the course of the inquiry were the finalisation of a Memorandum of Understanding between the Commonwealth, and the Cocos (Keeling) Islands Council and the Cocos Islands Co-operative Society Limited, on the steps to be taken jointly and separately towards the extension to the Cocos (Keeling) Islands of mainland equivalent living standards and levels of services.

1.3.5 A further major change was made during the course of the inquiry to the legal regime of Ashmore and Cartier Islands with the proclamation of the Ashmore and Cartier Islands Acceptance Act 1985 on 1 October 1989.

1.4 Guiding Principles

1.4.1 During the conduct of the inquiry, the Committee detected several elements common to all the external territories.

1.4.2 Most strikingly, inadequacies were detected - although in varying degrees - in respect of the legal regimes of each territory.

1.4.3 It clearly emerged, as the inquiry proceeded, that the inadequacy in each case could be attributed primarily to historical factors. It also emerged that, exacerbating the situation in more recent times has been the lack of priority attention and the lack of sufficient resources to address these inadequacies. As a consequence, no significant remedial action has been taken, to date.

1.4.4 The Committee stresses that it has not been its intention to dwell unduly on the past. Rather, noting the lessons of those times, the Committee has directed the thrust of its inquiry towards the future directions and emerging requirements of each territory.

1.4.5 Underpinning the direction of the inquiry have been two basic premises:

(i) that all territories considered during phase I of the inquiry will continue to be part of Australia; and

(ii) arising from (i), that the citizens of the territories - Australian citizens - must be accorded the same or at least comparable benefits, rights and protection under the law as are enjoyed by mainland citizens.

1.4.6 In order to ensure that territory residents have full and equal rights as Australian citizens, the Committee has concluded that adjustments to the legal regimes of each territory are essential, and must be actioned quickly.

1.4.7 Several guiding principles have served to bolster these basic premises.

1.4.8 The Committee sees it as a minimum requirement, in respect of the inhabited territories, that local government bodies be assured the same powers as

are enjoyed by comparable bodies on the mainland, with the proviso that final authority be vested in the Commonwealth Minister.

1.4.9 One of the most fundamental principles for the Committee has been its conviction that Australian citizens in each of the inhabited territories should have equal voting rights, which are neither inferior nor superior to those of other Australian citizens in that territory.

1.4.10 In framing its recommendations, the Committee has adopted the general principle that, where a significant degree of reform is required, the laws based on those of the closest mainland state or territory are the most appropriate to be applied in each territory.

1.4.11 Flowing from this general principle, the Committee considers it essential that the Commonwealth ensure the availability of an adequate legal infrastructure in respect of each territory. There should be appropriate levels of courts available for the processing of legal claims which are broadly comparable with those of the adjacent state or territory.

1.4.12 As an additional requirement, the Committee stresses the need to make formal provision to ensure that territory residents have, of right, access to legal aid.

1.4.13 The Committee considers it essential that, in considering and adjusting the legal regimes of each external territory, due regard be given to land usage and planning considerations.

1.4.14 A special aspect of the inhabited territories concerns the right to permanent residency which pertains to each. At present mainland citizens who may wish it, do not have an automatic right to permanent residency in the external territories. These arrangements should be regularly reviewed by the Commonwealth for their continuing appropriateness.

1.4.15 Overall, the Committee has assessed it as vital that all residents have the opportunity to be involved in decision-making processes in respect of matters affecting the territory generally.

1.4.16 In tandem with this increasing involvement on the part of territory residents, the Committee has concluded that the title, powers and functions of the Administrator in each of the inhabited external territories needs to be reviewed. This assessment is based on evidence the Committee has received to the effect that the role of the Administrator, currently an almost vice-regal role coupled with extensive administrative responsibilities, is anachronistic and inappropriate to the needs of the relevant territories in the 1990s and beyond.

1.4.17 Accordingly, the Administrator's role, powers and functions warrant revision to encompass the role and functions of Commonwealth department regional directors and, if necessary, a minor ceremonial function.

1.4.18 Inevitably, the proposed adjustments to the legal regimes of the external territories will have impact in financial and human resource terms. While such considerations have fallen outside the scope of the inquiry terms of reference, the Committee is concerned to ensure that adequate financial provision is made supporting the trend towards increasing self-management in the inhabited territories. In this context, the Committee considers it appropriate that the Commonwealth Grants Commission assess the extent to which the Commonwealth should be involved in the provision of services and funds to the territories.

1.4.19 Against this background, the Committee has formulated a number of guiding principles of relevance to the uninhabited external territories. In addition, a number of guiding principles have underpinned the framing of the Committee's recommendations regarding the inhabited external territories.

1.4.20 In respect of the uninhabited external territories, a key concern of the Committee has been to ensure that their legal regimes do not become anachronistic or inconsistent with the legal regime applying in the adjacent state or territory. Having no distinct legal systems of their own, the Committee considers that there

is considerable merit in the proposal that they be incorporated in the nearest mainland legal jurisdiction.

1.4.21 The Committee is aware of the provisions of section 123 of the Constitution which provides a mechanism for the alteration of the limits of states.

1.4.22 Whilst section 123 requires the approval of the majority of electors of a state before any alteration could occur, the Committee has nevertheless concluded that the interests of the uninhabited territories can best be served by this course being pursued. It is to be noted that, in respect of Ashmore and Cartier Islands, which are nearest to that part of the mainland which is itself a territory, no such constitutional considerations arise.

1.4.23 An overriding consideration concerning the uninhabited external territories has been concern to secure their proper management from the environmental and resource perspectives.

1.4.24 *The Jervis Bay Territory is, in a sense, an anomalous inclusion in this* Report, as it is an enclave within the Australian mainland.

1.4.25 The Committee has approached issues in relation to the Jervis Bay Territory on the basis that residents should be entitled to participate in their own government. Moreover, the Committee notes that the factors which led to the establishment of the Territory are no longer of paramount importance. Consistent with its thinking in relation to the other territories mentioned above, the Committee favours incorporation of the Territory in New South Wales, making special provision, however, to ensure appropriate environmental protection in the Territory. A particularly important feature of the Committee's recommendations has been to ensure that the rights of the Aboriginal residents in Wreck Bay are protected.

1.4.26 In respect to the Indian Ocean Territories, recognising that the legal regime of each is seriously out of date and inadequate, having regard to the small populations of each of these Territories, and taking into account the close links established between the community of each Territory and Western Australia, the

Committee favours the adoption of the legal regime of Western Australia, providing that it is adapted in each case to the needs of Territory residents.

1.4.27 The Committee notes that, whilst historically and culturally, there are significant divergences between the two Territories, there are also underlying similarities. Both Territories, for example, have a substantial component of the population who are descendants of the labourers brought to Cocos and Christmas Island in the nineteenth century, to provide cheap labour for a copra plantation and a mine, respectively.

1.4.28 In both Territories, the legal and administrative regimes have been characterised by abuses of rights, exploitation and limited opportunities for self management.

1.4.29 In considering possible options for these Territories, the Committee has aimed to secure, as far as possible, given the unproven capacity in each case for self-sustaining economic development, that the resident populations have an effective say in their future government.

1.4.30 It is particularly relevant to note, in this context, that within each Territory, the various elements of the community have distinct and legitimate needs which must be catered for. It is essential that the Commonwealth maintain overall responsibility in relation to the welfare of such distinct groups.

1.4.31 The Committee emphasises that the resident populations in each Territory - encompassing the various community elements in each - have expressed their wish for the laws of Western Australia, with suitable modifications reflecting local circumstances, to be adopted.

1.4.32 In respect of the Territory of Norfolk Island, principal considerations were the Island's distinctive history, the degree of self-management achieved and the strength of its economic base.

1.4.33 A particular concern of the Committee is that elements of the Norfolk Island community, though Australian citizens, do not have a right to vote in Australian mainland elections - a fundamental democratic right enjoyed by other Australian citizens. The Committee, accordingly, has recommended action in this regard. Overall, however, the Committee suggests no wholesale reform in respect of Norfolk Island, favouring instead some modifications and fine-tuning in specific areas of its extant legal regime.

1.4.34 The Committee considers that historic settlements on Norfolk Island, being directly related to Australia's history, should attract continuing Commonwealth support.

Conclusion

1.4.35 Overall, the Committee's recommendations are directed at ensuring, in respect of the occupied territories, that no Australian residents are subject to laws or administrative actions that do not accord with acceptable norms in mainland Australia. The recommendations in respect of the unoccupied territories seek to overcome what appear to the Committee to be anomalies in their status as external territories.

1.5 Framework of the Report

1.5.1 A Chapter of the Report is devoted to each of the territories reviewed during the first phase of the inquiry. For ease of reference, the chapters have been arranged in alphabetical order, viz Ashmore and Cartier Islands, Christmas Island, Cocos (Keeling) Islands, Coral Sea Islands, Jervis Bay, Norfolk Island.

1.5.2 Chapter 2 is dedicated to the Territory of Ashmore and Cartier Islands. The Chapter principally focusses on the domestic, international, financial, legal and constitutional considerations associated with a proposal to incorporate the Territory into the Northern Territory.

1.5.3 In Chapters 3 and 4, the Committee addresses the issues in connection with the legal regimes of, respectively, Christmas Island and the Cocos (Keeling) Islands. Each Chapter provides historical background to the current legal regimes of each Territory and addresses the domestic and international considerations which have led the Committee to conclude that the currently outdated and outmoded laws warrant immediate remedy.

1.5.4 In Chapter 5, issues of relevance to the Coral Sea Islands Territory are examined. The Chapter focusses, to a large extent, on the Territory's environmental significance.

1.5.5 Chapter 6 is dedicated to the Jervis Bay Territory. The Chapter principally addresses the Commonwealth's current role vis-a-vis the Territory. It also focusses on the needs of the four distinct groups of Territory residents, as well as on environmental considerations.

1.5.6 The legal regime of the Territory of Norfolk Island is addressed in Chapter 7. In this Chapter, consideration is given to the progress made on the Island since self-government was introduced in 1979, and to areas of law in which further action can be taken to ensure that Territory residents have benefits, rights and protection under the law which are the same, or at least comparable, with mainland standards.

CHAPTER 2

TERRITORY OF ASHMORE AND CARTIER ISLANDS

2.1 Description/Historical Background

2.1.1 The Territory of Ashmore and Cartier Islands (Ashmore and Cartier) is comprised of the Ashmore Reef (Middle, East and West Islands) and Cartier Island. The Islands are situated in the Timor Sea approximately 320 kilometres off the northwest coast of Australia, 800 kilometres west of Darwin and 100 kilometres south of the Indonesian island of Roti. They are small, totalling five square kilometres in area, uninhabited and comprised of coral and sand, with a cover of grass.

2.1.2 The Islands were discovered by Europeans in the late 18th and early 19th centuries. Inhabitants of present-day Indonesia have traditionally fished in the area[1].

2.1.3 The Ashmores were annexed by Great Britain in 1878 and Cartier Island in 1909[2].

2.1.4 By an *Order in Council dated 23 July 1931, it was ordered that the Islands* be placed under the authority of the Commonwealth of Australia. The Islands were declared to be so accepted by the Commonwealth as a Territory of the Commonwealth pursuant to the Ashmore and Cartier Islands Acceptance Act 1933 (the 1933 Act). The acceptance was proclaimed to take effect from 10 May 1934[3].

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1 H Burmester, 'Island Outposts of Australia', Australia's Offshore Maritime Interests, Canberra, 1985, p.59.
2 Yearbook Australia, 1988, p.952.
3 H Renfree, The Federal Judicial System of Australia, Sydney, 1984, p.779.

2.2 Applicable Law

2.2.1 The 1933 Act provides that a Commonwealth law has effect in and in relation to the Territory, except in so far as the context otherwise requires, as if the Territory were an internal territory.

2.2.2 The automatic extension of Commonwealth Acts to Ashmore and Cartier, unless otherwise provided, is the reverse of the position applying in the other external territories, the subject of this Report.

2.2.3 Section 6 of the 1933 Act originally preserved the laws in force in Ashmore and Cartier at the date of acceptance. In 1938, however, the Ashmore and Cartier Islands Acceptance (Amendment) Act 1938 (the 1938 Act) provided that the Territory was to be annexed to and deemed part of the Northern Territory. The laws, Ordinances and regulations which were from time to time in force in the Northern Territory were, so far as applicable, to apply to and be in force in Ashmore and Cartier. In addition the legislative and judicial provisions in force in the Northern Territory applied to Ashmore and Cartier. The laws of the Northern Territory at the time included laws of South Australia which had been applied at the time of the acceptance by the Commonwealth from South Australia of the Northern Territory as well as certain imperial legislation and Commonwealth law.[4]

2.2.4 When the Northern Territory achieved self-government, new arrangements for Ashmore and Cartier were brought about under the Ashmore and Cartier Islands Acceptance (Amendment) Act 1978 (the 1978 Act).

2.2.5 Pursuant to the 1978 Act the laws in force in the Northern Territory, other than the Northern Territory (Administration) Act 1910, as at 30 June 1978, were to apply in Ashmore and Cartier. The 1978 Act also provided that the Governor-General may make Ordinances for the peace, order and good government of the Territory. The law of Ashmore and Cartier was, after 1978, substantially the same as that of the Northern Territory prior to 1 July 1978, with three exceptions:

[4] Evidence, pp.S399, S240-S241 and S1103.

- Commonwealth Acts applying in the Northern Territory at that date may, according to their context, have not applied to Ashmore and Cartier;

- Commonwealth Acts made after 1 July 1978 generally applied to Ashmore and Cartier; and

- local Northern Territory law, including its unenacted law, could have been superseded or supplemented by Ashmore and Cartier Ordinances made by the Governor-General.

2.2.6 The Commonwealth has subsequently passed the Ashmore and Cartier Islands Acceptance (Amendment) Act 1985 (the 1985 Act). The 1985 Act was proclaimed during the conduct of this inquiry on 1 October 1989. A number of Ordinances made under the Act came into force on the same day. Section 6 of the Act provides that the laws of the Northern Territory as in force from time to time are, so far as applicable, in force in Ashmore and Cartier.

2.3 Administrative Arrangements

2.3.1 Section 11 of the 1978 Act provides that, where, by any law in force in the Territory by virtue of section 6, a power or function is vested in a person or authority (not being a court) that power or function is, in relation to the Territory, vested in and may be exercised or performed by the Minister.

2.3.2 Pursuant to the Administrative Arrangements Order, administrative responsibility for Ashmore and Cartier is vested in the Minister for the Arts, Sport, the Environment, Tourism and Territories. Under current administrative arrangements, the Minister for the Arts, Tourism and Territories is the responsible Minister.

2.4 Legislative Activity

2.4.1 There was minimal legislative activity in relation to Ashmore and Cartier prior to proclamation of the 1985 Act in 1989, with only one Ordinance having been made since 1978, namely the Migratory Birds Ordinance 1980.

2.4.2 The Commonwealth had also, in that time, utilised the provisions of the National Parks and Wildlife Conservation Act 1975 to declare the Ashmore Reef National Nature Reserve.

2.4.3 As mentioned, three additional Ordinances: an Application of Laws Ordinance; an Interpretation Ordinance and a Criminal Code (Amendment) Ordinance, were promulgated at the time the 1985 Act was proclaimed.

2.4.4 The Application of Laws Ordinance repeals a number of Northern Territory laws in their application to Ashmore and Cartier; the Criminal Code (Amendment) Ordinance 1989 amends one and repeals five sections of the Northern Territory Criminal Code in its application to Ashmore and Cartier, most notably in relation to mandatory life imprisonment for murder, suicide and the treatment of sex offenders, and the Interpretation Ordinance 1989 contains machinery provisions for the interpretation of the law of the Territory.

2.5 Adequacy of Laws and Administrative Arrangements

2.5.1 The lack of an active legislative program combined with the effective freezing of the law of Ashmore and Cartier from 30 June 1978 to 1 October 1989 left the law of the Territory stagnant and out of date for that period.

2.5.2 The proclamation of the 1985 Act obviously overcomes much of the criticism made in early submissions to the inquiry about the adequacy of the law in the Territory.

2.5.3 BHP Petroleum's (BHP) major concern, for instance, was that the civil and criminal law applicable in the Territory was frozen at 30 June 1978. BHP commented:

> As time progresses the task of discovering, stating and applying the law at that date becomes increasingly difficult and the legal regime increasingly outmoded and inconvenient.[5]

2.5.4 BHP was concerned that the development of the Jabiru Field petroleum discovery within the adjacent area of Ashmore and Cartier was being hindered by the Territory's laws.

2.5.5 By virtue of section 11 of the Petroleum (Submerged Lands) Act 1967 the laws of Ashmore and Cartier are applicable in the adjacent area of the Territory.

2.5.6 The Crimes at Sea Act 1979 applies the criminal law of the Northern Territory to the Ashmore and Cartier adjacent area.

2.5.7 Accordingly, the petroleum or mineral activities undertaken in the Ashmore and Cartier adjacent area are affected by the legal regime applying in the Territory.

2.5.8 BHP in commenting on the adequacy of this arrangement notes:

> Since discovery of the Jabiru Field by BHP Petroleum in 1984 there has been an accelerated and sustained increase in petroleum exploration and exploitation operations in the adjacent area. Part of the risk in such operations has been, and continues to be, the inadequate legal regime applicable in the adjacent area.[6]

2.5.9 Notably, arrangements for the administration of aspects of petroleum activities in the adjacent area, such as inspection of oil rigs, were also cited by the Northern Territory as an example of inefficiencies and inadequacies in the law of Ashmore and Cartier and its administration.

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[5] Evidence, p.S327.

[6] Evidence, p.S320.

2.5.10 As a result of the 1978 Act, the Inspection of Machinery Act (Northern Territory) (as at 30 June 1978) applies in the adjacent area. The Northern Territory asserted that the Commonwealth had not, however, delegated to any Northern Territory person or authority, the power to carry out inspections in Ashmore and Cartier or the adjacent area pursuant to that Act. The Commonwealth instead utilised Commonwealth appointed inspectors, normally based elsewhere in the Commonwealth.[7]

2.5.11 The Northern Territory claims in fact that the Commonwealth, through the Minister, has not delegated to any Northern Territory official or organisation any powers in any Northern Territory law applying in Ashmore and Cartier. Rather, it asserts, the Commonwealth has utilised the provisions of certain applied Commonwealth Acts and thereby superimposed an ad hoc and supplementary body of laws on the existing regime of Northern Territory applied laws which has created an unsatisfactory regime of 'domestic law'.[8]

2.5.12 In a submission at odds with that of the Northern Territory, the Department of the Arts, Sport, the Environment, Tourism and Territories (DASETT) expressed the view that the laws applicable to Ashmore and Cartier are sufficient to meet the requirements of the Territory for basic regulatory and environment protection purposes.[9]

2.5.13 DASETT has also advised the Committee that the Commonwealth laws applied to Ashmore and Cartier are administered by Northern Territory officials on behalf of the Commonwealth as the need arises.

2.5.14 In considering options for a future legislative structure for Ashmore and Cartier, DASETT concluded that arrangements with the Northern Territory were working well and that proclamation of the 1985 Act would bring the legal regime up

[7] Evidence, p.S1105.
[8] Evidence, pp.S1107-S1108.
[9] Evidence, p.S415.

to date 'with an appropriate body of Australian law and a mechanism for applying that law to (Ashmore and Cartier) conditions'.[10]

2.5.15 The Department of Primary Industries and Energy (DPIE) also suggested, contrary to the initial view of the Northern Territory, that since Ashmore and Cartier is unpopulated but for the temporary residents involved in the petroleum exploration and development industry, the question of the effect of the legislation is not relevant. DPIE believes the arrangements in place for the administration of petroleum activities in the Ashmore and Cartier adjacent area work well with the only matter of contention relating to the reimbursement of administrative costs.[11]

2.5.16 Representatives of the Northern Territory Government at public hearings in Darwin on 13 August 1990, reiterated, despite the proclamation of the 1985 Act, objections to the arrangements for the administration of Ashmore and Cartier in the following terms:

> The present situation in the petroleum industry, in which the adjacent areas of the Northern Territory and the Islands Territory are under different regimes is illogical. In relation to the Northern Territory adjacent area, the Northern Territory Minister is directly appointed ... By contrast, in the Islands Territory adjacent area the Commonwealth Minister is the designated authority; yet his or her powers are exercised by a range of people. Some powers are delegated to the Northern Territory Minister, some are delegated to specific Northern Territory Government appointees, and others are retained by the Commonwealth Minister. The result is constant cross-referencing of authority.[12]

2.5.17 The Northern Territory also drew attention to anomalies in the application of laws to Ashmore and Cartier subsequent to proclamation of the 1985 Act and promulgation of the Application of Laws Ordinance 1989. The anomalies relate in the main to confusion about the status of certain of the laws purported to be applied to Ashmore and Cartier pursuant to that Ordinance. The Northern Territory alleges that certain of the nominated laws had in fact already been repealed or amended

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[10] Evidence, p.S420.
[11] Evidence, p.S1538.
[12] Evidence, pp.1314-1315.

with a number of obviously unintended consequences resulting. The Northern Territory believes that these anomalies are illustrative of the difficulties that will persist with the continuance of the current arrangements for the administration of Ashmore and Cartier.[13]

Conclusions

2.5.18 The evidence on both the adequacy of the legal regime of Ashmore and Cartier and the arrangements for its administration varied. While it was argued that the laws applicable to the Territory were satisfactory in meeting the requirements of a remote and uninhabited island territory it was also suggested that the laws were inadequate and that arrangements for the administration of the Territory were inappropriate.

2.5.19 A legal regime based on laws frozen in time will rarely, if ever, be appropriate. The law of Ashmore and Cartier was effectively twelve years out of date at the time the 1985 Act was proclaimed.

2.5.20 The Committee agrees with BHP in respect of a legal regime caught in such a time warp:

> As time progresses the task of discovering, stating and applying the law ... becomes increasingly difficult, and the legal regime increasingly outmoded and inconvenient.[14]

2.5.21 The Committee is concerned at the delay which occurred in implementing the 1985 Act and the consequent impact of the delay on activities undertaken in Ashmore and Cartier and its adjacent area, and potentially on those persons employed to work in those areas.

2.5.22 Subject to the requirement that the Commonwealth monitor and ensure the appropriateness of the laws of the Northern Territory which are from time to time made applicable to Ashmore and Cartier pursuant to the operation of the 1985

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[13] Evidence, p.1317.
[14] Evidence, p.S327.

Act, the Committee believes, on balance, that the legal regime of Ashmore and Cartier is currently appropriate to its circumstances.

2.5.23 There is significant disagreement, however, evident in the submissions of DPIE and DASETT on the one hand, and the Northern Territory Government on the other, as to the extent to which the current administrative arrangements for Ashmore and Cartier are either appropriate or effective. The claims of DPIE and DASETT that arrangements with the Northern Territory for the administration of Ashmore and Cartier are 'working well' are clearly contradicted by the Northern Territory Government.

RECOMMENDATION 1

2.5.24 The Committee recommends that, the Ashmore and Cartier Islands Acceptance (Amendment) Act 1985 having been proclaimed, the Commonwealth initiate negotiations with the Northern Territory Government with a view to assuring the existence of mutually acceptable arrangements for the administration of the Ashmore and Cartier Territory in accordance with the current legal regime.

2.6 Nature Conservation Legislation

2.6.1 The Australian National Parks and Wildlife Service (ANPWS) has, in a submission to the Committee, indicated that certain steps, in addition to those already in place, are warranted in respect of Ashmore and Cartier in order to guarantee an appropriate level of nature conservation protection in the Territory.

2.6.2 ANPWS is the principal adviser to the Commonwealth on national nature conservation and wildlife policies. Parks and reserves proclaimed in the tropical island territories, including the Ashmore Reef National Nature Reserve, provide the highest level of protection of wildlife and environmental values.

2.6.3 The potential also exists, in areas of Commonwealth jurisdiction outside parks and reserves, for effective legislative protection to be provided to wildlife under regulations to the National Parks and Wildlife Conservation Act 1975 (the NPWC Act).

2.6.4 ANPWS also drew the Committee's attention to the need for regulations under the NPWC Act for the purposes of nature conservation in Ashmore and Cartier.

2.6.5 ANPWS argues that the need for extending regulations under the NPWC Act relate to:

- the need for standardisation of conservation legislation between the Territories;
- the desirability of such legislation as an indication of the Commonwealth Government's commitment to nature conservation; and
- the utilisation of ANPWS expertise for assessing the nature conservation needs of the Territories.

Conclusion

2.6.6 The Committee accepts ANPWS arguments relating to the need for extending regulations under the NPWC Act. In relation to Ashmore and Cartier, the Committee notes that ANPWS has detected a trend in recent years, on the part of Indonesians fishing in the Territory, away from traditional subsistence harvesting and towards commercial harvesting of marine life.[15] It also notes the consequent concerns of ANPWS for the survival of the Territory's wildlife populations. Accordingly, the Committee concurs that an appropriate level of nature conservation protection in the Territory is essential.

RECOMMENDATION 2

2.6.7 The Committee recommends that the ANPWS, having regard to the individual circumstances of each of the external territories, work towards the standardisation, to the greatest degree possible, of legislation relating to nature conservation in the territories, by way of regulations under the NPWC Act.

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[15] Evidence, p.S740.

RECOMMENDATION 3

2.6.8 The Committee recommends that the ANPWS ensure, through the promulgation of wildlife regulations under the NPWC Act if necessary, that regimes of wildlife legislation exist for the proper protection of wildlife in the Ashmore and Cartier Territory.

2.7 Incorporation of Ashmore and Cartier into the Northern Territory

Domestic Considerations

2.7.1 The basis of the Northern Territory Government's original submission was that the effect of the 1978 Act was to deny Ashmore and Cartier a comprehensive system of law. The Northern Territory Government in a further submission to the inquiry, after proclamation of the 1985 Act, advised that the Northern Territory's basic policy on Ashmore and Cartier Islands remains unchanged. The Northern Territory Government stated that the incorporation of Ashmore and Cartier into the Northern Territory would fill a fundamental deficiency in its domestic law:

> The Northern Territory Government submits that with prevailing Commonwealth legislation in all areas of federal concern, *it is illogical* and *in many respects unreasonable to* cater for the domestic legislative requirements of the Territory with current Northern Territory laws, Northern Territory administration and the Northern Territory judiciary and yet for the Territory not to be part of the Northern Territory.[16]

2.7.2 The Northern Territory Government has provided a detailed analysis of the legislative and administrative history of Ashmore and Cartier.[17]

2.7.3 A significant claim of the Northern Territory Government arising from its analysis is that the practical effect of section 6 of the 1938 Act was to 'annex the islands to form part of the Northern Territory'.[18]

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[16] Evidence, pp.S1106-S1107.
[17] Evidence, pp.S1102-S1104.
[18] Evidence, p.S1103.

2.7.4 This situation prevailed, in the Northern Territory view, until the 'annexation' was broken by the 1978 Act. The Northern Territory Government submitted to the Committee that:

> ... the islands therefore reverted to exclusively Commonwealth territory. The Territory now lay outside both the geographic limits of the Northern Territory and the jurisdiction of the new Northern Territory body politic ...[19]

2.7.5 The Northern Territory accordingly summarises its position in relation to Ashmore and Cartier in the following terms:

> The Northern Territory's position is that in view of these practical facts concerning legislative control, administration and division of powers it is artificial in the extreme to have the Northern Territory legislating and administering with respect to the Territory, when it presently has no legal connection with the Northern Territory. The inconsistency should be removed by restoration of the Territory as part of the Northern Territory...[20]

2.7.6 The Northern Territory restated this position at public hearings subsequent to proclamation of the 1985 Act as follows:

> It is the Northern Territory's position that the Islands Territory should be administered in the same way as the rest of Australia, domestic matters being the province of the States or Northern Territory while matters of national concern remain the province of the Federal Government. The Northern Territory submits that on-the-ground, domestic ownership of and management of the Islands Territory should be with the Northern Territory, it being the closest constitutionally capable jurisdiction and the closest administrative regime.[21]

2.7.7 The Attorney-General's Department (AG's) has, however, demurred from the Northern Territory claim that Ashmore and Cartier was 'annexed' in 1938 to the Northern Territory. AG's state:

> This Department's view is that section 6 did not intend to create a geographical or political union, but rather an administrative union. This seems to be confirmed by section

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[19] Evidence, p.S1103.
[20] Evidence, p.S1110.
[21] Evidence, p.1314.

> 6 (2) which provided for the application to the Territory... of the Northern Territory Acceptance Act 1910 as if it formed part of the Northern Territory of Australia[22].

Conclusion

2.7.8 The legislative history of Ashmore and Cartier, while revealing the nexus with the Northern Territory does not, nevertheless, lead to the view that the relationship was ever other than based on administrative convenience.

International considerations

2.7.9 In considering the proposal to incorporate Ashmore and Cartier into the Northern Territory, the Committee was advised of important international considerations.

2.7.10 The Department of Foreign Affairs and Trade (DFAT) noted that the Territory of Ashmore and Cartier Islands has significance for Australia's foreign relations in the context of bilateral fisheries arrangements with Indonesia and petroleum exploration in the Timor Gap.[23]

2.7.11 Australia and Indonesia have reached understandings which permit Indonesian fishermen using traditional vessels and traditional fishing methods to fish in a defined area of the Australian Fishing Zone. These understandings are contained in a 1974 Memorandum of Understanding and the 1989 Agreed Minutes of Meetings between Officials of Australia and Indonesia on Fisheries.[24]

2.7.12 Under the arrangements agreed between Australia and Indonesia, traditional fishing may be carried out in the three mile territorial sea of the Ashmore and Cartier Islands except in the Ashmore Reef National Nature Reserve.

2.7.13 DFAT also noted that the boundaries of the Zone of Co-operation in the Timor Gap, agreed in negotiations between Australia and Indonesia to be the area

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22 Evidence, p.S1417.
23 Evidence, p.S1408.
24 Evidence, p.S1408.

of joint administration by them of petroleum activities, overlap slightly with the boundaries of the Territory of the Ashmore and Cartier Islands. It is expected that the Timor Gap Treaty will be implemented by new Commonwealth legislation. The legal arrangements prevailing in the adjacent area of Ashmore and Cartier will in that case not affect arrangements made for the Timor Gap.[25]

2.7.14 DFAT advised, however, that while there are foreign relations implications in the proposal to incorporate Ashmore and Cartier into the Northern Territory, there is no reason from a foreign relations perspective why such a proposal should be opposed. It made the proviso, however, that it would not wish any decision taken in relation to the Territory to jeopardise Australia's relations with Indonesia.[26]

2.7.15 DPIE advised that the incorporation of Ashmore and Cartier into the Northern Territory would have an adverse effect on Australia's relations with Indonesia on fishery matters.[27]

Conclusion

2.7.16 While incorporation of Ashmore and Cartier in the Northern Territory should not of itself affect Australia's international arrangements, the Committee accepts that changes should not be made to the status of Ashmore and Cartier which would in any way prejudice Australia's understandings with Indonesia.

Financial Considerations

2.7.17 In the view of DPIE, implementation of the Northern Territory Government's proposal for Ashmore and Cartier would result in a loss of considerable revenue to the Commonwealth from petroleum and minerals exploitation. Making the Ashmore Cartier Adjacent Area part of the Northern Territory Adjacent Area would, according to DPIE, significantly increase Northern Territory revenue at the expense of the Commonwealth.

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[25] Evidence, p.S1409.
[26] Evidence, p.S1408-S1409.
[27] Evidence, p.S1536.

2.7.18 In this context DPIE noted that:

> The petroleum resources of the Ashmore Cartier Adjacent Area are large with the major operator in the area, BHP Petroleum, estimating that there is a 50% probability of finding over a billion barrels of oil in the Timor Sea (largely the Ashmore Cartier Adjacent Area) and a 90% confidence of finding at least 700 million barrels of oil in the area. Revenue from releases in the Adjacent Area total $31,564,342.73 to date.[28]

2.7.19 The Treasury also noted that the transfer of Ashmore and Cartier to the Northern Territory could have important revenue implications for the Commonwealth.[29]

2.7.20 Treasury confirms that as a consequence of Ashmore and Cartier's current status as an external territory, the Commonwealth alone would enjoy any petroleum taxation revenues derived from the Territory, its territorial sea and the Adjacent Area. This would almost certainly, though not necessarily, change if Ashmore and Cartier were transferred to the Northern Territory.

2.7.21 Treasury make the point that if the Northern Territory were to gain access to a share of resource rent tax (RRT) from the Ashmore Cartier region then it could stand to benefit substantially. Treasury note however that:

> ... as the Northern Territory has no existing rights, revenue sharing arrangements different from those applying to other petroleum fields could be negotiated.
>
> Possible revenue sharing arrangements would be as follows:
>
> . to continue to apply the RRT to the entire area with revenues being shared on a basis agreeable to the Commonwealth but different, and less generous, than those bases applying in other areas;
>
> . to transfer to the Territory the Islands but not any rights to petroleum revenues derived from the Territorial Sea and Adjacent Area;

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[28] Evidence, p.S1537.
[29] Evidence, p.S1579.

- to give the Territory rights equivalent to those enjoyed by the States in other offshore areas.[30]

2.7.22 At public hearings, representatives of the Northern Territory Government confirmed that the Northern Territory supported the third of the above options but accepted that consequent adjustments in financial assistance to the Territory are likely to be made by the Commonwealth to offset any financial benefit gained by the Northern Territory from petroleum taxation revenues as a result of the transfer.[31]

2.7.23 In the event that the Commonwealth agreed to the transfer of Ashmore and Cartier to the Northern Territory, the Treasury counselled that the respective rights to petroleum taxation revenues should be settled prior to the transfer.

2.7.24 The Northern Territory Government acknowledged the economic implications which would flow from the incorporation of Ashmore and Cartier into the Northern Territory and suggested that, on policy grounds, these implications should be allowed to flow.

2.7.25 The Northern Territory Government claimed that the incorporation of Ashmore and Cartier into the Northern Territory would broaden and enlarge its economy, which was essential for its development as a future member State of the Commonwealth. It is also, in its view, consistent with the principle of the Offshore Constitutional Settlement.[32]

Policy Considerations

2.7.26 Representatives of DASETT gave evidence, at public hearings in respect of the inquiry, of the decision of the Commonwealth, as evidenced by the 1978 Act to retain direct responsibility for Ashmore and Cartier, thereby reaffirming its status as a separate external territory.[33]

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30 Evidence, pp.S1579-S1580.
31 Evidence, pp.1325-1327.
32 Evidence, p.1314.
33 Evidence, p.640.

2.7.27 In its submission to the inquiry, Treasury also commented on whether the Northern Territory has a substantive claim to the Islands. Treasury noted for instance that:

> There is evidence that the prospectivity of the Islands was known in 1978 when the Islands were explicitly excluded from forming part of the Northern Territory. This suggests that its exemption was not in the nature of an oversight. In addition, the geographical location of the Islands is such that the area is adjacent to the Western Australian adjacent areas. In this case, Western Australia could seek to make a claim to the Islands.[34]

2.7.28 By way of response, the Northern Territory Government commented that the existing relationships and links between Ashmore and Cartier and the Northern Territory are sufficient to counter any suggestion of a competing claim to the area. Darwin is not only the home of up to 300 of the employees involved in petroleum operations in the adjacent area, but is also the service and supply centre for operations in the area. The Northern Territory is also responsible, under delegation, for the day-to-day administration of the petroleum operations.[35]

2.7.29 In the longer term there is the likelihood of the development of the natural gas potential of the Jabiru Field being centred in Darwin.

2.7.30 In response to questions from the Committee in respect of the proposal to incorporate Ashmore and Cartier into the Northern Territory, representatives of DASETT indicated that the Department did not currently have a policy position or a settled view on this issue.[36]

2.7.31 It was indicated to the Committee, however, by the DASETT officials that in the light of changing circumstances, for instance the conclusion of negotiations with Indonesia on the Timor Gap and fishing arrangements/agreements, the legislative and administrative status of Ashmore and Cartier should arguably be revised or reviewed.

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[34] Evidence, p.S1580.
[35] Evidence, pp.1324-1325.
[36] Evidence, pp.641-645.

Legal and Constitutional Considerations

2.7.32 AG's advised that there is no legal impediment to the amalgamation of Ashmore and Cartier and the Northern Territory:

> There is no limitation in the Constitution which would prevent the Commonwealth Parliament exercising its power (under section 122 of the Constitution) from legislating to provide that two or more Territories be amalgamated into one Territory for the purposes of the application of a common set of laws and of a common administration.[37]

2.8 Conclusions

2.8.1 The evidence which has been presented in relation to the possible amalgamation of Ashmore and Cartier and the Northern Territory suggests that the proposal has merit.

2.8.2 DPIE opposed the proposal, primarily for financial reasons. Both DFAT and DPIE expressed concern to ensure that Australia's relations with Indonesia would not be compromised by changes to the status of Ashmore and Cartier. Treasury has presented a number of possible revenue sharing options for consideration in the event of the transfer of Ashmore and Cartier.

2.8.3 The Northern Territory proposal for the amalgamation of Ashmore and Cartier is based in the main on the historical administrative link between the two Territories. The Northern Territory has not, however, disguised the possible financial advantage to be gained by it from the inclusion of Ashmore and Cartier within the Northern Territory. The Northern Territory asserts that such a result would be consistent with the principles of the Offshore Constitutional Settlement as well as vital to the continuance of constitutional development of the Northern Territory.

2.8.4 The Committee notes that DFAT, DASETT and AG's could see no disqualifying impediment either in-principle, or of a foreign relations or legal nature, to the amalgamation of the two Territories. DASETT has, in addition, acknowledged

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[37] Evidence, p.S1416.

that in the light of current circumstances, it may be appropriate to review the status of Ashmore and Cartier.

2.8.5 Any proposal affecting the limits of a state or territory of the Commonwealth is a serious matter, requiring detailed consideration. The Committee is not aware of any detailed discussions or negotiations to date between the Northern Territory and the Commonwealth Government or of their respective officers concerning the transfer of Ashmore and Cartier to the Northern Territory.

2.8.6 The Committee recognises that Ashmore and Cartier is a focus of Australia's relations with Indonesia. It does not seem to the Committee that that relationship would or should be affected by the constitutional or administrative arrangements which Australia chooses to apply to the Islands.

2.8.7 Similarly the conservation status of Ashmore and Cartier would not, having regard to the primacy of Commonwealth legislation, be affected by the transfer of Ashmore and Cartier to the Northern Territory.

2.8.8 The substantive argument for retaining Ashmore and Cartier as an external Territory of the Commonwealth is its potential as a source of revenue. However, as noted previously, the Treasury has informed the Committee that the transfer of Ashmore and Cartier need not necessarily deny the Commonwealth its revenue. This is a question which could be subject to regulation.

RECOMMENDATION 4

2.8.9 The Committee, noting Commonwealth interests, recommends the incorporation of Ashmore and Cartier Islands into the Northern Territory.

CHAPTER 3

TERRITORY OF CHRISTMAS ISLAND

> **... we regard these breaches of the obligation Australia has undertaken under the ICCPR as extremely serious violations of basic human rights which cannot be permitted to continue.**[1]

3.1 Description

3.1.1 Christmas Island is situated in the Indian Ocean at latitude 10°25'S. It is 360 kilometres southwest of Java Head and 2,600 kilometres from Perth. The Island has an area of 135 square kilometres and rises to a height of 360 metres. It is the remnant of an extinct submarine volcano.[2]

3.2 Historical Background

3.2.1 Christmas Island was placed under the authority of the Governor of the Straits Settlements in 1889 and incorporated within the Settlement of Singapore in 1900.[3]

3.2.2 During World War II Christmas Island was surrendered to the Japanese who occupied it for three years.[4]

3.2.3 The Singapore Colony Order in Council 1946 provided that the 'Island of Singapore and its dependencies, the Cocos (Keeling) Islands and Christmas Island shall be governed and administered as a separate Colony and should be called the Colony of Singapore'.

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1 Evidence, p.S1274.
2 Yearbook Australia, 1988, p.950.
3 H Renfree, The Federal Judicial System of Australia, Sydney, 1984, p.771.
4 Evidence, p.S242.

3.2.4 By Order in Council dated 13 December 1957, made under the Straits Settlements (Repeal) Act 1946 and the British Settlement Acts of 1887 and 1945, Christmas Island was excised from the Colony of Singapore and governed as a separate Colony.[5]

3.2.5 A raft of legislation designed to have Christmas Island designated as an external Territory of Australia followed the Order in Council. This included the Christmas Island (Request and Consent) Act 1957 by which the Parliament of the Commonwealth requested the enactment by the Parliament of the United Kingdom of an Act designed to enable the transfer of Christmas Island to Australia.

3.2.6 The transfer was subsequently facilitated by the United Kingdom Parliament's enactment of the Christmas Island Act 1958. This was followed by the Christmas Island (Transfer to Australia) Order in Council 1958, which empowered and then arranged for the Island to be placed under the authority of the Commonwealth.

3.2.7 The Commonwealth of Australia formally accepted Christmas Island as a Territory under the authority of the Commonwealth under the Christmas Island Act 1958. The Act was proclaimed to come into operation on 1 October 1958.[6]

3.3 Applicable Law

3.3.1 Section 7 of the Christmas Island Act 1958 (the Christmas Island Act) provides that the laws in force in the Colony of Christmas Island immediately before the date of the Island's transfer to the Commonwealth (1 October 1958) continue in force in the Territory by virtue of the Act and not otherwise. By virtue of section 9, the Governor-General is given power to make Ordinances for the peace, order and good government of the Territory and may accordingly make Ordinances which alter, amend or repeal the laws applied under the Act.

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5 Evidence, p.S242 and Renfree, op.cit., p.771.
6 Evidence, pp.S242-S243, and Renfree, op.cit., pp.771-772.

3.3.2 Commonwealth Acts or provisions of Commonwealth Acts are not in force in Christmas Island unless expressed to extend to the Territory. Acts which do extend may not be affected by an Ordinance.[7]

3.3.3 The laws in force in the Colony of Christmas Island immediately before its transfer to Australia are determined primarily by reference to the Christmas Island Order in Council 1957, by which Christmas Island was detached from the Colony of Singapore and made a separate British Colony. The laws continued in force by section 8 of that Order were: (a) all Acts of the United Kingdom Parliament and Orders in Council which extended to Christmas Island as part of the Colony of Singapore immediately prior to the date of detachment (ie paramount laws); (b) 95 Ordinances of the Colony of Singapore, set out in Schedule 2 (with necessary modifications); and (c) any other laws in force in Christmas Island immediately prior to the date of detachment (ie received English laws). In addition, section 9 of the 1957 Order in Council empowered the newly-appointed Administrator of Christmas Island to make Regulations for the peace, order and good government of the Island, and section 18 preserved the power of the Queen in Council to make laws for the same purpose.[8]

3.3.4 The hierarchy of laws for Christmas Island as a Territory of the Commonwealth is, therefore, broadly as set out above. There remains, however, significant confusion about the precise identity and nature of much of the law and the structure of the hierarchy of laws.

3.3.5 The difficulties faced in establishing the parameters of the Christmas Island legal regime are dealt with in a number of submissions to the inquiry, including those of the Director of Public Prosecutions and the Legal Aid Commission of Western Australia. The submission of the Centre for Comparative Constitutional Studies contains the following succinct analysis of the situation:

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[7] Evidence, p.S403.
[8] Evidence, p.S255.

The present position in relation to paramount laws is not entirely clear. It would seem that whatever Acts of the United Kingdom Parliament and Orders in Council extended to Christmas Island as part of the Colony of Singapore on 1st January 1958, still apply in Christmas Island, unless they have been altered or impliedly repealed by Acts of the Commonwealth Parliament which extend to Christmas Island, or by Ordinances made by the Governor-General, if they can be affected by Ordinance.

The question of which English domestic Statutes were received on Christmas Island, and remain in force there, is also problematic. According to the Straits Settlements Repeal Act 1946 and the British Settlements Acts 1887 and 1945, Christmas Island was also classified as a 'settled' colony. Thus so much of the law in force in England at the relevant 'cut-off date' as was applicable to the circumstances of the newly-settled colony would have been received there. It is not necessary to finally determine the question of a 'cut-off date' specifically for Christmas Island, however, since all laws in force in the Colony (including received laws) were repealed when it was incorporated with the Straits Settlements in 1900.

The Singapore Christmas Island Ordinance 1900 provided that as from 26 October 1900, the laws in force in Christmas Island would be the laws of Singapore, and no others. Yet this does not remove the problem of received law. Rather, it means that such English domestic law as was received in the Colony of Singapore applied also to Christmas Island. This would seem to make the task of ascertaining which laws were received even more difficult. Once again, it would then be necessary to determine whether any such laws have been altered or repealed by Straits Settlements Ordinances, Singapore Colony Ordinances, Christmas Island Regulations, Christmas Island Ordinances or Commonwealth Acts extending to the Territory.

The author is not aware of any purported wholesale repeals of received law in relation to Christmas Island as seems to have occurred in the Cocos (Keeling) Islands, although it is possible that apparently limited repeals of Singapore Ordinances may have had a wider effect by virtue of definitions contained in the Christmas Island Interpretation Ordinance 1958, a copy of which was unobtainable in Melbourne.

A number of the Singapore Colony Ordinances preserved by the Christmas Island Order in Council 1957 have been amended or repealed by Christmas Island Ordinances made by the Governor-General. In particular, the Ordinances Revision Ordinance 1971 repealed 24 of the 95 Singapore Ordinances applying in Christmas Island. The earlier Laws Repeal Ordinance 1958 also repealed a number of Singapore Ordinances, as well as certain Imperial laws. Conversely, some Singapore Ordinances not included in the Christmas Island Order in Council 1957 have been adopted and apply as laws of the Territory by virtue of Christmas Island Ordinances.

It would appear, then, that the law of Christmas Island falls into the following hierarchy:

Commonwealth Acts extending to Christmas Island

Christmas Island Ordinances

Paramount laws

Singapore Ordinances adopted by Christmas Island Ordinances

Christmas Island Regulations made by the Administrator under the Christmas Island Order in Council 1957;

Singapore Ordinances preserved by that Order

English statutes received in the Colony of Singapore ...

Principles of common law and equity.[9]

3.4 Courts

3.4.1 The Christmas Island Act 1958 made provision, in sections 11 to 13, for the establishment of the Supreme Court of Christmas Island. The Court was constituted by a single judge and given the same original jurisdiction, both civil and criminal, as the Supreme Court of the ACT at that time. However, all proceedings, whether

[9] Evidence, pp.S255-S256.

civil or criminal, were to be heard and determined by the Court sitting without a jury.[10]

3.4.2 In 1963 an additional judge was appointed and in 1987 criminal trial by jury was restored.

3.4.3 The Rules of the ACT Supreme Court as in force immediately before 1 October 1958 still apply to proceedings in the Christmas Island Supreme Court, so far as they are consistent with the specific laws of Christmas. An amendment to substitute the ACT Rules as in force from time to time is needed.[11]

3.4.4 The Administrator is Registrar of the Supreme Court. The Registrar of the ACT Supreme Court is a Deputy Registrar. Apart from the Territory itself, the Court may sit:

(a) in criminal trials on indictment, in whichever State or Territory the Court selects, provided the Court is satisfied that the interests of justice require sittings outside Christmas (subs.11AA(2), Christmas Island Act);

(b) in other criminal matters, as for (a), except that the sittings outside Christmas need only 'not be contrary to' the interests of justice (subs.11AA(1), Christmas Island Act);

(c) in civil matters, in NSW, Victoria, WA, the ACT or the NT, again if the sittings are 'not contrary to' the interests of justice (the Christmas Island (Sittings of the Supreme Court) Regulations, made under paragraph 23(A) of the Christmas Island Act.[12]

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10 Evidence, p.S431.
11 Evidence, p.S431.
12 Evidence, p.S431.

3.4.5 Registries of the Court may be established in any State or Territory pursuant to s.11A of the Christmas Island Act.

3.4.6 To date the Court has convened about once in every one or two years to deal with civil matters, and has held two criminal trials (in 1961, and 1987-8), and an average of about one criminal appeal every two or three years.[13]

3.4.7 The District Court Ordinance 1958 provides for a District Court, intended to be intermediate between the Supreme and Magistrate's Courts. It has a civil jurisdiction of less than one-third of that of the Magistrate's Court, and has never sat. There is currently no appointed Judge.

3.4.8 By arrangement with the Western Australian Government, a Stipendiary Magistrate of Western Australia holds office as a Special Magistrate under the Magistrate's Court Ordinance 1958. The Magistrate is available to visit the Territory as required, generally once or twice per year, to deal with more complex cases. Two residents of the Territory hold office as Special Magistrates.

3.4.9 Section 5A of the Magistrate's Court Ordinance 1958 applies the provisions of the Court of Petty Sessions Ordinance 1930 of the ACT (now entitled the Magistrates Court Act 1930) to the practice and procedure of the Christmas island Magistrate's Court in civil matters.

3.4.10 The civil procedure of the Magistrates Court of the ACT is mainly regulated by the Magistrates Court (Civil Jurisdiction) Ordinance 1982, rather than the Magistrates Court Act 1930, of the ACT. Legislation to apply the Magistrates Court (Civil Jurisdiction) Act 1982 to the Magistrate's Court of Christmas is in preparation.

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[13] Evidence, p.S432.

3.4.11 The Small Claims Ordinance 1983 parallels the Small Claims Act 1974 of the ACT. The monetary limit of the jurisdiction exercised under it is $1,000.[14]

3.4.12 The Minister has appointed the Special Magistrates as Coroners under the Coroners Ordinance 1958 and, pursuant, to the Children's Court Ordinance 1972, the Children's Court consists of any one Magistrate of the Magistrate's Court.

3.4.13 Despite the reasonably limited caseload in the courts of Christmas Island, a number of issues have been presented in respect of their operation.

3.4.14 The Committee has, for instance, received evidence from Mr Ken Moore, a Western Australian Stipendiary Magistrate appointed as a Special Magistrate and Coroner for Christmas Island, and also from Mr Justice Robert French, a judge of the Federal Court of Australia appointed as a judge of the Supreme Court of Christmas Island, of their experience in the courts in the Territory.

3.4.15 Mr Moore and Mr Justice French each comment, in particular, on the difficulties involved in determining the relevant law and applying it in a given situation.[15] This is an issue which is discussed in greater and more specific detail elsewhere in this Report. Mr Moore also provides an insight into the appointment of residents of Christmas Island to act as Special Magistrates on the Island.

3.4.16 The resident Special Magistrates are local residents who have undergone a short course of instructions on Magistrates' Court practice and procedure and who have been given instruction in practice and procedure and an elementary introduction to local laws.[16]

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[14] Evidence, p.S432.
[15] Evidence, pp.S47-S49, and pp.863-870.
[16] Evidence, p.S47.

3.5 Administrative Arrangements

3.5.1 Pursuant to the Commonwealth Administrative Arrangements Order the Minister for the Arts, Sport, the Environment, Tourism and Territories has responsibility for administration of the Christmas Island Act. However, the Minister for the Arts, Tourism and Territories is the responsible Minister under the Christmas Island Act.

3.5.2 The Administration Ordinance 1968 provides, inter alia, for the institution of the office of the Administrator. The Administrator is empowered to administer the Territory on behalf of the Commonwealth.

3.5.3 The Christmas Island Assembly Ordinance 1985 made provision for the election of the Christmas Island Assembly.

3.5.4 The Christmas Island Assembly was empowered, chiefly, to control municipal services in the Territory via the Christmas Island Services Corporation.

3.5.5 The Assembly was dissolved in 1987 and the Administrator was appointed to act as the Assembly and to exercise its powers and perform its functions.

3.5.6 Subsequent to the dissolution of the Assembly, an advisory body, known as the Christmas Island Local Assembly was elected, with the Administrator as Chairperson, to advise the Minister on matters affecting the Territory. A new Assembly was elected in 1990.

3.6 International Considerations

United Nations Treaty

3.6.1 *Australia has asserted sovereignty over Christmas Island since it was* placed by the Queen under the authority of and accepted by the Commonwealth as a Territory. There are no suggestions, to the Committee's knowledge that Australian sovereignty is questioned. The Department of Foreign Affairs and Trade (DFAT) has submitted that Australian sovereignty over Christmas Island is soundly based in

international law:

> It derives from effective British occupation and administration of the (I)sland, a valid transfer of the Island from Britain to Australia in 1959 by complementary British and Australian legislation, and continuous governmental and judicial activities by Australia ever since.[17]

3.6.2 The primary source of Commonwealth power in relation to Christmas Island, as with the other Territories, is section 122 of the Commonwealth Constitution which empowers the Commonwealth Parliament to make laws for the government of any territory.

3.6.3 Similarly, the Commonwealth attracts obligations under international law with respect to the territories in the same way as with the rest of the Commonwealth.

3.6.4 Obligations under international law with respect to Christmas Island may for instance flow from Chapter XI of the United Nations Charter and subsequent practice regarding non-self governing territories.

3.6.5 In this regard the Centre for Comparative Constitutional Studies notes that Christmas Island has never been considered by Australia as a non-self governing Territory within the terms of Chapter XI and thus necessitating a report to the United Nations under Article 73(e).[18] Classification as a non-self-governing territory would involve international scrutiny of conditions in the Territory, as occurred in the case of the Territory of Cocos (Keeling) Islands, which was so classified.

3.6.6 The criteria for determining whether a territory could be considered non-self governing are derived from Article 73 of the United Nations Charter which refers to 'territories whose peoples have not yet attained a full measure of self-

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[17] Evidence, pp.S1406-S1407.
[18] Evidence, p.S259.

government' and the Annex to General Assembly Resolution 1541 which establishes the criteria of geographical separateness, ethnic and/or cultural distinctiveness, and a position of subordination due to historical, administrative, political and/or economic elements.

3.6.7 Christmas Island is certainly geographically separate. It is a moot point whether it meets any of the remaining criteria.

3.6.8 The Centre for Comparative Constitutional Studies makes a case for the proposition that 'at this point in time, Christmas island might arguably have the status of a non-self-governing Territory.'

3.6.9 The Centre's argument was presented in the following terms:

> 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. When Christmas Island was transferred in 1958, however, 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 as it did not have a permanent indigenous population (Senate Select Committee on Foreign Affairs and Defence, United Nations Involvement with Australia's Territories, Canberra, 1973, 64).
>
> ... The Christmas Island population ... was largely composed of phosphate mine employees recruited from 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.
>
> In so far as the other criteria were concerned, however, Christmas Island had certainly not 'attained a full measure of self-government', and was quite definitely in a position of subordination due to historical, administrative and economic elements - namely the hegemonic control exerted by the Christmas Island Phosphate Commission, a joint authority of the Australian and New Zealand governments concerned

primarily with exploitation of the Island's resources and only secondarily with the welfare of its workers.

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 Committee of 24 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 (p.111).

Thus, 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); and a number of the Commonwealth Acts which were extended to the Cocos (Keeling) Islands as part of that Territory's integration package were also extended to Christmas Island. The representative Christmas Island Assembly, which is empowered to direct the CISC 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' (Minister for Territories, second reading speech on Christmas Island Administration (Miscellaneous Amendments) Bill 1984, Commonwealth Parliamentary Debates, Vol. House of Representatives 138 (1984), 664).

The 'integration' of Christmas Island with Australia, although it occurred unasked, would seem to have gone some way towards reducing the possibility of United Nations involvement in the Territory. Two new factors must be taken into account, however. Firstly, with the cessation of Australian government schemes to encourage Christmas Islanders to leave the Territory (either through repatriation or resettlement on the mainland) (Christmas Island Annual Report 1984-85, pp.472/1985, p.10), a permanently settled population with a distinct ethnic and cultural identity is likely to develop. Secondly, the fact that the functions of the Christmas Island Assembly have been performed for long periods not by a representative body but by a person appointed as the Acting Assembly, would seem to tip the balance back towards political subordination.

> Thus, at this point in time, Christmas Island might arguably have the status of a non-self-governing territory. 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.[19]

3.6.10 The Attorney-General's Department (AG's) and the Department of Foreign Affairs and Trade (DFAT) do not, however, accept the Centre's conclusions. AG's disagreement is 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[20]. AG's 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 which is at apparent odds with the British practice in relation to Christmas Island prior to its transfer to Australia, as reported by the Senate Select Committee on Foreign Affairs, Defence and Trade in its Report, United Nations Involvement with Australia's Territories.[21]

3.6.11 DFAT has advised that the Centre's suggestion 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'.[22]

3.6.12 DFAT has also advised that:

> The suggestion contained in the Centre's submission also raises legal considerations. The question arises, for instance, how much weight may be given to the criteria contained in the Annex to UNGA Resolution 1541 (XV). 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 the resolution. There can be no guarantees, however, that inscription of Christmas Island on the UN list

[19] Evidence, pp.S260-S262.
[20] Evidence, p.S1419.
[21] Evidence, p.S260.
[22] Evidence, p.S1407.

> of NSG territories will not be sought, if there is a political will on the part of other members of the UN to do so; the inscription of New Caledonia on the UN list is a recent case in point. We are unaware of any current proposal to that effect.[23]

Conclusion

3.6.13 The Committee believes that the possibility raised by the Centre for Comparative Constitutional Studies about the status of Christmas Island is, at the very least, arguable. It notes, however, the comments of DFAT in this regard, particularly those relating to the benefits to be derived from hastening the process of legal, administrative and political reform:

> The case for listing Christmas Island as a non-self-governing territory would clearly stand a better chance of being maintained as long as local political institutions are absent and other disparities between treatment of Islanders and other Australians persist. On the other hand, hastening the process of legal, administrative and political reform to bring Christmas Island into the Australian mainstream would help dispel any possible moves in the UN to that end.[24]

International Covenant on Civil and Political Rights (ICCPR) and Human Rights

3.6.14 Australian practice in relation to its treaty obligations was described to the Committee by Senator the Hon. Gareth Evans, Minister for Foreign Affairs and Trade in the following terms:

> Although the focus of the terms of reference is on rights and duties under domestic law my Department has an interest arising from the implementation of Australian treaty obligations. Prior to 1972, treaties to which Australia became party were applicable to the external territories only if there was an express provision to that effect in the body of the treaty or a declaration was made at the time of depositing the instrument of ratification or accession. Current Australian practice is that, in the absence of a provision to the contrary, a treaty will automatically apply to the whole territory for which Australia is responsible internationally. This practice is supported by Article 29 of the Vienna Convention on the

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[23] Evidence, p.S1407.
[24] Evidence, p.S1407.

> law of Treaties which, in dealing with the territorial scope of treaties, provides that
>
> > 'Unless a different intention appears from the Treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.'
>
> Thus in cases where domestic legislation is required to enable Australia to implement its treaty obligations upon becoming a party, such legislation includes equally the laws of the Australian states and territories.
>
> If the law of an external territory is not in conformity with a multilateral treaty which allows parties to declare that it will apply only to certain parts of their territory, and if it appears likely that there will be a long delay before that law can be amended, Australia may make a declaration that the treaty does not apply to that territory. It is usually understood, however, that the declaration will be removed as soon as the territory's law has been amended.[25]

3.6.15 The International Covenant on Civil and Political Rights (ICCPR) is a case of an international obligation accepted by Australia, which require it to ensure rights recognised in the Covenant are available to all individuals within its territory and subject to its jurisdiction without distinction. Article 50 requires that the Covenant 'shall extend to all parts of Federal States without any ... exceptions.'

3.6.16 Human Rights Australia, in a submission to the Committee, drew attention to a number of areas of the law of Christmas Island which were in its view clearly inconsistent with the ICCPR.

3.6.17 It noted, for example, that the continued availability under inherited Singapore law of punishment by whipping as a sentencing option is clearly a violation of the basic human rights which the Commission administers. The Commission views with similar seriousness the absence of an appropriate range of

[25] Evidence, p.S1411.

sentencing options and the continued sentence of mandatory life imprisonment for murder.[26]

3.6.18 *Human Rights Australia also notes the lack of a formal arrangement for* legal aid for residents of Christmas Island and concludes that residents of the Island are denied effective and equal enjoyment of their rights to equality before the law, and equal protection of the law, guaranteed by articles 14 and 26 of the ICCPR.[27]

3.6.19 Human Rights Australia has condemned Australia's performance in fulfilling its human rights and international obligations to the residents of Christmas Island. It has done so in the most unambiguous terms in stating:

> We must emphasise that we regard these breaches of the obligation Australia has undertaken under the ICCPR as extremely serious violations of basic human rights which cannot be permitted to continue.[28]

3.6.20 In similar vein and in a specific reference to the absence of formal arrangements for the provision of legal aid to the residents of Christmas Island the Legal Aid Commission of Western Australia (LACWA) said:

> That Covenant (by which the Commonwealth is bound by international treaty...) does not seem to convince the Commonwealth that it has a bounden moral duty, if not legal, to supply or to facilitate to the Islanders a reasonable legal service either from this Commission or elsewhere.[29]

3.6.21 The Committee concurs with the conclusion of LACWA that the question of the provision of legal aid, as with many of the other obvious deficiencies in the law of Christmas Island:

> ... begs the question as to why the Commonwealth needs to justify a service to one of its own Territories relying upon an

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26 Evidence, p.S1273.
27 Evidence, p.S1275.
28 Evidence, p.S1274.
29 Evidence, p.S41.

International Treaty. Surely its own responsibilities for the special needs of those residents is more than enough.[30]

Conclusion

3.6.22 The Committee shares the concern of the Human Rights Commission that Australia meet its international obligations to the residents of Christmas Island. The trenchant criticisms of the Commission and its insistence that the Commonwealth is responsible for denying certain basic human rights to the residents of the Territory demand an appropriate and immediate response by the Commonwealth.

International Labour Organisation (ILO)

3.6.23 Article 35 of the ILO Constitution obliges Member States to make declarations as soon as possible after a Convention is ratified concerning its application to its external ('non-metropolitan') territories. Declarations may be 'applicable', 'applicable with modification' or 'not applicable' and may be varied from time to time if circumstances within the territory change.[31]

3.6.24 Declarations are required for each territory in relation to the 40 ILO Conventions ratified by Australia, and a further ten Conventions which are appended to Convention No.83, Labour Standards (Non-Metropolitan Territories), 1947. It is noted, however, that declarations are not required with respect to five Conventions because they are machinery instruments (Nos. 80 and 116), are revised by a later Convention (Nos. 63 and 93), or declarations are made with respect to appended Conventions only (No.83).[32]

3.6.25 Australia has some non-metropolitan territories for which declarations are required, including Christmas Island.

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30 Evidence, p.S41.
31 Evidence, p.S716.
32 Evidence, p.S1568.

3.6.26 While the ILO cannot enforce action by a Member State, it does monitor the application of Conventions it has ratified both in the mainland and in the territories by examining reports prepared by Member States, and making public any comments by the ILO Committee of Experts on the Application of Conventions and Recommendations concerning non-compliance.[33]

3.6.27 In a submission to the Committee the Department of Industrial Relations (DIR) advised:

> In light of the issues raised during the Inquiry, we are reviewing as a matter of priority the approach taken to Australia's obligations under the ILO Constitution in relation to *its non-metropolitan territories.*[34]

3.6.28 The DIR response is a reaction to the fact that in respect of both Cocos (Keeling) Islands and Christmas Island no declarations have been made by Australia and none were made by the United Kingdom prior to the Territories being accepted by the Commonwealth.

3.6.29 DIR indicated that it has, in conjunction with the relevant administering Department, been examining the situation in respect of the non-application of ILO Conventions in these territories since the late 1950s with a view to making suitable declarations.[35]

3.6.30 The reasons advanced by DIR for not progressing with declarations for Christmas Island include:

- the small size of the population likely to be affected by such declarations, given the early stage of industrial development; and

- the lack of pressure from Christmas itself to expedite the declaration process.[36]

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[33] Evidence, pp.S714-S715.
[34] Evidence, p.S1566.
[35] Evidence, pp.S1571-1572.
[36] Evidence, p.S1571.

3.6.31 DIR has advised the Committee that it proposes to re-open discussions with the Department of the Arts, Sport, the Environment, Tourism and Territories (DASETT) as soon as possible with a view to making appropriate declarations in respect of both Cocos (Keeling) and Christmas Island.[37]

Conclusion

3.6.32 The Committee regards the non-application of the ILO Conventions to Christmas Island as a serious breach of Australia's obligations to the residents of the Territory.

3.6.33 The fact that not a single declaration has been made in respect of Christmas Island in relation to the application of any of the ILO Conventions, in the thirty two years that it has been an Australian Territory, raises serious doubts about the Commonwealth's commitment to its obligations under the ILO Convention. The Committee welcomes the announcement by DIR of its intention to now proceed with declarations for Christmas Island.

3.7 Responses to Inquiry Terms of Reference

3.7.1 The Committee received, during the course of the inquiry, a range of evidence from Government and private organisations, and private citizens from both Christmas island as well as other parts of Australia. Much of the evidence was concerned with assessing the adequacy of the overall legal regime applying in the Territory while considerable attention was also given to a wide number of specific laws and issues.

3.8 Assessments of Overall Regime

3.8.1 The Committee has not, during the course of the inquiry, been conscious of any support for the existing legal regime of Christmas Island. DASETT, the administering Department, in its submission to the inquiry makes the broad generalisation that 'the laws applying to Christmas Island are generally inadequate

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[37] Evidence, p.S1572.

for the Territory's needs.' DASETT noted:

> A law reform program initiated in the mid 1980s has not progressed very far. Available resources have had to be directed to drafting legislation to meet local exigencies such as the murder trial, closure of the Government's phosphate mine and the casino development. The approach has been piecemeal and reactive.[38]

3.8.2 Mention was made earlier of the sweeping condemnation of the laws of the Island by the Commonwealth Human Rights Commissioner and of the Legal Aid Commission of Western Australia.

3.8.3 The universality of the general criticism of the legal regime of Christmas Island was further illustrated by submissions from, among others, the Commonwealth Director of Public Prosecutions:

> Quite apart from the inappropriateness of some of the applied provisions of Singaporean criminal law, it surely is unacceptable that it is necessary to have to research a wide range of foreign statute and case law to establish the law applicable in an Australian Territory. Further, from a practical point of view, that foreign law is simply not readily available.[39]

3.8.4 The Centre for Comparative Constitutional Studies commented:

> The patchwork of laws pertaining ... would seem to render the coherence and adequacy of those Territories legal regimes open to question.[40]

3.8.5 Ms J Yorkston, Christmas Island resident, commented:

> At the present time the laws and legislative structure operating on Christmas Island are totally inadequate to the needs of the population. Residents are not receiving equal benefits, rights or protection under the law to other citizens

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[38] Evidence, p.S415.
[39] Evidence, p.S15.
[40] Evidence, p.S264.

> of the Commonwealth of Australia. This has led to a generalised disillusionment with and distrust of the legal system.
>
> ...
>
> To a substantial portion of the population, the law of Christmas Island has long been regarded as a joke ...[41]

3.9 Consultation with Residents

3.9.1 During the inquiry, the Committee has been particularly conscious of the need not only to obtain as wide a range of views on the legal regime of Christmas Island via written submissions, but also to consult, to the greatest degree possible, with the residents of Christmas Island.

3.9.2 The Committee accordingly sought, during two visits to the Territory, to consult with all representative bodies on the Island as well as with all residents who had expressed an interest in the inquiry or wished to meet with the Committee.

3.10 Options for Reform

3.10.1 An important part of the consultative process employed by the Committee in respect of Christmas Island involved the development and distribution of a paper setting out a number of options for the reform of the Territory's legal regime.

3.10.2 The paper was the basis of discussions which the Committee held on the Island in August 1990.

3.10.3 Options for reform of the laws and legal regime of Christmas Island which were indicated in the paper were:

- retain the status quo;

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[41] Evidence, p.S212.

- retain the status quo with an assurance that urgent attention and increased resources will be applied to a detailed program of law reform;

- repeal the existing law and apply, while retaining ultimate Commonwealth authority, the law from time to time applying in:

  (a) Western Australia

  (b) Australian Capital Territory; or

  (c) Northern Territory;

- apply the laws from time to time applying in:

  (a) Western Australia

  (b) the Australian Capital Territory; or

  (c) the Northern Territory

  with the proviso that any law of the Christmas Island inconsistent with an applied law is repealed to the extent of the inconsistency and that no laws will be applied without prior consultation with the residents;

- enhance the powers of the Christmas Island Assembly by giving it greater powers and responsibility for specified domestic laws;

- incorporate the Territory within the geographic and political boundaries of:

  (a) Western Australia; or

  (b) Northern Territory.

3.10.4 The overwhelming view of the residents of Christmas Island is that the law from time to time applying in Western Australia should be extended to Christmas Island.

3.10.5 This was the broad view of all witnesses who appeared before the Committee. For example, a representative of the Island's Administration commented:

> There are good reasons for taking on Western Australian law, mainly because of its (the State's) proximity, and a larger

> number of the residents ... have close connections with Western Australia.[42]

3.10.6 The need to ensure that the laws of Western Australia be adapted to the special needs of Christmas Island residents was, however, emphasised to the Committee:

> ... the laws need to be introduced selectively and in line with the culture of the Island.[43]

3.10.7 Representatives of the Christmas Island Local Assembly emphasised the same points to the Committee, noting that it would be preferable for there to be an overriding opportunity for the Assembly to have some say in respect of the Western Australian laws to be applied. The Committee was advised that this was the view commonly held, not only by all members of the Assembly, but also by 'the majority of the members of the community as well.'[44]

3.10.8 Representatives of the Union of Christmas Island Workers, the Islamic community and the Chinese Literary Association, similarly, supported the adoption of Western Australian laws, subject to their being adapted to the particular circumstances of the Territory:

> We would like this ... to change entirely and for it to be put totally into Western Australian law ...
>
> But because we have ... ethnic backgrounds here, cultural backgrounds, customs and practices ... we of course cannot follow entirely 100 per cent any legislation that has been made through Western Australia ...[45]

3.10.9 DASETT has also conceded that extension of the law of Western Australia represents the most feasible response to reform of the legal regime of Christmas Island.

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[42] Evidence, pp.1342-1343.
[43] Evidence, p.1343.
[44] Evidence, p.1354.
[45] Evidence, pp.1377-1378.

3.10.10 The Centre for Comparative Constitutional Studies identifies two basic options for reforming the substantive law of Christmas Island as being:

> to make the laws of ...(the Territory) substantially the same as the laws applying in other parts of Australia; or to attempt as far as possible or appropriate, to cater for the unique cultural, political and economic characteristics of (the) Territory.[46]

3.10.11 The former option would in the Centre's view involve extending all Commonwealth Acts to the Territory as well as the application of all the law of a mainland state or territory. The centre suggests Western Australia or the Northern Territory. The latter option would involve the introduction of mainland standards of law while recognising the existence of material differences on Christmas Island. The Centre insists that 'as a matter of principle, balancing of Australian norms and Territorial particularities'[47] should be the basis of reform of the Island's legal regime. This view is supported by the Human Rights Commission.[48]

Conclusions

3.10.12 There was overwhelming support from the Christmas Island residents to the proposal that Western Australian law be adopted as the effective legal system on Christmas Island. Such a step is favoured by the Committee, with the proviso that laws currently in force on Christmas Island, which are relevant to local circumstances, be retained. The Committee mentions, for example, that it may be appropriate for local practices, which derive from the history, customs and traditions of Singapore and Malaya, to continue, even though they may not conform to mainland standards.

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[46] Evidence, p.S267.
[47] Evidence, pp.S267-S268.
[48] Evidence, p.S1269.

RECOMMENDATION 5

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

3.10.14 The need for the Christmas Island community to be involved in the reviewing process, in respect of the Western Australian laws to be applied on Christmas Island, has been highlighted in several submissions and in evidence, and is endorsed by the Committee. Pending the formal establishment of such a reviewing mechanism, this role should be undertaken by the Commonwealth in consultation with the Christmas Island Assembly.

RECOMMENDATION 6

3.10.15 The Committee recommends that, in the absence of the establishment on Christmas Island of a reviewing mechanism, relevant Commonwealth Departments monitor the possible application of Western Australian laws to Christmas Island in consultation with the Christmas Island Assembly, to ensure that the particular circumstances of Christmas Island and/or its residents are not adversely affected by the extension of a law.

3.10.16 Territory residents expressed concern to the Committee about the lack of opportunity for consultation in respect of Territory matters, generally.[49] As a way of overcoming these concerns, the Committee supports an expansion of the role of the Assembly, along the lines of a local government body. It is suggested that the expanded Assembly could also undertake the reviewing process in respect of Western Australian laws to be applied in the Territory. The Committee supports this development subject to the proviso that as many residents as possible are provided with the opportunity of electing Assembly members.

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[49] Evidence, p.1348.

RECOMMENDATION 7

3.10.17 The Committee recommends that the Commonwealth accelerate the development of administrative and political reform on Christmas Island to ensure the progressive development towards the establishment of a local government body on Christmas Island with an expanded role, including direct access to the Commonwealth Minister in respect of laws to apply on the Island, for reviewing Western Australian laws for their appropriateness to the Territory.

3.10.18 The strong links between Christmas Island and Western Australia were repeatedly emphasised to the Committee. One resident commented:

> Let us go as much as we can with Western Australia.[50]

It is considered desirable that ways by which these links could be strengthened, in the longer term, should be explored.

RECOMMENDATION 8

3.10.19 The Committee recommends that the Commonwealth initiate discussion with the Government of Western Australia in respect to the long term future of Christmas Island including its possible incorporation within the State of Western Australia.

3.10.20 As noted earlier, the Human Rights Commission has advised that, with respect to Christmas Island, Australia is in serious breach of obligations it has undertaken under the ICCPR. The Committee concurs that this situation cannot be permitted to continue.

RECOMMENDATION 9

3.10.21 The Committee recommends that the Commonwealth initiate action designed to overcome the breaches of human rights identified by the Human Rights and Equal Opportunity Commission.

[50] Evidence, p.1391.

3.10.22 A particular concern in respect of human rights is the absence of formal arrangements for legal aid for Christmas Island residents. This situation warrants immediate redress.

RECOMMENDATION 10

3.10.23 The Committee recommends that the Commonwealth arrange for the provision of a formal legal aid service for the residents of Christmas Island.

3.10.24 The Committee views the non-application of the ILO convention to Christmas Island as a serious breach of Australia's obligations to Territory residents. It is of vital importance that this situation is immediately redressed, particularly bearing in mind the mining operations currently being undertaken, and the potential for tourism to develop on the Island.

RECOMMENDATION 11

3.10.25 The Committee recommends that the Commonwealth ensure that, consistent with the particular circumstances of Christmas Island, as many as possible of the ILO Conventions ratified by Australia are applied to Christmas Island.

3.10.26 The Committee acknowledges evidence that a case could be mounted for listing Christmas Island as a non-self-governing Territory. Of specific relevance in this context is the advice of DFAT that hastening the process of legal, administrative and political reform in respect of the Territory would help to dispel any such doubts.

RECOMMENDATION 12

3.10.27 The Committee recommends that the Commonwealth ensure, in its administration of Christmas Island, that the Territory not assume the characteristics of a non-self-governing Territory within the terms of Chapter X1 of the United Nations Treaty.

3.10.28 An emerging concern to Territory residents is the lack of access to funds and grants which are available to other Australian citizens by virtue of their

residence in a mainland state or territory. As an example, the Christmas Island Women's Association has submitted that, in the absence of any formal funding provisions, it has been difficult to provide even the most basic of child-care services.[51] This would seem to be an anomolous situation. The Committee, accordingly strongly urges the Commonwealth to take steps to ensure that, to the maximum extent possible, Territory residents have access to services and funding arrangements enjoyed on the mainland.

3.11 Assessment of Specific Aspects of the Legal Regime of Christmas Island

3.11.1 The Committee also, in terms of assessing the overall regime, gave consideration to certain specific areas of law as a basis for assessing the state of the law generally.

3.11.2 Illustrations based on the inadequacy of the criminal justice system applying on Christmas Island provided the major focus in many submissions to the Committee of a specific instance in which the law was patently deficient. There were, however, in addition, many other examples drawn to the attention of the Committee. The Committee has not purported to undertake an extensive analysis of the adequacy of the individual laws of the Island, but rather has been concerned to determine, in accordance with its terms of reference, the extent to which the legal regime of the Territory is generally appropriate to the circumstances of the Territory.

3.12 Administrator

3.12.1 As mentioned in paragraph 3.5.2 the Administrator is appointed by the Governor-General in accordance with the Administration Ordinance 1968, and administers the Territory on behalf of the Commonwealth. Subject to the direction of the Minister, the Administrator is responsible for co-ordinating the provisions of

[51] Evidence, pp.1401-1402.

Commonwealth functions. These include health, education, law and order, postal services, aerodrome and airport facilities, and off-Island communication services.

3.12.2 From late 1987, when the Assembly was dissolved, until late 1990, when new Assembly elections were held, the Administrator acted as the Assembly, and exercised its powers and performed its functions.

3.12.3 Some doubt surfaced during the inquiry of the continued validity of the Administrator's role. For instance, Mr G J Collins, a Christmas Island pharmacist and a special magistrate for the Territory believes:

> The office of Administrator is something of an anachronism. The position appears to be 'all powerful' and decisions are beyond appeal. It may not be appropriate that the Administrator is also the Christmas Island Assembly...[52]

3.12.4 Mrs J Yorkston, a resident of Christmas Island also expressed concern at the nature and role of the position of Christmas Island Administrator. She believes that the Administrator's responsibility for law and order seriously affects the correct applications of the law on Christmas Island. Mrs Yorkston states:

> While I am aware that Governors may have legal powers in Australia, I have no doubt that there is nowhere where the power is used as often or as absolutely as it is on Christmas Island.[53]

RECOMMENDATION 13

3.12.5 The Committee recommends that the Commonwealth review the <u>Administration Ordinance 1968</u> with particular reference to the title, functions and powers of the Administrator.

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[52] Evidence, p.S210.
[53] Evidence, p.S213.

3.13 Criminal Law

3.13.1 'As officer in Charge of the Christmas Island Police Force and Inspector of Police for Cocos (Keeling) Islands, I have been concerned about the inadequacies of Criminal laws on both Islands for some time ...'[54]

This statement is the phlegmatic introduction by Inspector R Wheeler to his submission to the inquiry.

3.13.2 Inspector Wheeler's concern is echoed, in strong terms, in a majority of the submissions which deal with or touch on the criminal law.

3.13.3 DASETT notes that a number of the criminal law provisions as well as the procedure provisions in the relevant law, the Penal and Criminal Procedures Codes of the Colony of Singapore as of 1958, are clearly inappropriate.

3.13.4 DASETT refers in particular to the retention of whipping as a punishment, the limited powers possessed by the police and antiquated rules in respect of the making of confessions as examples of areas in which the law of Christmas deviates from Australian norms.[55]

3.13.5 The Commonwealth Director of Public Prosecutions (DPP), whose office has direct experience with the law of Christmas Island through the prosecution of a recent case of murder, R v Toh Yu Teng and Chong Wooi Sing, has made scathing criticisms of the criminal law and procedures of the Territory.

3.13.6 The following passage from the DPP submission encapsulates the difficulties encountered by it in dealing with the law of Christmas Island:

> The criminal law applicable on ... Christmas Island ... is Singaporean law as it was in 1958 ... with a few minor amendments. That law can depart, sometimes considerably,

[54] Evidence, p.S79.
[55] Evidence, p.S437.

from accepted practice within Australia. The Christmas Island murder prosecution provided a pertinent example of this.[56]

3.13.7 Inspector Wheeler provides as random examples of deficiencies in the law, the absence of any law prohibiting the possession of drugs other than Heroin, Cocaine or Indian Hemp, and the absence of a prohibition from trading, using or cultivating illegal drugs.[57]

3.13.8 Similarly the Inspector notes that the lack of legislation in respect of domestic violence has led to the situation of women subjected to violence being accommodated in the Police Station.[58]

3.13.9 As noted previously the Human Rights Commission believes that the breaches of human rights arising out of the state of the criminal law of Christmas Island are serious breaches of Australia's obligations under the ICCPR and cannot be permitted to continue.

3.13.10 It is notable that the DPP, on gaining first-hand experience of the law of Christmas Island, recommended to DASETT and AG's in its 1987/88 Annual Report, that the criminal laws of Singapore in so far as they apply to Christmas Island and the Cocos (Keeling) Islands should be repealed and replaced by law in operation on the mainland. AG's itself, in evidence to the Committee also recommended the repeal of the extant criminal law and its replacement with that of a mainland jurisdiction.[59]

3.14 Commercial Law

3.14.1 While the criminal law of Christmas Island is universally regarded as seriously flawed it is nevertheless quite superior to the commercial law of the Island,

56 Evidence, p.S15.
57 Evidence, p.S1319.
58 Evidence, p.S1320.
59 Evidence, p.S513.

in respect of which, in many cases, no specific provisions or laws exist. There is, for example, no bankruptcy law or specific companies law. Under the Civil Law Ordinance, the current 'law of England' - not of any Australian jurisdiction - applies to commercial matters generally. In some exceptional areas, the law of England as at 1826 would still apply.

3.14.2 The lack of adequate company law has worked to the serious detriment of residents of Christmas Island. The Committee has received evidence from a firm of solicitors acting on behalf of a number of residents of Christmas Island who have, quite simply, been unable to prosecute an apparently straight-forward commercial claim involving significant sums of money because of the state of the law.[60]

3.15 Family Law

3.15.1 The Family Law Act 1975 and the Marriage Act do not extend to Christmas Island. The Acts were not extended to the Territory in deference to the usage of Islamic law, under the Muslims Ordinance, for the performance of marriage. Marriage and divorce in the Territory are governed by the Muslims Ordinance, the Civil Marriage Ordinance 1955, the Christian Marriage Ordinance of 1955 and the Divorce Ordinance 1955.

3.15.2 Under this legislation divorce by taalik and fassah continues. There is a right to polygamous marriage and there is no minimum marriageable age.[61]

3.15.3 Divorce pursuant to the Divorce Ordinance depends on a finding of fault (for a husband, that his wife is guilty of adultery, desertion, cruelty, or is of unsound mind; for a wife, that her husband has changed his religion and taken another wife, or is guilty of adultery, sodomy, bestiality, desertion, cruelty, or is of unsound mind.) A husband petitioning for divorce will be able to claim damages from his wife's

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[60] Evidence, pp.S897-S898.
[61] Evidence, p.S454.

adulterer, and a wife can be awarded alimony if she is the petitioner. Either party to a marriage may petition for restitution of conjugal rights.

3.15.4 DASETT and AG's have apprised the Committee of progress in the extension of the Family Law Act and the Marriage Act to Christmas Island. DASETT notes:

> The changes in the law may have little practical effect ... (as, in practice), minimum marriageable ages are observed and divorce by taalik may have fallen into disuse on Christmas ...[62]

3.15.5 The Human Rights Commission submitted to the Committee that:

> The present position concerning family law in the territories of the Cocos (Keeling) Islands and Christmas Islands is not satisfactory. Singapore law which continues to be applied by reference is outdated and discriminatory in many respects. Some of the features of this body of law are explicable only as a product of colonial history, rather than as a response to cultural conditions.[63]

3.15.6 While the Human Rights Commission supports the extension of the Family Law Act to Christmas Island there is, in its view, a clear need to give proper recognition to local customs and institutions. In this regard the Human Rights Commission supports the Law Reform Commission's requirement that any special laws should satisfy certain basic conditions with respect to customary law, specifically:

- any special provisions would have to be developed in consultation with, and introduced with the agreement of, the communities affected;
- individual members of those communities would have to be able to choose to live under the general law; and

[62] Evidence, p.S454.
[63] Evidence, p.S1271.

- the special law should be consistent with basic human rights.[64]

3.15.7 The Committee notes that at no time during the inquiry were reservations expressed in respect to the Family Law Act as it applies on the mainland by Territory residents.

RECOMMENDATION 14

3.15.8 The Committee recommends that, in applying the law of Western Australia, priority attention be given to the application of appropriate laws and the development of education programs in respect to domestic violence.

RECOMMENDATION 15

3.15.9 The Committee recommends that the Family Law Act 1975 be applied to Christmas Island.

3.16 Environment Protection

3.16.1 Christmas Island's history as a centre for phosphate mining, and the imminent recommencement of mining, provide a focus for the Territory's environment and conservation laws.

3.16.2 Development on Christmas Island has, until the present time, been subject to Commonwealth veto, in that there has been no land held in freehold in the Territory. The Commonwealth has also, pursuant to the National Parks and Wildlife Conservation Act 1975 (NPWC Act) declared almost 70% of Christmas Island as a national park.

3.16.3 The Australian National Parks and Wildlife Service (ANPWS) believes, however, that many of the Christmas Island Ordinances relating to conservation and the environment are out of date and/or of little relevance to current Island circumstances. ANPWS do not favour the revision, modification or amendment of

64 Evidence, pp.S1271-S1272.

the existing unsatisfactory law but recommend instead that it be repealed and replaced with regulations under the NPWC Act. ANPWS believe:

> legislation relating to management of the Christmas Island environment reflects the ad hoc manner of its creation. Few of the ordinances or acts are designed specifically for Christmas Island conditions but most are rather ill-fitting attempts to adapt legislation designed for other cultures and environments.[65]

3.16.4 ANPWS submits that the effective maintenance of the environmental resources and values of Christmas Island will require legislation designed to deal with wildlife conservation and land use activities comprehensively. Parks and reserves proclaimed under the NPWC Act provide the highest level of protection of wildlife and environmental values while use of regulations under the NPWC Act are, in the view of ANPWS, the most effective means of providing legislative protection to wildlife outside parks and reserves.

RECOMMENDATION 16

3.16.5 The Committee recommends that the ANPWS ensure, through the promulgation of regulations under the NPWC Act if necessary, that a regime of nature conservation legislation exists for the proper protection of Christmas Island's wildlife and environmental values.

3.16.6 The Committee is concerned at the legacy of mining on Christmas Island. For example, large amounts of machinery and abandoned buildings remain. The Committee also observed evidence of de-stabilised land forms on the Island. Although beyond the immediate scope of the inquiry Terms of Reference, the Committee notes that the mining site requires the application of appropriate environmental measures to ensure the restoration and proper management of the site.

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[65] Evidence, pp.S736-S737.

CHAPTER 4

TERRITORY OF COCOS (KEELING) ISLANDS

> **... the affairs of the Cocos (Keeling) Islands Territory are regulated by a system of law which is Byzantine in its complexity.[1]**
>
> **... a national disgrace.[2]**

4.1 Description

4.1.1 The Territory of the Cocos (Keeling) Islands (Cocos) comprises a group of 27 small coral islands in two separate atolls and has a total land area of approximately 14 square kilometres. The Territory is situated in the Indian Ocean at latitude 12°05'S and longitude 96°53'E. It is more than 2,700 kilometres northwest of Perth and almost 3,700 kilometres west of Darwin.

4.1.2 The northern atoll, North Keeling, is a single uninhabited island. The main atoll, 24 kilometres to the south, contains five major islands: West, Home, South, Direction and Horsburgh. Two of these islands, West and Home, are inhabited. The Territory's administration, airport and animal quarantine station, and approximately 200 mainland-based Commonwealth and private sector employees and their families, are located on West Island. The Cocos Malay community, comprising approximately 400 Cocos Malays, lives on Home Island.

4.1.3 The Islands have been built of coral clinker and sand thrown up from the edge of the coral reef by wind and wave action and are extensively vegetated. The differences in elevation on the Islands are slight and the highest point is a six-metre sand dune.[3]

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1 Evidence, p.S499
2 Evidence, pp. 651-652.
3 Cocos (Keeling) Islands Annual Report, 1985-86, pp.11-12; Yearbook Australia 1988, p.949, and Evidence, p.S401.

4.2 Historical Outline

4.2.1 The Islands are believed to have been discovered by Captain William Keeling of the East India Company in 1609 but remained uninhabited until small settlements were established by Alexander Hare and John Clunies-Ross in 1826 and 1827 respectively. Following Hare's departure in 1831, Clunies-Ross secured sole possession and he began the development of the Territory's copra industry with the aid of imported labour. Today's permanent inhabitants of the Territory are descendants of these original labourers who were principally of Malaysian, Indonesian, Chinese and African extraction.

4.2.2 The Islands were annexed by Britain in 1857.

4.2.3 In 1878, responsibility for the supervision of the Islands was transferred to the Government of Ceylon and in 1886 to the Government of the Straits Settlements. In 1886, the British Crown, by indenture, granted all land above high-water mark in the Islands to George Clunies-Ross and his heirs in perpetuity, subject to certain conditions, including the right of formal repossession by the Crown for public purposes.

4.2.4 The Islands were incorporated in the Settlement of Singapore in 1903 and remained there until 1955 except for a period during World War II when, as Singapore was under Japanese occupation, they were attached to Ceylon.

4.2.5 Between 1948 and 1951, approximately two-thirds of the Cocos Islands' population, over 1600 inhabitants, resettled in North Borneo (now Sabah), Singapore and Christmas Island.[4]

4.2.6 In 1954, by the Cocos (Keeling) Islands (Request and Consent) Act, the Commonwealth Parliament requested and consented to the enactment by the British Parliament of a law enabling the Cocos (Keeling) Islands to be placed under the authority of the Commonwealth.

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[4] Cocos (Keeling) Islands Annual Report 1985-86, pp.13-14, and Yearbook Australia, 1988, p.949.

4.2.7 By the Cocos Islands Act 1955 of the Parliament of the United Kingdom, the Queen was empowered to direct that the Cocos (Keeling) Islands should cease to form part of the Colony of Singapore and be placed under the authority of the Commonwealth.

4.2.8 Sovereignty over the Islands was formally transferred from the United Kingdom to Australia with the passage of the Cocos (Keeling) Islands Act 1955, which came into operation on 23 November 1955.[5]

4.2.9 In 1979, the Cocos (Keeling) Islands Council, the Cocos Malay community's local government arm, and the Cocos Islands Co-operative Society, the community's commercial and business arm, were established. Shortly thereafter, title to all land in the Territory purchased by the Australian Government in 1978, with the exception of land used for Government purposes, and a small portion owned by John Clunies-Ross, was transferred to the Council.

4.2.10 In an Act of Self Determination in 1984, the Cocos Malay Community, given the options of integration, free association or independence, chose to integrate with Australia.

4.3 Applicable Law

4.3.1 By section 5 of the Cocos (Keeling) Islands Act 1955 (the Cocos Act) the Cocos (Keeling) Islands were accepted by the Commonwealth as a Territory under the authority of the Commonwealth. The Cocos Act is the basis of the Territory's legislative, judicial and administrative systems.[6]

4.3.2 By sub-section 8(1) of the Cocos Act, all laws in force in the Islands immediately before the date of transfer were to continue in force in the Territory. Under section 9, such laws may be amended or repealed by Ordinances which, under section 12, the Governor-General has the power to make for the peace, order and good government of the Territory.

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[5] Evidence, p.S241 and p.S401.
[6] Evidence, p.S401.

4.3.3 Generally, Commonwealth Acts have no application in the Territory unless expressed to extend to the Territory. Where there is no express provision, application or extension may be determined in each case from the tenor or implied effect of an Act. Currently, there are over 200 Commonwealth Acts which apply, either expressly or impliedly, in the Territory. Where a Commonwealth Act is expressed to extend to the Territory, its operation there may not be affected by Ordinance.[7]

4.3.4 The law in force in the Islands immediately before sovereignty was accepted by the Commonwealth, and which thus continued in force in the Territory by virtue of section 8 of the Cocos Act, have been described 'as a complex legal legacy' and as a 'hybrid collection'[8]. They included Acts of the Parliament of the United Kingdom and Orders in Council made under them which applied to the Islands themselves, the Straits Settlements or the Colony of Singapore; English domestic laws received in the Islands and not subsequently superseded by Singapore law; and Singapore law as at the date of transfer.[9]

4.3.5 Since the date of transfer, there have been a number of alterations to the Territory's applicable law. By the Laws Repeal Ordinance 1955, certain Imperial laws and Ordinances of the Colony of Singapore, set out in the Schedule to the Ordinance, were repealed as laws of the Territory as from 23 November 1955. The Interpretation Ordinance 1955 of the Territory made a number of provisions adapting the laws of Singapore to the Islands as a Territory of the Commonwealth.[10]

4.3.6 Further alterations were effected under the Laws Repeal Ordinance 1973 and the Singapore Ordinances Application Ordinance 1979. Under section 3 of the latter Ordinance, all Ordinances of Singapore which had continued in force in the Territory by virtue of section 8 of the Cocos Act were repealed. Sections 5 and 7 of the Ordinance re-enacted as laws of the Territory a total of 95 Ordinances of

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[7] Evidence, p.S251 and p.S401.
[8] Evidence, p.S251.
[9] Evidence, pp.S251-S252.
[10] H Renfree, The Federal Judicial System of Australia, Sydney, 1984, p.767.

Singapore as in force in Singapore on 31 December 1957. Eleven of these were Ordinances which had been in force in Singapore on that date but which had been subsequently amended by Ordinances made by the Governor-General.[11]

4.3.7 Laws which currently apply in the Cocos (Keeling) Islands, therefore, are in the main a mixture of Commonwealth Acts extending (either expressly or impliedly) to the Territory; Cocos (Keeling) Island Ordinances made by the Governor-General since 23 November 1955 under section 12 of the Cocos Act; and Ordinances in force in the Colony of Singapore on 31 December 1957 (some of which have been amended by Cocos (Keeling) Island Ordinances) that are applied by virtue of the Singapore Ordinances Application Ordinance 1979.[12]

4.3.8 It is a requirement of the Local Government Ordinance 1979 (sub-section 51(2)) that the Cocos (Keeling) Islands Council be provided by the Minister with a copy of every proposed Territory Ordinance, regulation, rule or by-law for consideration. The Council, in turn, may make representations in relation to these proposed laws. Territory Ordinances, and regulations, rules and by-laws made under Ordinances, are tabled for scrutiny by the Federal Parliament.[13]

4.3.9 The Cocos Act provides, subject to any law in force from time to time, for the preservation of the institutions, customs and usages of the Cocos Malay residents.

4.4 Courts

4.4.1 By virtue of the Supreme Court Ordinance 1955, the Supreme Court of the Territory of Cocos (Keeling) Islands exercises jurisdiction in the Territory. The court system of the Territory is also governed by the Singapore Courts Ordinance which creates District and Magistrate's Courts and provides for the appointment of Coroners. In practice, however, civil matters are handled only by the Supreme Court of the Territory and, apart from the Magistrate's Court in a few criminal cases, there

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[11] Evidence, p.S252 and p.S402

[12] Evidence, p.S254.

[13] Evidence, p.S402.

is no evidence to suggest that Courts governed by the Courts Ordinance of Singapore have ever been constituted.[14]

4.4.2 The Supreme Court Ordinance 1955, as amended in 1963, 1976 and 1987, provides for the appointment of judges, jurisdiction and other matters in relation to the Supreme Court of the Territory. The procedure of the Supreme Court, as prescribed under the Ordinance, is governed by the ACT Supreme Court Rules which were in force immediately before 23 November 1955.

4.4.3 All proceedings before the Supreme Court, whether civil or criminal, are to be heard and determined by the Court sitting without a jury. The principal seat of the Supreme Court is at West Island. In civil cases sittings may, however, be held at such other places as the Judge determines, having regard to the interests of justice. The Judge also has the power to make Rules of Court.[15]

4.4.4 The Minister for Arts, Tourism and Territories is empowered to appoint a Registrar and such other officers of the Supreme Court of the Territory as are necessary. The Registrar of the Court is the Administrator. Although the Registry on Cocos has never functioned, two mainland Registries were established in 1987.

4.4.5 In the past, local residents have been appointed as lay Magistrates to deal with minor matters. A Cocos resident is a Coroner. A member of the Western Australian Court of Petty Sessions has also been appointed Special Magistrate and Coroner for Cocos.[16]

4.5 Administrative Arrangements

4.5.1 When the Islands became a Territory of Australia in 1955, there was little immediate change to the administration on Home Island by the Clunies-Ross family. Despite the fact that the Islands were an Australian Territory and that, consequently, Commonwealth law extended to Home Island as well as to West Island, Home Island in practice tended to be regarded as private property, possibly

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[14] Evidence, p.S277 and p.S433.
[15] Renfree, op.cit., p.769.
[16] Evidence, p.S433 and p.S439.

in part because of the 1886 indenture.[17] Provision was made for an Official Representative of the Australian Government to be appointed. However, the appointee was predominantly involved in the administration of Australian activities on West Island.[18]

4.5.2 The arrangement was altered by the Administration Ordinance 1975 by which an office of Administrator was established to administer the Territory on behalf of Australia.[19] To overcome potential difficulties in relation to Home Island, several functions were invested in the office of the Administrator, including Controller of Labour, Food Controller, Sanitary Authority, Price Controller and Registrar of Schools. The Administrator was advised by an Interim Advisory Council, which was eventually replaced by the Cocos (Keeling) Islands Council.[20]

4.5.3 The Administrator is appointed by the Governor-General and reports directly to the responsible Minister.

4.5.4 The Commonwealth Electoral Act 1918 was amended in 1984 to extend to the Territory, thus permitting the Cocos Malay community to vote in Federal elections. The Islands are included as a District in the Federal Division of the Northern Territory.

4.5.5 Pursuant to the Administrative Arrangements announced in July 1987, the Territory is a portfolio responsibility of the Minister for the Arts, Sport, the Environment, Tourism and Territories. However, the Minister for the Arts, Tourism and Territories is the responsible Minister under the Cocos Act. The Department of the Arts, Sport, the Environment, Tourism and Territories (DASETT) is responsible for providing support and advice to the Administrator in the administration of the Territory. At present, the Department is involved in a broad range of municipal and territorial functions in respect of West Island.

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[17] P. Tahmindjis, 'Australia, the Cocos Islands and Self-Determination', Queensland Institute of Technology Law Journal, Vol.1, 1985, p.188, and Evidence, pp.S538-S539.
[18] Tahmindjis, op.cit., pp.185-186 and Evidence, pp.S538-S539.
[19] Tahmindjis, op.cit., p.189
[20] Tahmindjis, op.cit., p.189 and Evidence, p.S541.

4.5.6 The drafting of Ordinances and Regulations for the Territory is the responsibility of the Attorney-General's Department. Law-making for the Territory can therefore be a drawn-out process because, of necessity, drafting of legislation for the Territory competes with other national priorities.[21]

4.5.7 The distance and time differences between Cocos and the east of mainland Australia create difficulties for both Commonwealth Departments and the Territory's administrators. As an example, there are no lawyers resident in Cocos and, because of limited telephone access, it is often particularly difficult for timely advice to be provided to the Territory's administrators on issues which arise under the Territory's laws.[22] This concern was borne out by a former Administrator of the Territory who commented:

> Residents frequently came to me to ask what the law was in relation to a matter which had arisen. People have a right to know what is the law which governs them, but only rarely could I assist them without referring to the Department, and even then the answer was complex or uncertain. Contact with the Legal Section often had to be made by phone, and the time differences - nearly eight hours - increased the inconvenience, and often the tension, when an urgent matter needed resolution.[23]

4.5.8 Under the Local Government Ordinance 1979, a wide range of local government powers and functions in relation to Home Island is the responsibility of the elected Cocos (Keeling) Islands Council. The Council is also empowered to advise the Administrator on matters relating to the peace, order and good government of the Territory.

4.5.9 It is a statutory requirement that the elected representatives of Cocos be consulted in respect of laws proposed for the Territory. The Cocos Council must also be furnished with a copy of all proposed Ordinances and Regulations. In addition, Ordinances and Regulations must be laid before the Federal Parliament, for

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[21] Evidence, p.S408.
[22] Evidence, p.S411.
[23] Evidence, p.S528.

scrutiny, within 15 sitting days of their making. Following consultation, proposed laws are referred to the Governor-General for making.[24]

4.5.10 Both the Cocos Council and the Cocos Islands Co-operative Society are based on a tradition of collective decision-making. In addition to its functions as the community's commercial and business arm, the Co-operative administers social welfare, having a wage equalisation policy and providing fringe benefits to members. However, this role is changing under arrangements implemented in response to the 1989 Commonwealth Grants Commission's Report on the Cocos (Keeling) Islands.

4.5.11 Commonwealth social security and health legislation was extended to Cocos following the Act of Self-Determination in 1984, providing unemployment, sickness and invalidity benefits to residents of the Territory.[25]

4.6 International Considerations

International Scrutiny

4.6.1 As a non-self-governing territory, the affairs of the Cocos (Keeling) Islands were regularly scrutinised prior to 1984 by the United Nations (UN) under Chapter XI of the UN Charter. After Australia assumed sovereignty over the Islands in 1955, it submitted regular reports as required under Article 73(e) of the UN Charter, and the information was subject to the scrutiny of the UN Committee on Decolonisation, known as the Committee of Twenty-Four.[26]

4.6.2 The Committee of Twenty-Four visited the Islands in 1974 and again in 1980. On both occasions, reservations were expressed, amongst other matters, about the legal system of the islands. Principal concerns included the extent to which Territory laws were being applied on Home Island, the difficulty of determining the laws which were applicable, and the lack of suitable arrangements, in practice, to ensure that Malay usages, customs and traditions were suitably taken into account.[27]

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[24] Evidence, pp.S408-S409.
[25] Evidence, p.S414.
[26] Evidence, p.S534 and Tahmindjus, op cit., p.186.
[27] Evidence, pp.S538-S540 and Tahmindjus, op.cit., pp.187-188 and p.191.

4.6.3 It is of concern to this Committee that many of these concerns, as detailed in section 4.8, remain current in the 1990s.

4.6.4 The UN supervised the Act of Self-Determination of the Cocos Malay community in 1984 by which the community voted for integration with Australia on the basis of complete equality. The Australian Government gave a commitment at that time to bring living standards up to mainland levels by 1994, and steps to ensure this are currently being implemented.[28] A principal mechanism of achieving this is provided by the Commonwealth Grants Commission which, in 1989, presented its Second Report to the Government on the Territory, detailing what had been achieved to this end in the period 1984-89, and what remained to be done in the period to 1994.

4.6.5 As noted above, reservations have been expressed about the legal regime of the Islands. In this context, the Committee is of the view that the goal of bringing living standards up to mainland levels by 1994 will be substantially impeded if thorough reform of the Territory's legal regime has not been achieved by that date.

Human Rights

4.6.6 The International Covenant on Civil and Political Rights (ICCPR), ratified by Australia in 1980, contains several Articles of particular relevance to the consideration of the Territory's legal regime. Article 1 of the Covenant affirms the right to self-determination, a right exercised by Territory residents in 1984. Self-determination, however, has not been regarded as being limited to this single action and Australia affirmed this viewpoint to the UN Human Rights Committee when presenting Australia's Second Periodic Report under article 40 of the ICCPR in 1988:

> ... the right (of self-determination) was not exercised fully by a single-act of self-determination on gaining independence after a colonial era. Australia interpreted self-determination as the matrix of civil, political and other rights required for the meaningful participation of citizens in the kind of

[28] Evidence, p.S421 and p.S452.

> decision-making that enabled them to have a say in their future.[29]

4.6.7 Under Article 2.1 of the Covenant, Australia has guaranteed that it will respect and ensure, for all individuals within its Territory, without distinction, the rights recognised in the Covenant.[30] Article 26 recognises that all people are equal before the law and are entitled, without discrimination, to the equal protection of the law.[31] Consistent with these Articles, it is imperative that the rights secured for most Australians by Commonwealth or state legislative or administrative arrangements are also secured for Territory residents,[32] and that 'these rights are enjoyed by Territory residents equally with residents of other parts of Australia'.[33]

4.6.8 It has been submitted to the Committee that the unsatisfactory nature of the Territory's legal regime has resulted in continuing breaches of some of Australia's obligations under the ICCPR in respect of Territory residents. Article 7 of the ICCPR, for example, prohibits cruel, inhuman or degrading treatment or punishment, and yet whipping and beating continue to be punishment options available under laws still applying in the Territory.[34] The lack of legal services on Cocos, and the absence of an appropriate range of sentencing options under criminal law are two other concerns in relation to ICCPR Articles 14 and 26 guaranteeing, respectively, rights to equality before the courts, and equality before the law and equal protection of the law.[35]

4.6.9 Of equal concern is the absence of the formal provision of legal aid to Territory residents, contrary to ICCPR Article 14.3. This issue was also raised with the UN Human Rights Committee in 1988. It was admitted at that time that the position was unsatisfactory, and an undertaking was given that the problem would

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29 Evidence, pp.S1269-S1270.
30 Evidence, p.S268 and p.S1271.
31 Evidence, p.S1268.
32 Evidence, p.S268.
33 Evidence, p.S1271.
34 Evidence, pp.S1273-S1274.
35 Evidence, p.S1275.

be addressed.[36] Up to this time, however, the question of delivery of legal aid to Territory residents continues to be unresolved.

4.6.10 Clearly, a number of changes need to be made to ensure that Territory residents enjoy the full range of ICCPR protections. In this regard, the Human Rights Commission has advised:

> ... we regard these breaches of the obligations Australia has undertaken under the ICCPR as extremely serious violations of basic human rights which cannot be permitted to continue.[37]

4.6.11 In relation to Human Rights issues, DASETT has submitted that most Commonwealth legislation implementing UN human rights conventions 'either extends or will be extended' to Cocos and other external Territories.[38] In this context, Territory residents are currently being consulted about the extension of the Marriage and Family Law Acts.[39] Current provisions are considered outdated and discriminatory in many respects.[40] The Committee notes that, during these consultations, the customs and traditions of the Cocos Malay community must be respected. In addition, the Committee notes that there are particularly important UN Conventions which must also be considered during the consultation process. Chief amongst these are several ICCPR Articles relating to equal status and equal rights of men and women, and the Convention on the Elimination of all forms of Discrimination Against Women.[41]

International Labour Organisation Conventions

4.6.12 Australia has been a member of the International Labour Organisation (ILO) since the establishment of that body in 1919,[42] and has now ratified more than 40 ILO Conventions.[43] Currently, declarations of application of ratified ILO Conventions have not been made in respect of Cocos, although discussions have been

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36 Evidence, p.S1275 and p.S269.
37 Evidence, p.S1274.
38 Evidence, p.S454.
39 Evidence, p.S455.
40 Evidence, p.S1271
41 Evidence, p.S1272.
42 Evidence, p.S714.
43 Evidence, p.S451.

held with Cocos residents with a view to implementing all appropriate ILO Conventions as progress is made towards achieving mainland conditions by 1994.[44]

4.6.13 The Department of Industrial Relations has also advised that it is now 'reviewing, as a matter of priority, the approach taken to Australia's obligations under the ILO Constitution' in respect to Territories such as Cocos.

4.7 Response to Inquiry Terms of Reference

4.7.1 Following the announcement of the Inquiry in November 1988, a general invitation to lodge submissions was issued to interested persons and organisations both in the Territory and on the mainland. Submissions were received from a number of Commonwealth Departments and agencies including the administering Department, DASETT. In addition, submissions addressing issues of relevance to the Cocos (Keeling) Islands were received from a number of non-government organisations and private individuals on the mainland. At the same time submissions were also received from residents of the Cocos (Keeling) Islands itself. All these submissions highlighted the fact that the legal regime of the Territory is outmoded and inadequate, a legacy of its colonial past.

4.8 Assessments of Overall Regime

4.8.1 The legal regime of the Territory has been consistently the subject of criticism. DASETT, which administers the Territory, acknowledged that the Cocos (Keeling) Islands have a large body of 'outmoded, inaccessible laws which do not reflect Australian norms and standards. As a result ... (the) citizens (of Cocos) do not enjoy the same benefits under the law as other Australians.'[45]

4.8.2 The Department points to historical factors in accounting for the inadequacy of the current legal system on Cocos, noting that, as with 'company towns', all services on Cocos were provided by the Clunies-Ross estate for many

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[44] Evidence, p.S452 and pp.S718-S719.
[45] Evidence, p.S395.

years and, subsequently, by the Commonwealth.[46] Since 1978, when almost the whole of the Clunies-Ross estate was acquired by the Commonwealth, efforts have been principally directed towards the achievement of self-determination for the Cocos Malay people and the development of local institutions, centred on the community, in accordance with Australian standards.[47] Inevitably, therefore, though not intentionally, upgrading of the legal regime has lagged.

4.8.3 DASETT further advised that the inadequate legal regime has been a matter of concern to Ministers and has been recognised by Government. However, resources have not been available to undertake a systematic review and update of the laws of the Territory.[48] The problem has been further exacerbated by the fact that the Territories are:

> ... one of those pockets of government administration that get transferred every time there is a change in the administrative arrangements orders.[49]

4.8.4 As a result, a law reform program for the Cocos (Keeling) Islands has been 'reactive rather than systematic.'[50]

4.8.5 DASETT points to current economic and social developments in the Territory which 'could substantially alter community lifestyles and hasten the move away from a self-contained, self-regulating community'[51] and concludes that:

> A comprehensive body of appropriate Australian law is urgently needed to accommodate emerging circumstances in the Territory, especially the prospect of commercial developments.[52]

4.8.6 The Cocos (Keeling) Islands Council submitted that section 18 of the Cocos Act is important as it ensures that 'customs, culture, religious practice and tradition are respected.'[53] In respect of the laws of the Territory, the Council argues that 'the

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[46] Evidence, p.S413.
[47] Evidence, pp.S413-S414.
[48] Evidence, p.652.
[49] Evidence, p.650.
[50] Evidence, p.S395.
[51] Evidence, p.S414.
[52] Evidence, p.S415.
[53] Evidence, p.S366.

tedious process(es) that prevail today should be terminated in a foreseeable future'.[54]

4.8.7 A former Administrator of the Territory, Ms C Stuart, also emphasised the importance of taking into account the culture of the Cocos Malay residents, but submitted that, at the same time, this consideration should not be an impediment to improvement in the future: 'this need has for too long been an excuse for doing nothing.'[55]

4.8.8 Ms Stuart further commented:

> The legal ethos on Cocos is that the community regulates itself. On Home Island, the Council takes a great deal of responsibility for its own 'law and order' but it is powerless in several important areas ... On West Island the self-regulation works reasonably well, although it puts quite a degree of responsibility on the ... (Island's administrators). In my view such a regime - which is essentially 'colonial' - should not have to be maintained in an Australian Territory at the end of the 20th century.[56]

4.8.9 The Human Rights and Equal Opportunity Commission submitted that the legal regime of the Territory is unacceptable in major respects. Its principal concerns are that the body of unreformed Singapore law which applies 'is inconsistent in a number of significant respects with human rights instruments binding on Australia.' The Commission also noted that the fact that the applicable law of Cocos is neither readily ascertainable nor accessible, of itself, 'presents human rights problems independently of the content of the law.' A further human rights problem stems from the fact that mechanisms for consulting with local representative institutions in relation to laws that ought to apply are deficient.[57]

4.8.10 The Centre for Comparative Constitutional Studies assessed the overall legal regime as one that suffers from a range of defects. These range from physical difficulty in identifying the laws in force to a complex and confusing legal structure.

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[54] Evidence, p.S367.
[55] Evidence, p.S529.
[56] Evidence, p.S529.
[57] Evidence, p.S1267.

Compounding these problems is the fact that the Territory's law contains an 'undefined but probably sizeable component of anachronistic English law' added to which is a body of Singapore law which is, in many instances, 'monstrously outdated.' It notes that, in the past, a lack of legal activity seemed to be combined with the practice of 'merely papering over the most obvious cracks' and concludes that '... a continuation of present administrative practices could have disastrous consequences'.[58]

Conclusions

4.8.11 The current legal regime of the Cocos (Keeling) Islands Territory has been shown to be seriously inadequate and inappropriate. Its principal deficiencies are *that it is outmoded, complex and confusing, that it is neither readily ascertainable* nor accessible, and that it raises some fundamental and serious human rights issues.

4.8.12 In the Committee's view, the Territory's legal regime can properly be labelled 'a national disgrace'.

4.8.13 It has been submitted that competing national priorities in respect of the drafting of legislation, administrative priorities within the Territory itself following the Act of Self-Determination, and the tradition of self-regulation followed by the *Cocos-Malay community itself, combined to undercut the urgency of the need for a* systematic review of the laws of Cocos.

4.8.14 The Committee notes and commends the efforts of the current administering Department, DASETT, for its initiatives in relation to the legal regime on Cocos, and acknowledges the efforts of previous Ministers and Administrators in this regard.

4.8.15 Nevertheless, the Committee deplores the current state of the Territory's legal regime and urges immediate redress.

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[58] Evidence, p.S281.

4.8.16 It is unacceptable that, in the 1990s, there are Australian citizens who are denied the same or comparable benefits and privileges enjoyed under the law as other Australians and, indeed, whose fundamental human rights in respect of the law have yet to be assured.

4.9 Consultation with Residents

4.9.1 It was readily apparent to the Committee that the key questions to be asked in respect of the Territory's legal regime were not so much those relating to the degree of adequacy and appropriateness of the law but, rather, those in relation to the most appropriate remedies to the currently unsatisfactory situation.

4.9.2 Before examining possible options, however, it was essential that the Cocos Malay community and other Cocos residents be consulted, in order to determine their wishes in this regard.

4.9.3 The need for direct consultation with the residents of the Territory was considered crucial for a number of reasons that are unique to the Cocos (Keeling) Islands Territory. First, it was clear from submissions put to the Committee that the Cocos Malay community itself places considerable emphasis on the need for and importance of consultation. Second, such consultation is consistent with the spirit of the Cocos Act which specifically provides for the preservation of the institutions, customs and usages of the Territory. Third, the community submitted to the Committee that they had 'no expertise in the area of laws' and wished their inexperience to be taken into account in the Committee's consideration of the legal regime of the Territory. In addition, the Council submitted that it was of paramount importance for any proposals and their implications to be explained.[59]

4.9.4 The Committee accordingly visited the Cocos (Keeling) Islands Territory in July 1989.

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[59] Evidence, p.S362 and p.S367.

4.9.5 Informal consultations were held with a number of the residents on both Home Island and West Island. In addition, a public hearing was held on Home Island on Wednesday 26 July 1989.

4.9.6 Evidence was taken at the hearing, through an interpreter, from the Chairman, Deputy Chairman and Secretary of the Cocos (Keeling) Islands Council, and from the Chairman, Deputy Chairman and General Manager of the Cocos Islands Co-operative Society. The Administrator, and the President and a member of the Cocos Club, also appeared at the hearing to give evidence.

4.9.7 Evidence provided by representatives of the Home Island community focussed on the need for consultation and on the need to preserve the way of life of the Cocos Malay people. The Chairman of the Council submitted:

> What is important is the legal regime for Cocos in the future ... The main point ... is that the community must be fully involved in discussing and in providing advice in relation to the changes to the legal regime, in particular, in relation to laws from the mainland which are proposed to be extended here ...[60]

4.9.8 Similarly, the Chairman of the Co-operative commented:

> We, the Home Island people ... have to be given the opportunity to consider our future very clearly so that one day we will be able to stand on our own feet.[61]

and he concluded:

> I feel these are very important matters ... we have to decide what laws are needed here ... we need to consider proposals ... I am very concerned to ensure that we establish the right laws here and do not establish laws that are not required here.[62]

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[60] Evidence, p.1083.
[61] Evidence, p.1088.
[62] Evidence, pp.1102-1103.

4.9.9 These thoughts were echoed by the Administrator of the Territory:

> The present law applicable to Cocos is anachronistic, outdated and almost unworkable. The question now arises, of course, as to which set of laws should apply to Cocos ....[63]

4.9.10 The Committee gave an undertaking, during the hearings, to provide Cocos residents with an opportunity to comment on possible proposals for reform before the Committee's Report was finalised. Section 4.11 details the options considered and the method by which residents were consulted.

4.10 Comparison of Laws with Mainland Australian Jurisdictions

4.10.1 On the basis of evidence provided both orally and in writing, an assessment of the laws of the Territory in comparison with mainland Australian jurisdictions reveals that the laws of the Cocos (Keeling) Islands Territory, a mixture of Singapore-derived and Australian statutes, are largely outmoded and inaccessible, and do not reflect Australian norms and standards.

4.10.2 The highly unsatisfactory nature of the Territory's legal regime was recently highlighted by Justice French, in the case of Re Clunies-Ross: ex parte Totterdell and Another (1989) 82 ALR 475. His Honour commented that, in respect of a legal regime, as a minimum requirement, '(i)t would be reasonable to expect that persons living in Australia or its territories live under a reasonably intelligible set of laws and legal framework'.[64] He concluded, however, that the legal regime of Cocos fell well short of this minimum requirement.

4.10.3 In addition, it was submitted in evidence that it is fundamental that 'the law applying to any given situation ought to be reasonably readily ascertainable by and accessible to anyone wishing to know it'.[65] In this respect, however, the Committee was advised that, because of other Government printing priorities, it has not been possible to print a consolidated listing of the laws in force in the Territory

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[63] Evidence, p.1104.
[64] Evidence, p.S499.
[65] Evidence, p.S244.

nor to reprint the 'inherited' laws.[66] Access by courts, officials and the public is, therefore, difficult.[67] Most importantly, the lack of accessibility and ready ascertainability of the laws of the Territory is a violation of fundamental human rights.[68]

4.10.4 Thus, the basic requirements are not available to the citizens of the Cocos (Keeling) Islands Territory.

4.10.5 A former Administrator of the Territory provided evidence to the Committee which demonstrated the consequences, in practice, of this situation:

> One of my most vivid memories is sitting with an irate husband who was complaining about the inadequacy of the (workers') compensation being offered ... I was going through the ... (relevant) Ordinance in my copy of the Singapore Ordinances, and to my embarrassment, the page was so brittle that it snapped off. The husband was not amused. But of more importance, the law on the page was even older than the page itself, since the consolidation was 1955, and the law may not have been amended since 1913.[69]

4.10.6 Comparison of the laws also reveals that several of the Singapore-derived laws differ in many ways from those in every other Australian jurisdiction. For example, some of the penalties of the Singapore-derived laws which continue in force in the Territory differ significantly from those that apply under similar laws on the mainland. As noted earlier, beating with a rattan, for example, and whipping are penalties which are still in force in the Territory. The continuing availability of such punishments, regardless of whether or not such penalties are in practice carried out, is yet another violation of basic human rights. It is abhorrent to the Committee that such provisions remain in force:

> We in this nation are out there waving the banner as libertarians yet within our own jurisdiction we have an archaic structure that we ought to be ashamed of.[70]

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66 Evidence, p.S406.
67 Evidence, p.S411.
68 Evidence, p.S1267.
69 Evidence, pp.S528-S529.
70 Evidence, p.652.

4.10.7 Arising from its piecemeal nature, the legal regime of the Territory is not a coherent whole. Thus, from many points of view, in addition to the outdated nature of the laws themselves, the legal regime for Cocos is inappropriate and unacceptable.

4.11 Options for Reform

4.11.1 When considering options in relation to the legal regime of the Cocos (Keeling) Islands Territory, there was agreement on two broad issues. First, maintenance of the status quo was not considered an acceptable option as the laws in place, demonstrably 'obsolete, archaic and inadequate ... would allow the economic, social and political development of (Cocos) to be stifled.'[71] Second, there was universal agreement that any alternative to the current regime must 'provide both for "norms" applying in the rest of Australia, and for the (Territory's) particular cultural, economic and political features...'.[72] Moreover, it was emphasised to the Committee that, when remedying the problem, it was not necessarily a requirement, or even desirable, for the law to be identical to mainland Australian law. It was essential, rather, to ensure that:

> (Territory) citizens ... are assured the same fundamental human rights as other citizens, and enjoy benefits, rights and protection under the law... equal to that enjoyed by other citizens.
>
> The same fundamental rights may be protected and ensured by laws which differ in detail between jurisdictions.[73]

4.11.2 Against this background, a series of options for reform of the laws and legal regime of the Territory, based on the evidence received, was prepared. They comprised:

- retention of the status quo with an assurance that urgent attention and increased resources would be applied to a detailed program of law reform;
- repeal of the existing law and application, while retaining ultimate Commonwealth authority, of the law from time to time applying in:

[71] Evidence, p.S423.
[72] Evidence, p.S237.
[73] Evidence, pp.S1267-S1268.

(a) Western Australia

(b) the Australian Capital Territory; or

(c) the Northern Territory;

- application of the laws from time to time applying in:

  (a) Western Australia

  (b) the Australian Capital Territory; or

  (c) the Northern Territory

  with the provisos that any law of the Cocos (Keeling) Islands inconsistent with an applied law is repealed to the extent of the *inconsistency, and that no laws would be applied without prior* consultation with the residents;

- enhancement of the powers of the Cocos (Keeling) Islands Council by giving it greater powers and responsibility for specified domestic laws;

- incorporation of the Territory within the geographic and political boundaries of:

  (a) Western Australia; or

  (b) the Northern Territory.

4.11.3 Of these options, the predominant view, in evidence from those who agreed with or supported the application of existing laws to the Cocos (Keeling) Islands, was that the laws of Western Australia would be most appropriate.

4.11.4 Consistent with the Committee's undertaking to Territory residents that consultations would take place in relation to the options for reform before the Committee's Report was finalised, these options were circulated to Territory residents. The Committee returned to the Territory and consulted with individual residents or their nominated representatives in this regard in August 1990.

4.11.5 It was readily apparent, in discussions, that Cocos residents favoured adoption of the laws of Western Australia, with the proviso that the law be adapted to the special needs of Cocos residents. Several reasons were advanced for this.

4.11.6 Representatives of the Cocos Malay community, for example, indicated that they favoured this option in part because they consider they are becoming much more integrated with the mainland, most particularly with Western Australia:

> Cocos is geographically closest to Western Australia ... Most of our close connections and most of our needs are satisfied by Western Australia.[74]

4.11.7 It was also noted that many Cocos Malays had moved to various communities in Western Australia, and that the Western Australian laws seemed appropriate to them. Further, residents noted that:

> Our charter flight services and shipping services all come from Western Australia; all our food supplies come from Western Australia; our children go to Western Australia for education ... All our requirements are supplied by Western Australia.[75]

4.11.8 It was stressed during discussions that an important factor to be considered in the adoption of Western Australian law was the mechanism by which that law could be adapted to the particular needs of the Territory.

4.11.9 Options advanced included an increase in the powers of the Cocos (Keeling) Islands Council, along the lines of a local government body with, possibly, greater powers than mainland local government bodies, or the establishment of a local government body and, as well, some other representative body or assembly.

4.11.10 In this context discussion focussed, in particular, on the extent to which such a body needed to be truly representative of all Cocos residents.

4.11.11 It was noted that there was an ongoing need to preserve the traditions, values and customs of the Cocos Malay community. However, it was also stressed to the Committee that the needs of Territory inhabitants other than those in the Cocos Malay community also needed to be taken into account:

> ... to have a body on the island which is advising people in Australia of the local needs and requirements and ignoring

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[74] Evidence, p.1419.
[75] Evidence, p.1429.

> totally half the population, whether they are only here for two years or not, is bordering on the criminal.[76]

4.11.12 A further consideration derives from the land grant to the Clunies-Ross family. Whilst mindful of recent legal proceedings, the Committee stresses that the interests and rights of the Clunies-Ross family need to be taken into account in the context of future land use considerations in the Territory.

4.11.13 The Committee concurs that any body charged with the task of reviewing laws to be applied to the Territory must be representative of the whole community. To accommodate this need, one proposal put forward was the establishment of a Council for the Territory, with local government powers, elected on the basis of proportional representation:

> (It) might be that a ward structure would be introduced into the Islands, with proportional representation on a population basis. That would mean that there (would be) certain representation from the Cocos Malay community and similar representation from ... (other Territory residents).[77]

4.11.14 The Committee notes that the practice on Christmas Island of a three-month residency period as qualification to be part of the electorate may be considered an appropriate model in this context.

4.11.15 The Committee was advised that a draft Memorandum of Understanding had been developed by the Commonwealth for consideration by the Cocos Malay community. It is to be noted that the Memorandum of Understanding contains clauses, in part, regarding the adoption of Western Australian law, and a changed role for the Cocos Council along the lines of a local government body, using Western Australia as a model.[78]

Conclusions

4.11.16 There was general agreement to the proposal that Western Australian law be applied in the Territory. The proposal was favoured for several reasons, including

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[76] Evidence, p.1445.
[77] Evidence, p.1429.
[78] Evidence, pp.S1590-S1591.

the links between Cocos and Western Australia, and recognition that, under this arrangement, the Commonwealth's plenary powers to make laws for the peace, order and good government of the Territory would be preserved. No other proposal was put forward to the Committee in this regard.

RECOMMENDATION 17

4.11.17 The Committee recommends that the laws of Western Australia (as amended from time to time) be applied in Cocos to replace the currently applied law, in so far as the currently applied law has not been developed to a unique or particular characteristic of the Cocos (Keeling) Islands Territory.

4.11.18 The Committee notes the limited role and functions of the Cocos Council and the proposal, under the Memorandum of Understanding, for the Council to be given the role powers and functions of a local government body. In this regard, particular concern is that, at present, there are no arrangements for ensuring that other Territory residents are or will be involved in decision-making processes in respect of the Territory. This situation should be immediately redressed. At the same time, the Committee stresses the ongoing importance of ensuring that the customs, culture and traditions of the Territory's Cocos Malay community, consistent with human rights considerations, continue to be taken into account.

RECOMMENDATION 18

4.11.19 The Committee recommends that the Commonwealth, ensuring, consistent with human rights considerations and Australia's international obligations, that the local culture and traditions of the Cocos Malay community continue to be be taken into account, foster the development of further self-government in the Territory including enfranchisement of <u>all</u> residents of Cocos (Keeling) Islands in respect of matters affecting the Territory generally.

4.11.20 A particular concern of the Committee is that an appropriate mechanism needs to be established to ensure the involvement of all residents of the Territory in respect of the Western Australian laws to be applied on Cocos, such that, within a defined time period, say three months, laws to apply could be subject to disallowance by the Commonwealth Minister, on the recommendation of the Territory's residents or their representatives.

RECOMMENDATION 19

4.11.21 The Committee recommends that the Commonwealth, in consultation with Territory residents, develop a mechanism, such as a local government body with an expanded role, including direct access to the Commonwealth Minister in respect of laws to apply on Cocos (Keeling) Islands, for reviewing Western Australian laws for their appropriateness to the Territory.

4.11.22 Evidence has been provided that the new legal regime will be either in place by July 1992, or significantly advanced.[79] In the absence of a formal mechanism for consultation with Territory residents in this regard, it is essential as an interim measure that the Commonwealth assume this role.

RECOMMENDATION 20

4.11.23 The Committee recommends that, in the absence of the establishment on Cocos of a reviewing mechanism, relevant Commonwealth Departments monitor and report on the possible application of Western Australian laws to the Territory, in consultation with Territory residents, to ensure that the particular circumstances of the Cocos (Keeling) Islands Territory and/or its residents are not adversely affected by the extension of a law.

4.11.24 In the longer term, it may be desirable to further increase the already close links between the Territory and Western Australia. Discussions should accordingly be commenced with the Western Australian Government in this regard.

RECOMMENDATION 21

4.11.25 The Committee recommends that the Commonwealth institute discussions with the Western Australian Government in respect of the long-term future of Cocos (Keeling) Islands including their possible incorporation within the State of Western Australia.

4.11.26 The Committee has been advised that Australia is in serious breach of several ICCPR Articles in respect of Cocos. The ICCPR contains several articles of direct relevance to the consideration of the Territory's legal regime. The Human Rights Commission has identified a number of areas in which changes need to be

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[79] Evidence, p.S1588.

made to ensure that Territory residents enjoy the full range of ICCPR protections. These are summarised in paragraphs 4.6.6 to 4.6.11 of the Report.

RECOMMENDATION 22

4.11.27 The Committee recommends that the Commonwealth initiate action designed to overcome the breaches of human rights identified by the Human Rights and Equal Opportunity Commission.

4.11.28 The Committee is concerned that no formal provisions have been made to ensure that Territory residents have access to legal aid. In this regard, the Human Rights Commission has advised that Australia is, accordingly, in breach of ICCPR Article 14.3. The Committee notes that commitments in this regard were provided to the UN Human Rights Committee but that, to date, no action has been taken.

RECOMMENDATION 23

4.11.29 The Committee recommends the Commonwealth arrange for the provision of a formal legal aid service for the residents of the Cocos (Keeling) Islands Territory.

4.11.30 The Committee is further concerned that, as revealed in evidence at paragraph 4.6.12, none of the ILO Conventions currently ratified by Australia has yet been applied on Cocos. The situation needs to be addressed immediately.

RECOMMENDATION 24

4.11.31 The Committee recommends that the Commonwealth ensure that, consistent with the particular circumstances of Cocos, as many as possible of the ILO Conventions ratified by Australia are applied to the Cocos (Keeling) Islands Territory.

4.12 Specific Issues of Concern

4.12.1 During consideration of the overall legal regime, particular sections of the applicable law on Cocos were examined in the context of the Committee's brief to assess the extent to which Territory citizens receive the same benefits, rights and protection under the law as other Australian citizens.

4.12.2 This examination revealed several serious anomalies and inadequacies. In some instances, residents of the Cocos Malay community are denied benefits and rights which are available to residents on West Island; in other instances, all Cocos residents continue to be subject to outdated and unreformed Singapore Ordinances, when these same Ordinances have been reformed for Christmas Island residents.

4.12.3 Overall, this examination revealed many serious inadequacies which should be addressed immediately, or on a priority basis, rather than in a reactive way, in response to emerging circumstances. The examination further substantiated the view that Territory residents do not enjoy the same or even comparable benefits, rights and protections under the law as other Australian citizens.

4.13 Administration of the Territory

4.13.1 During the inquiry, the very large range of powers and offices vested in the Administrator has been noted. There are suggestions that such an arrangement is anachronistic. As noted in Chapter 1, a thorough review of the title, functions and powers of Territory Administrators is warranted. In this context, the Committee notes that the role, power and functions of the Regional Director, Jervis Bay Territory, may serve as a useful alternative model.

RECOMMENDATION 25

4.13.2 The Committee recommends that the Commonwealth review the Administration Ordinance 1975 with particular reference to the title, functions and powers of the Administrator.

4.14 Criminal Law

4.14.1 The inadequacy of the Territory's criminal laws was highlighted in many submissions. Criticism from the Commonwealth Director of Public Prosecutions centred on the difficulty of identifying the criminal laws applicable, as well as on deficiencies in the laws - substantially unreformed pre-1955 Singapore law - themselves.[80]

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[80] Evidence, p.S15.

4.14.2 It was noted, moreover, that the applicable law, while sometimes departing significantly from accepted practice in Australia, does not appear to cater for the culture and traditions of the Cocos Malay community.[81] Its inappropriateness is therefore clear and unequivocal.

4.14.3 The fact that the Territory has been relatively crime-free since becoming a Territory of Australia has been cited as a principal reason for the lack of impetus for change. However, with the prospect of changing circumstances in the Territory arising, for example, from the proposed development of tourism, and the consequent increase in arrivals on the Islands, the incidence of petty crime, if nothing else, is expected to increase.[82]

4.14.4 It would clearly be preferable, therefore, to have a coherent body of criminal law in place rather than for no action to be taken until an increase in the crime rate prompts further action.

RECOMMENDATION 26

4.14.5 The Committee recommends that, in applying the law of Western Australia to Cocos, priority should be given to the application of the criminal law of Western Australia to the Territory.

4.15 Workers' Compensation

4.15.1 The lack of adequate workers' compensation provisions was highlighted in several submissions. The legal framework for workers' compensation is provided by the Singapore Workers' Compensation Ordinance of 30 April 1955 applied by the Singapore Ordinances Application Ordinance 1979. The rates of compensation are extremely low by mainland Australian standards. They provide, for example, where death results, 36 months earnings or $7,200 whichever is the less and, in the case of permanent disability, 48 months earnings or $9,600 whichever is the less. It is also noted that, as this is a Singapore Ordinance, the sums quoted refer to Singapore and not Australian dollars, and the relevant Interpretation Ordinance sets the conversion rate at 50 cents in the dollar. Thus, the compensation amounts

[81] Evidence, p.S15 and p.S273.
[82] Evidence, p.S439.

provided, in Australian dollars are, in the cases of death and permanent disability, equal to A$3,600 and A$4,800 respectively. By comparison, on Christmas Island the equivalent payment for permanent disability is around A$56,000.[83]

4.15.2 A considerable sense of injustice, if not ill-usage, was conveyed to the Committee by the Cocos Islands Co-operative Society, in relation to this matter. The Co-operative noted that this same Ordinance was repealed in the Territory of Christmas Island in 1984 to be replaced with a more appropriate Ordinance and yet *the issue continues to be unresolved in relation to the Cocos Malay community.*[84]

4.15.3 The Co-operative also noted that following the Act of Self-Determination in 1984, the Commonwealth had given an undertaking to comply with certain ILO Conventions, including that relating to workers' compensation. To date, this has not been done. Moreover, it is only the Cocos Malay residents of the Territory to whom these outdated provisions apply, as Commonwealth employees located in the Territory are eligible to receive the full range of benefits enjoyed by citizens on the mainland.[85]

4.15.4 The Co-operative further submits that a particularly annoying aspect of this situation is that, on other occasions, the Commonwealth has enacted legislation such as the Migratory Birds Ordinance 1980 relatively quickly.

4.15.5 The Co-operative commented:

> ... surely workers deserve legislative treatment at the same level of birds. To ...(add) insult to injury, in 1988, additional legislation was enacted for the migratory birds. Currently the Commonwealth funds the position of a conservator and his assistant, but in relation to workers' compensation and occupational health and safety matters, the workers trail far behind the birds.[86]

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83 Evidence, p.S449 and p.S803.
84 Evidence, p.S803.
85 Evidence, pp.S803-S804.
86 Evidence, p.S804.

4.15.6 A firm of insurance brokers, Heath Fielding Australia, established provisional insurance arrangements in the Territory in 1988. Heath Fielding has commented, however, that the relevant Singapore Ordinances which apply in the Territory afford citizens of Cocos only extremely limited workers' compensation and motor vehicle third party insurance. Consequently, these citizens are 'clearly disadvantaged' compared with the citizens of Christmas Island as well as other citizens of the Commonwealth.[87] Heath Fielding also alerted the Committee to inadequacies in the current statutory provisions which have potentially serious consequences for tourists visiting Cocos:

> Visitors to the Territory ... are also potentially at a great disadvantage in the event they suffer personal injury arising out of the use of a motor vehicle (in the absence of insurance protection).[88]

4.15.7 The dichotomy on the Islands between Cocos Malay residents and Administration staff in respect of workers' compensation is also evidenced in relation to wages and working conditions in the Territory. No overall system for the administration of pay and related matters is in place in the Territory. However, provision is made in the Commonwealth Administration Ordinance 1975 in relation to the terms and conditions of employment of Administration staff. Wages and working conditions on Cocos are also determined under the Singapore Labour Ordinance 1955 in respect of which the Department of Industrial Relations has commented:

> ... the Ordinance is not an appropriate basis for the determination of wage levels.[89]

4.15.8 The Committee has recommended in relation to wages and working conditions that as many as possible of the ILO Conventions ratified by Australia be applied to Cocos. Adequate workers' compensation provisions are also required.

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87 Evidence, p.S723.
88 Evidence, p.S724.
89 Evidence, p.S701

RECOMMENDATION 27

4.15.9 The Committee recommends that, in applying the law of Western Australia to Cocos, priority attention be given to the application of appropriate workers' compensation laws in the Territory.

4.16 Commercial Law

4.16.1 The President of the Cocos Club, the major social club in the Territory, advised the Committee that, on the basis that it is not possible for the Cocos Club to become an incorporated club, the standards of benefits, rights and protection under the law enjoyed by other Australian citizens are not enjoyed by Territory residents. It was also submitted that the relevant current laws can be confusing, such as in this instance, where conflicting legal opinions had been received from DASETT and the Western Australian Corporate Affairs Department. The Club President commented:

> We believe we should have legal rights, as an interim and as a minimum, similar to the Christmas Island Associations Incorporation Ordinance 1976.
>
> We submit we should have the same legal rights and privileges of other Australian clubs ...[90]

4.16.2 The Committee suggests that priority attention be given to this area of the law when the Western Australian legal regime is being applied in Cocos.

4.17 Nature Conservation Legislation

4.17.1 The Australian National Parks and Wildlife Service (ANPWS) submitted that a large portion of the Territory's laws is antiquated and irrelevant. In addition, principal wildlife conservation Ordinances such as the Migratory Birds Ordinance are deficient and require substantial amendment.

4.17.2 ANPWS also questioned the wisdom of a recent tourist development agreement in which a set of environmental conditions was agreed before approval to proceed was given. In the view of ANPWS, such agreements are prone to inequity if not inadequacy, and it concludes:

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[90] Evidence, pp.S52-S53.

> The development of tourism can be expected to exacerbate the need for legislation containing adequate environmental safeguards for the Territory. ... Ideally, the Islands require *comprehensive legislation for management of the environment.*[91]

4.17.3 The status of North Keeling also requires urgent attention. Under current arrangements, in the absence of Regulations under the National Parks and Wildlife Conservation Act 1975 (the NPWC Act), the Comittee was advised that:

> ... there are very few ways - and also very few clear ways - in which conservation activities can be imposed throughout the Territory...[92]

4.17.4 Nature conservation measures under the NPWC Act are particularly favoured, because the legislation caters for traditional people:

> ... one of the areas in which the ... (NPWC) Act is regarded very much as a state-of-the-art piece of legislation worldwide is that it also caters for traditional people and their requirements in relation to wildlife within a set of priorities that may change from time to time.[93]

4.17.5 As previously noted by the Committee, it is also desirable that legislation relating to nature conservation in the Territories be standardised as far as possible, by way of regulation under the NPWC Act.

RECOMMENDATION 28

4.17.6 The Committee recommends that North Keeling be declared a park or reserve under the provisions of the NPWC Act.

RECOMMENDATION 29

4.17.7 The Committee recommends that the ANPWS ensure, through the promulgation of Regulations under the NPWC Act, if necessary, that a regime of nature conservation legislation exist for the proper protection of the environment, including the waters, of the Cocos (Keeling) Islands Territory.

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91 Evidence, pp.S738-S739.
92 Evidence, p.S1433.
93 Evidence, pp.1432-1433.

CHAPTER 5

CORAL SEA ISLANDS TERRITORY

5.1 Description/Historical Background

5.1.1 The Coral Sea Islands Territory consists of small islands spread over a sea area of 780,000 square kilometres. It is located off the east coast of Australia between the outer edge of the Great Barrier Reef and longitude 157°10'E, and between latitudes 12°S and 24°S. The Territory consists of the islands only, and does not include the sea.[1]

5.1.2 The extremely small islands, which together comprise only a few square kilometres of land area, are largely of sand and coral, some with grass or scrub cover, but none with permanent fresh water. The islands, discovered early in the nineteenth century, are uninhabited except for a staffed meteorological station on Willis Island.[2]

5.1.3 Two of the islands have automatic weather stations which are linked to the mainland. On other islands, beacons and a lighthouse have been installed. The area is occasionally subject to tropical cyclones.[3]

5.1.4 The Territory is hazardous to shipping, and many of the cays and islands have been named after the ships which have been wrecked there. The islands fall into two broad groupings: in the North West, the group includes islands or cays such as Moore, Holmes, Herald, Lihou and Willis. The South East group includes Frederick, Kenn, Saumarez and Cato. Willis and Cato are the largest islands of the Territory.[4]

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1 Yearbook Australia, 1988, p.952, DASETT Annual Report 1988-89, p.74 and Evidence, p.S739.
2 Yearbook Australia, 1988, p.952 and Evidence p.S399.
3 Yearbook Australia, 1988, p.952.
4 H Burmester, 'Island Outposts of Australia', Australia's Offshore Maritime Interests, Canberra, 1985, p.57.

5.1.5 No formal claim of sovereignty was asserted by Britain in respect of the Coral Sea Islands. Thus, when Australia asserted sovereignty over the islands in 1969, its claim was based on actions taken by the Commonwealth itself 'assertive and denotative of sovereignty' over a number of years.[5]

5.1.6 The Territory's method of acquisition is thus different from that which pertains in the other external territories and the Jervis Bay Territory, all of which were accepted by the Commonwealth, pursuant to section 122 of the Constitution, as Territories of the Commonwealth.[6]

5.2 Applicable Law

5.2.1 By the Coral Sea Islands Act 1969 (the Coral Sea Islands Act), the Coral Sea Islands were declared to be a Territory of the Commonwealth. Under section 4 of the Coral Sea Islands Act, the laws in force in the Islands when the Act came into effect were to continue in force, although provision has been made for them to be altered or repealed by Ordinance. Under section 5, the Governor-General is empowered to make Ordinances for the peace, order and good government of the Territory.[7]

5.2.2 Commonwealth Acts do not apply in the Coral Sea Islands Territory unless they are expressed to extend to the Territory. In addition, where there is no express provision, Commonwealth Acts may also be deemed to apply, depending on the tenor or implied effect of an Act.[8] Under sub-section 6(2) of the Coral Sea Islands Act, application of Commonwealth Acts may not be affected by Ordinance.[9]

5.2.3 The Application of Laws Ordinance 1973 makes provision for the application of laws of the Australian Capital Territory in the Coral Sea Islands Territory. Under the Ordinance, ACT laws which are in force, and which are applicable to the Coral Sea Islands Territory, apply in and to the Coral Sea Islands

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5 Evidence, p.S397, p.S399 and Evidence, p.S243.
6 Evidence, p.S397.
7 H Renfree, The Federal Judicial System of Australia, Sydney, 1984, p.781.
8 Evidence, p.S400.
9 Evidence, p.S250.

Territory as laws of the Territory. However, Commonwealth laws which apply in the ACT, and which do not either expressly or by implication apply in the Coral Sea Islands Territory, do not apply in the Territory by virtue of the Ordinance.[10]

5.2.4 Under the ACT Self-Government (Consequential Provisions) Act 1988, provision is made for ACT laws after self-government to continue to apply in the Territory.[11]

5.2.5 Laws in force in the Territory therefore comprise:

- Acts of the Commonwealth which either expressly or by implication apply;
- Laws in force in the ACT, in so far as they are applicable;
- Ordinances made for the peace, order and good government of the Territory; and
- Laws in force in the Coral Sea Islands before they became a Commonwealth Territory in 1969, preserved by section 4 of the Act and which have not subsequently been repealed.[12]

5.2.6 In relation to pre-existing laws, the Committee received no evidence by which the Territory's previously existing laws could be identified.

Conclusion

5.2.7 Although provision has been made in the Coral Sea Islands Act for pre-existing laws to continue in force, these laws have not so far been identified. While, to date, there may have been no urgent requirement for all laws applicable in the Territory to be identified, there is no guarantee that such a need will not emerge in

10 Evidence, p.S250 and p.S400.
11 Evidence, p.S400.
12 Evidence, p.S251.

the future. In any case, it is unsatisfactory that these laws continue to be unidentified. This situation warrants remedy as soon as possible.

RECOMMENDATION 30

5.2.8 The Committee recommends that the Commonwealth identify the laws currently applying in the Coral Sea Islands Territory, in particular those applying pursuant to section 4 of the Coral Sea Islands Act 1969.

5.3 Courts

5.3.1 Under section 8 of the Act, the Courts of Norfolk Island have jurisdiction in and in relation to the Territory except for matters relating to the Petroleum (Submerged Lands) Act 1967. In exercising this jurisdiction, a court of Norfolk Island may sit in the Territory, in Norfolk Island or in Australia.[13]

5.4 Administrative Framework

5.4.1 Section 4 of the Application of Laws Ordinance 1973 provides:

> Powers and functions vested, in relation to the ACT, in a person or authority (other than a court) are, in relation to the Territory, deemed to be vested in, and may be exercised or performed by, that person or authority, or such other person or authority as the Minister specifies ...[14]

5.4.2 Pursuant to the Administrative Arrangements announced in July 1987, the Territory is a portfolio responsibility of the Minister for the Arts, Sport, the Environment, Tourism and Territories. The Minister for the Arts, Tourism and Territories is the responsible Minister under current administrative arrangements.

5.4.3 While the Minister is empowered, where necessary, to appoint officers to execute the laws of the Territory, there was no evidence to suggest that, to date, any such appointments have been made.

5.4.4 The Department of the Arts, Sport, the Environment, Tourism and Territories (DASETT) is responsible for the administration of the Territory. The

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[13] Evidence, p.S434, Evidence p.S276 and Renfree, op cit., p.781.
[14] Renfree, op.cit., p.781.

Department has submitted, however, that having regard to the uninhabited nature of the Territory, its involvement in Territory administration is relatively limited.[15]

5.5 International Considerations

5.5.1 The creation of the Coral Sea Islands as an external territory, emphasised Australia's claim to sovereignty over the area.[16] It has been suggested to the Committee, however, that the claim needs to be continually bolstered, partly because the Territory - unlike the other Australian external territories - was not at any time formally claimed by the British Crown:

> The effectiveness of Australia's assertion of sovereignty would depend, at international law, upon the existence of any competing claims to the area, and whether such claims were backed by acts of effective occupation ... sufficient to defeat Australia's claim ... Australian action in actually making laws for the Coral Sea Islands Territory, and in administering those laws, is a significant element in maintaining sovereignty.[17]

5.5.2 The islands of the Territory have international significance in two other major respects: islands and cays in the area have been used as basepoints in delimitation agreements with Australia's neighbours in the Pacific. They have also extended Australia's maritime jurisdiction considerably.[18]

5.6 Legislative Activity

5.6.1 There has been little legislative activity in relation to the Coral Sea Islands Territory, although Commonwealth Acts such as the Petroleum (Submerged Lands) Act 1967 have been extended. Principal activity that has occurred has been concerned with the environment and nature conservation.

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15 Evidence, p.S398.
16 Evidence, p.S734.
17 Evidence, p.S243.
18 Burmester, op.cit., pp.57-58, and H Burmester, 'Outposts of Australia in the Pacific Ocean', The Australian Journal of Politics and History, Vol.29, No.1, 1983, pp.19-21.

5.7 Adequacy of Laws and Administrative Arrangements

5.7.1 The administering Department, DASETT, has advised the Committee that there has never been a prosecution for an offence in the Coral Sea Islands Territory.[19]

5.7.2 DASETT has cautioned, however, that while the Territory's legal regime may be adequate in present circumstances, an increase in human activity in the area may create problems, particularly in relation to enforcement.[20]

5.7.3 The Department has also indicated that, in relation to prosecutions, technical difficulties could arise when a Court of Norfolk Island is applying a law of the ACT in respect of an offence committed in the Coral Sea Islands Territory.[21]

5.7.4 At the same time, DASETT has indicated that the Territory's basic regulatory and environment protection laws are sufficient.[22]

Conclusion

5.7.5 The Committee could detect no major dissatisfaction or difficulties with the overall legal regime of the Coral Sea Islands Territory. It notes however that, potentially, difficulties could arise should human activity in the area increase. It also considers it unsatisfactory that, in such an event, a court of Norfolk Island, with little if any firsthand experience of the particular conditions of the Territory, will apply laws of the ACT - laws of a land-locked Territory - in relation to offences committed in the Territory.

5.7.6 Arguably, the legal regime of an Australian state or territory, other than that of the ACT, could be more relevant to the needs of the Coral Sea Islands Territory. In this context, the Committee is of the view that the legal regime of the state most geographically proximate to the Territory - Queensland - may be more appropriate. Examination of this possibility is favoured by the Committee.

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[19] Evidence, p.S440.
[20] Evidence, p.S421.
[21] Evidence, p.S440.
[22] Evidence, p.S415.

RECOMMENDATION 31

5.7.7 The Committee recommends that the Commonwealth institute formal discussions with the Queensland Government in relation to the future status of the Territory, the possible application of Queensland law and its possible incorporation in Queensland.

5.8 Nature Conservation Legislation

5.8.1 The Australian National Parks and Wildlife Service (ANPWS) administers several pieces of legislation dealing with national conservation and wildlife policies applicable in the Territory, most notably the National Parks and Wildlife Conservation Act 1975 (the NPWC Act).[23]

5.8.2 ANPWS administers two National Nature Reserves, Lihou Reef and Coringa-Herald, in the Territory, both of which were declared under the NPWC Act, and the Reserves are regularly patrolled and surveyed. Plans of Management have been formulated in respect of the Reserves and these are currently being implemented.[24]

5.8.3 It is of some concern to the Committee that the areas in the Territory outside these Reserves are not covered by wildlife regulations under the NPWC Act. Instead, the provisions of the ACT Nature Conservation Act 1980 apply. In this regard, ANPWS indicated that its desired objective is to achieve uniformity of wildlife legislation in the external territories. Provision under an ACT enactment for a large portion of the Coral Sea Islands Territory is inconsistent with this aim. Moreover, ANPWS noted, as the Act has been designed for a land-locked jurisdiction, it is singularly inappropriate to the circumstances of the Coral Sea Islands Territory.[25]

5.8.4 ANPWS has submitted, therefore, that wildlife regulations should be made under the NPWC Act for nature conservation purposes in the Coral Sea Islands Territory.[26]

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[23] Evidence, pp.S730-S731.
[24] Evidence, p.S739 and Exhibit 4, parts iv and v.
[25] Evidence, p.S739.
[26] Evidence, p.S743.

5.8.5 The Committee notes that, in addition to administering the Lihou Reef and Coringa-Herald National Nature Reserves in the Coral Sea Islands Territory, ANPWS administers areas outside the Territory as, under the NPWC Act, wildlife regulations are applicable in Commonwealth waters. As an example, the Elizabeth and Middleton Reefs, south of the Coral Sea Islands Territory, have been declared a Marine National Nature Reserve.[27]

5.8.6 No evidence was provided to the Committee to account for the fact that there continue to be large portions of the Coral Sea Islands Territory which are administered under the provisions of an ACT Conservation Act. With large areas both within and surrounding the Territory administered under the provisions of the NPWC Act, it would be appropriate for the remaining areas also to be administered under the provisions of that Act.

Conclusion

5.8.7 The Committee accepts the ANPWS argument that an Act designed for a land-locked Territory is inappropriate for the Coral Sea Islands Territory.

5.8.8 As noted in relation to the Ashmore and Cartier Islands Territory, the Committee supports the ANPWS objective of achieving, as far as possible, uniform wildlife legislation in the external territories, and has recommended accordingly.

5.8.9 It would seem to be anomalous that provision has not been made under the NPWC Act for conservation of islands and cays in parts of the Territory, when provision has been made under that Act for the Territory's declared Reserves as well as in surrounding Commonwealth waters.

5.8.10 *Having regard to the major conservation significance of the* Coral Sea Islands Territory as an oceanic wildlife reference area[28], it is essential that the most appropriate conservation provisions be extended throughout the Territory.

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[27] Evidence, p.S731 and p.S739.
[28] Evidence, p.S739.

RECOMMENDATION 32

5.8.11 The Committee recommends that wildlife regulations under the NPWC Act, currently applying in Commonwealth waters, be extended to the Territory.

RECOMMENDATION 33

5.8.12 The Committee recommends that a full-scale assessment be undertaken to determine the feasibility of declaring the whole of the Coral Sea Islands Territory and surrounding territorial waters a park or reserve under the provisions of the NPWC Act.

5.9 Status of Elizabeth and Middleton Reefs

5.9.1 The status of Elizabeth and Middleton Reefs emerged as an interesting additional issue in the context of the Committee's examination of the legal regime of the Coral Sea Islands Territory. The Reefs are in Commonwealth waters about 600 kilometres south-east of Brisbane, and are north of Lord Howe Island.[29]

5.9.2 As noted earlier, the Reefs have been declared a Marine National Nature Reserve, an indicator of their environmental significance.

5.9.3 Elizabeth and Middleton are the southernmost coral atolls in the world and, in addition to their environmental importance, they also have historical significance, most notably from the many shipwrecks in the area.[30] The Reefs are not, however, included in the Coral Sea Islands Territory.

5.9.4 There is some documented evidence that, originally, their inclusion in the Territory was envisaged.[31] The Committee could not, however, find any evidence to account for their exclusion from the Territory. Indeed their omission may have been 'accidental' because of their location - they are south of latitude 24°S, defined in the Act as the southern boundary of the Territory.

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29 ANPWS, Annual Report 1987-88, p.19.
30 ANPWS, Report 1986-87, p.20.
31 Burmester, 'Outposts of Australia in the Pacific Ocean', op.cit., p.22.

5.9.5 Most importantly, being located outside the Territory, though in Commonwealth waters, they do not appear to be within any other Australian jurisdiction.[32]

5.9.6 ANPWS has reported that some human activity is undertaken in the area[33] and there is the prospect that this activity may increase. Accordingly, it would be timely to undertake a review of the status of Elizabeth and Middleton Reefs.

Conclusions

5.9.7 The environmental significance of the Reefs has been recognised by their being declared a Marine National Nature Reserve under the NPWC Act. The Reefs are also historically important. ANPWS has, in addition, reported that permits have been issued for commercial activity to be undertaken in the area.[34]

5.9.8 As noted earlier, there is potential significance to Australia of its adjacent islands, reefs and cays in relation to extension of Australia's maritime jurisdiction, and in international negotiations such as delimitation agreements. Elizabeth and Middleton are potentially significant in this context.

5.9.9 It is a matter of concern that the Reefs, located off the New South Wales coast, do not appear to fall within an Australian jurisdiction.

5.9.10 Accordingly, the status of Elizabeth and Middleton Reefs should be clarified.

RECOMMENDATION 34

5.9.11 The Committee recommends that the status of Elizabeth and Middleton Reefs be reviewed with the object of assessing the feasibility of incorporating them within the State of New South Wales.

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32 Burmester, 'Island Outposts of Australia', op.cit., p.58.
33 ANPWS, Annual Report 1987-88, p.19.
34 ibid., p.19.

CHAPTER 6

JERVIS BAY TERRITORY

6.1 Description

6.1.1 The Jervis Bay Territory (Jervis Bay) is an extensive headland, which includes Bowen Island, on the coast of New South Wales about 160 kilometres south of Sydney. It covers an area of 70 square kilometres, which consists of two thirds nature reserve and one third Naval land, private leases, Aboriginal land and unoccupied Commonwealth land.

6.1.2 Within Jervis Bay Territory, there are four identifiable communities. The majority of the population - which varies between 450 and 600 depending on the intake at the time - is based in the Royal Australian Naval College, HMAS Creswell. In Jervis Bay Village about 100 people, most of whom are Commonwealth public servants, are housed. There is a permanent Aboriginal population of approximately 150 in the Wreck Bay Village and about a dozen people live on private leases in the Sussex Inlet area. These private leases include the Christian's Minde Heritage area, where there are some five houses, two holiday camps and one block of land leased for recreational purposes to an individual.[1]

6.1.3 Annually, more than 800,000 people visit the area.[2]

6.2 Historical Outline

6.2.1 Jervis Bay was named by Lieutenant Bowen of the transport 'Atlantic' in 1791 in honour of Sir John Jervis, under whom he served in the Royal Navy. The area was first settled by Europeans around 1880 when a Viking family called Ellmoos took land in the Sussex Inlet area. Descendants of the founders still occupy the site.[3]

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[1] Evidence, p.1160.
[2] Evidence, p.S1311.
[3] Evidence, p.1116 and Department of the Arts, Sport, the Environment, Tourism and Territories Annual Report 1987-88, Volume 1, p.75.

6.2.2 In 1908 it was determined by the Seat of Government Act that the site for the proposed Federal Capital should have access to the sea. In 1915, by agreement between the Commonwealth and New South Wales Governments and in accordance with the Jervis Bay Territory Acceptance Act, the State surrendered to the Commonwealth the area to be known as the Jervis Bay Territory. Its boundaries were corrected in 1922.[4]

6.2.3 The Royal Australian Naval College was established at Captains Point in the Territory in 1915, but for reasons of economy, it was moved to the Flinders Naval Depot in Victoria in 1930. The Naval College was moved back to Jervis Bay in 1957.

6.3 Legislative Framework

6.3.1 The Jervis Bay Territory Acceptance Act 1915 provided that:

> ... the territory so accepted shall be annexed to and be deemed to form part of the Australian Capital Territory to the intent that all laws, ordinances and regulations (whether made before or after the Act) which are from time to time in force in the Australian Capital Territory shall so far as applicable apply to and be in force in the territory so accepted.

6.3.2 This Act, together with the provisions of the Seat of Government Acceptance Act 1909, sections 6 to 9 inclusive, and the whole of the Seat of Government (Administration) Act 1910, except sections 9 and 10, clearly confirm that the Territory was to be regarded as 'part of the territory acquired by the Commonwealth for the seat of government, that is, the Australian Capital Territory'.[5]

6.3.3 Sections 6 and 7 of the Seat of Government Acceptance Act 1909 provided for the continuance of the pre-existing laws and of existing interests in land. Sections 8 and 9 have since been repealed.

[4] H Renfree, The Federal Judicial System of Australia, Sydney, 1984, p.748.
[5] ibid, p.748.

6.3.4 The relevant parts of the Seat of Government (Administration) Act 1910 provide for the application of Commonwealth Acts, the making of Ordinances and other miscellaneous matters.

6.3.5 The Jervis Bay Territory Acceptance Act 1915 provided that no Crown lands in the Territory were to be sold or disposed of for any estate of freehold except in performance of some contract entered into before the commencement of the Act.

6.4 Legislative Arrangements Prior to ACT Self-Government

6.4.1 The Jervis Bay Territory Acceptance Act 1915 provides that all laws which are from time to time in force in the Australian Capital Territory shall so far as applicable apply and be in force in the Jervis Bay Territory.

6.4.2 As Jervis Bay is an internal territory, all Commonwealth laws also apply without requiring specific provision.

6.4.3 The major difference between the ACT and Jervis Bay Territory is that the residents of Jervis Bay do not have the right to vote in either territorial or municipal elections. However, they are enfranchised at the Federal level, having the right to vote for ACT Senators and for the ACT electorate of Fraser.

6.4.4 Differences in land leasing arrangements also exist, but these only apply to a dozen residents.

6.5 Effects of ACT Self-Government

6.5.1 With the granting of self-government to the ACT in May 1989, section 4D of the Jervis Bay Territory Acceptance Act 1915 has been amended by Schedule 5 to the ACT Self-Government (Consequential Provisions) Act 1988. The main features of this Act as it relates to Jervis Bay are:

- laws in force in the ACT continue to be in force in Jervis Bay Territory so far as they are applicable;

- functions or powers under those laws may continue to be performed or exercised by the person or authority responsible in the ACT or as otherwise specified by the Governor-General; and

- a new power is vested in the Governor-General to make ordinances for the peace, order and good government of the Jervis Bay Territory.[6]

6.5.2 In a supplementary submission to the Committee, the Department of the Arts, Sport, the Environment, Tourism and Territories (DASETT) advised that the ACT Administration has reviewed the appropriateness of ACT laws in existence prior to Self-Government Day and has made amendments to a number of those laws.

6.5.3 A number of the amendments made by the ACT Government affect the applicability of legislation, in whole or in part, to Jervis Bay. DASETT is undertaking a review of the ACT laws in order to ensure an appropriate legal regime in Jervis Bay Territory.

6.5.4 It can be expected that the ACT Government will be making regulations under ACT enactments which will not always be suitable for Jervis Bay Territory, but which will automatically apply in Jervis Bay Territory under subsection 4A(1) of the Jervis Bay Territory Acceptance Act 1915 as amended. DASETT have advised the Committee that it would be cumbersome and inappropriate if these regulations could only be changed, insofar as they apply in Jervis Bay Territory, by the making of an Ordinance by the Governor-General under subsection 4F. An Administration Ordinance was therefore proposed empowering the Minister administering Jervis Bay Territory to make regulations amending regulations made under ACT enactments, to the extent that those regulations apply to Jervis Bay Territory.[7] This Administration Ordinance has since been made.

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[6] Evidence, pp.S1396-S1398.
[7] Evidence, p.S1397.

6.5.5 Similarly, some of the amendments made by the ACT Government to the Interpretation Ordinance as the result of self-government are inappropriate for application in Jervis Bay. It is proposed that under subsection 4F the Governor-General make an Interpretation Ordinance for Jervis Bay Territory by which amendments can be made to the ACT Interpretation Ordinance to make that ordinance suitable for Jervis Bay, and in which other interpretative provisions can be included as and when the necessity for these arises. The Attorney-General's Department is also preparing an appropriate draft Interpretation Ordinance.[8]

6.5.6 In examining the existing body of ACT laws to address inconsistencies and deficiencies in the legal regime for the Jervis Bay Territory as a result of ACT self-government, DASETT have indicated to the Committee that they will recommend to the Minister the making of ordinances specific to Jervis Bay Territory where appropriate.

6.5.7 The Department is also identifying services provided at Jervis Bay and proposes to enter into agency arrangements with the service providers, to ensure the *continuation of the range and level of services which Jervis Bay residents enjoyed* before ACT self-government.

6.5.8 The administrative difficulties associated with the continual assessment of the suitability of ACT laws and their application to Jervis Bay Territory leads the Committee to believe that an alternative solution is required.

6.6 Identification and Accessibility of Laws

6.6.1 As the greater part of the laws of Jervis Bay Territory are the laws of the ACT, an authoritative record of the laws has been available from government bookshops in an official edition. Before ACT self-government there were no Jervis Bay specific laws to supplement the ACT law in force in the Territory.[9] However, the identification of ACT laws applying to the Territory since ACT self-government will be more difficult.

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[8] ibid.
[9] Evidence, p.S406.

6.7 Courts

6.7.1 The Supreme Court of the ACT continues to have jurisdiction by virtue of s.4D of the Jervis Bay Territory Acceptance Act 1915 as amended by Schedule 5 to the ACT Self-Government (Consequential Provisions) Act 1988. The Court may exercise the jurisdiction at sittings at Jervis Bay or in the ACT.

6.8 Administrative Arrangements

6.8.1 The Jervis Bay Territory resembles the external territories in terms of area and population. It was acquired by the Commonwealth from New South Wales primarily for the purpose of ensuring sea port access for the Australian Capital Territory. As such it has been administered by DASETT, under the Jervis Bay Territory Acceptance Act 1915, as part of the ACT. The Commonwealth pays something in the order of $4 million to the ACT Government for services provided to Jervis Bay.[10] Under current administrative arrangements, the Minister for the Arts, Tourism and Territories is the responsible Minister.

6.8.2 DASETT shares with the Department of Defence the responsibility for the provision of municipal services in the Territory.

6.8.3 A number of services to the Territory are provided by other authorities on an agency basis on behalf of DASETT. These include ACT Department of Health, ACT Housing and Community Services Bureau, and ACT Department of Education. ACT Parks and Conservation Service also provide land management and conservation services in the Territory.

6.8.4 Under the provisions of a Memorandum of Understanding between the Commonwealth and the Wreck Bay Aboriginal community, the Commonwealth has the responsibility to provide municipal services to the residents of Wreck Bay.

6.8.5 On 26 April 1988, the Jervis Bay Territory, with the exception of the Aboriginal land at Wreck Bay, was entered on the Interim Register of the National Estate. The listing means that any works proposed by or requiring the consent of

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10 Evidence, p.1148.

the Commonwealth which may adversely affect the heritage value of the area should be referred to the Heritage Commission.[11]

6.9 Consultation with Residents

6.9.1 The Committee visited the Jervis Bay Territory during three days in July 1990. The Committee made a number of site inspections where they were briefed by key personnel in the Territory as well as a number of residents.

6.9.2 Public Hearings were conducted at venues in both the Wreck Bay and Jervis Bay Villages, where evidence was heard from representatives of the four different communities in the territory as well as from representatives from DASETT, the Australian Federal Police, the Shoalhaven City Council and a number of private individuals.

6.9.3 The views of the newly formed ACT Government were heard at a Public Hearing in Canberra in November 1989.

6.10 Specific Issues of Concern

6.10.1 The major issues concerning the residents of Jervis Bay Territory relate to the following:

Land ownership and housing

6.10.2 The inability to purchase land, or lease it for periods in excess of twenty-five years, was of major concern to some elements of the Jervis Bay community.

6.10.3 Mr Howe, one of the residents concerned about the right to own land in the Territory, told the Committee:

> If you live anywhere else in the Commonwealth, in any other State or Territory, you would have the right to purchase land or a house ... Individuals such as myself in the Territory do not have that right.[12]

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[11] Department of the Arts, Sport, the Environment, Tourism and Territories, Annual Report 1987-88, Volume 1, p.76.

[12] Evidence, p.1252.

6.10.4 Commonwealth employees also expressed their concern that, having spent twenty years in the Territory, they would have no right to remain when they cease employment with the Commonwealth.

6.10.5 Private lease holders, such as Mr Ellmoos, expressed concern that their leases were only available for 25 years as opposed to the 99 year leases available in the ACT and freehold title available in NSW. Lessees also expressed concern that the determination of rates appeared to be somewhat arbitrary, since it was not possible to make a direct comparison with freehold land in NSW. DASETT, in their evidence, confirmed that 'there is a difficulty in establishing a basis for assessing a land rent ... because Sussex Inlet itself is unusual in its location and its quality and, indeed, there are no sales (of land to enable the Australian Valuation Office to make a comparative assessment)'.[13]

6.10.6 Some residents also indicated that it would be desirable to extend the boundaries of the Jervis Bay Village to allow for additional settlement, although it was recognised that environmental considerations would prohibit extensive construction areas.

Environment

6.10.7 A considerable body of evidence acknowledged the need to protect the environment of the Territory, the values of which have been described in a submission from the Australian National Parks and Wildlife Service as:

> ... comprising richly diverse vegetation, relatively undisturbed plant communities supporting varied native fauna, well-preserved prehistory sites and attractive recreational areas.[14]

6.10.8 The Australian Conservation Foundation (ACF) expressed the view that the level of maintenance of the parks in the Territory is currently very high and should not be reduced in standard.

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[13] Evidence, p.1165.
[14] Evidence, p.S1310.

Policing

6.10.9 The Australian Federal Police maintain an establishment of four officers in Jervis Bay Territory as part of ACT Command.

6.10.10 Residents were of the opinion that a high standard of policing was provided by the Commonwealth Police who had established better relationships with the community than may have been possible with the State police, particularly with the Aboriginal community at Wreck Bay. In evidence, various members of the Wreck Bay Community Council, told the Committee that their relationship with the police is 'pretty good really' and that 'there is a big difference (between the way the NSW police and the Commonwealth police behave)'.[15]

6.10.11 Evidence from the Australian Federal Police indicated that they felt well placed to deal with the requirements of the Territory, especially in view of Commonwealth accountablitity for the military base.[16] The view was expressed that the provision of policing would be 'downgraded' if the service were to be provided by the State police force. However, it was recognised that there may well be advantages in having NSW laws in the Territory.[17]

6.10.12 Another policing issue which was drawn to the Committee's attention concerns the waters of Jervis Bay Territory. These waters are currently administered by the Commonwealth through the Federal Police which does not have the legislative power that the NSW Maritime Services Board has to control vessels using those waters. For example, the Committee was told by Sergeant Lindsay that 'There are no licensing requirements of drivers ... even a five-year old can drive a boat'.[18]

6.10.13 The Australian Federal Police also indicated that minor problems also exist with regard to the laws covering dredging of seaweed, vessel wrecks, pollution from vessels and removal of sand from beaches.[19] Sergeant Lindsay told the

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15 Evidence, pp.1213-1214.
16 Evidence, p.1228.
17 Evidence, pp.1230-1231.
18 Evidence, p.1233.
19 Evidence, p.S1343.

Committee that:

> Sometimes it is difficult to get a complainant to appreciate that below the high water mark is not our jurisdiction.[20]

Democratic Representation

6.10.14 As previously mentioned, residents of the Jervis Bay Territory have the right to vote in Federal elections for ACT Senators and for the ACT electorate of Fraser. They do not have the right to vote in ACT Government elections, nor do they have the right to vote in state or local elections in NSW.

6.10.15 Some residents expressed the view that they were quite happy with the current arrangement whereby they are enfranchised in Federal elections, but have no right to vote in State or local elections.[21]

6.10.16 Others expressed their concern that their democratic rights were being infringed by their inability to elect representatives at either the State or local level. Rev Hill told the Committee:

> ... my concern is that there is no voice in local or community government. Other citizens of New South Wales have a say about the education of their children through the election of local members; we do not. We do not have a say about health for our community or about the laws that are made for us for the policing of our community. Canberra residents do through their own elected government.[22]

6.10.17 Some confusion appears to exist as to whether any of the naval cadets and others stationed at Creswell are in any way disenfranchised in their home state elections because of the relatively short duration of their postings.[23]

6.10.18 A significant view put to the Committee was that having input to the decision-making processes was more important than having formal democratic representation. Mr Howe told the Committee:

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20 Evidence, p.1229.
21 Evidence, p.1286.
22 Evidence, p.1277.
23 Evidence, p.1178.

> ... representation is probably not so much the point as some input into the way things are developed ... or administered.[24]

6.10.19 This has particularly been the case since ACT self-government. A local residents' forum - the Jervis Bay Residents' Group - has been established, involving representatives from each of the four communities in the Territory in a consultative forum. The role of the group was described to the Committee as being 'more an information group where we voice our concerns ... disseminate the information ... and, from the results of the group, take it to a higher authority.'[25] It is not envisaged as an action group.

6.10.20 The Residents' Group is believed to be operating quite successfully in the Territory and allows access by the residents to the people in Canberra who retain responsibility for administering the Territory.

Municipal Services

6.10.21 DASETT is responsible for ensuring that a range of municipal services such as water and sewerage is available to residents and government establishments in the Territory. No service charges or municipal rates are levied.

6.10.22 Although the residents were generally happy about the provision of municipal services, the private lessees of Sussex Inlet indicated that further consideration would need to be given to the disposal of garbage in their area.

6.10.23 Considerable concern was expressed however at the idea of the Shoalhaven City Council providing these services and administering the area.

6.10.24 The Shoalhaven City Council made a detailed submission to the Committee in which they outlined the shared interests of Jervis Bay Territory and neighbouring Shoalhaven residents, the ability of the Council to accept responsibility

[24] Evidence, p.1262.
[25] Evidence, p.1269.

for the administration of services for the benefit of the residents of Jervis Bay Territory, and their record of providing a high level of services to the residents of the Council area. They concluded their submission with the suggestion that:

> ... in the interests of both the community and a cost effective administration, the legal regime within the Jervis Bay Territory should fall under the jurisdiction of the ... Council and the New South Wales State Government with the exception of those matters concerning Australia's Defence requirements.[26]

6.10.25 In evidence, the Shoalhaven City Council also drew the Committee's attention to public concern about 'the environmental sensitivity of Jervis Bay, the fact that it is administered by two sets of environmental laws'[27] and that duplication of services exists between those provided by the Shoalhaven City Council and those provided by the Commonwealth.

6.10.26 The Council reinforced the view that they were well placed to administer the area. However, some individuals and organisations such as the ACF indicated that the Shoalhaven City Council was not well placed to manage the Jervis Bay area because of their poor record on environmental issues:

> We do not like the idea of having this small area here put into the hands of the Shoalhaven Council ... until (the Council) proves that it is a little more environmentally conscious.[28]

6.10.27 Others shared this point of view:

> I would take any move to go towards administration by the Shoalhaven Shire Council as a backward move. Its reputation in the district is not good.[29]

6.10.28 One of the major concerns expressed by the residents of the Territory has been over the Council's plans to locate an ocean outfall for their regional sewerage scheme at Governor's Head. The Council has assured the Committee that it is very

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[26] Evidence, p.S1287.
[27] Evidence, p.1289.
[28] Evidence, pp.1305-1307.
[29] Evidence, p.1272.

much aware of community concern, but that the Council has been unjustly criticised in regard to the matter.[30]

6.11 Special Consideration for Wreck Bay

6.11.1 Wreck Bay is the only Aboriginal community located within a non self-governing Commonwealth territory. As such they enjoy a special status and a special relationship with the Commonwealth. Title to the Aboriginal land at Wreck Bay is held by the Wreck Bay Aboriginal Community Council under the terms of the Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (Land Grant Act). Under the provisions of the Memorandum of Understanding between the Commonwealth and the community, the Commonwealth are obliged to provide municipal services to the residents of Wreck Bay. Should the Territory be incorporated into New South Wales, the provision of municipal services to the Wreck Bay community will be subject to negotiation with New South Wales and the Wreck Bay community.

6.11.2 The Wreck Bay Aboriginal Community Council currently holds a contract with the Australian National Parks and Wildlife Service (ANPWS) under the Contract Employment Program for Aboriginals in Natural Cultural Resource Management[31]. In addition to the requirement under the contract for the Council to develop and conduct guided tours for schools, community groups and other tourists - for example, bush tucker tours are currently being conducted - the potential for applying Aboriginal expertise to the conservation and environmental management has long been recognised by ANPWS.

6.11.3 The residents of Wreck Bay drew the Committee's attention to problems created by the public (mainly tourists) who speed on the roads, and use their tracks to gain access to the nature reserve. Miss Brown, the Coordinator of the Wreck Bay Community Council, told the Committee that 'there is the feeling that (the area) should not be open to public access' and that 'we have no control over the people that come in'.[32]

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[30] Evidence, p.1291.
[31] Evidence, p.S1311.
[32] Evidence, pp.1212-1213.

6.11.4 The Committee believes that the current provisions of the Land Grant Act which specifically exclude title to the roadway to the beach reflect a paternalistic attitude towards Aboriginal land management which is no longer appropriate. The Aboriginal people in Arnhem Land, Northern Territory, are now able to determine access to their land; similar provisions should be extended to the Aboriginal community at Wreck Bay.

RECOMMENDATION 35

6.11.5 The Committee recommends that the Aboriginal Land Grant (Jervis Bay Territory) Act 1986 be amended to secure for the Aboriginal residents the right to control their land and access to it.

6.12 Special Consideration for HMAS Creswell

6.12.1 Responsibility for the management of the naval base at HMAS Creswell rests with the Department of Defence, although its administration is consistent with that provided to the remainder of Jervis Bay Territory by DASETT.

6.12.2 In considering options for the Territory and, in particular, proposals to introduce NSW laws to the Jervis Bay Territory, the Committee was told by Lieutenant-Commander Stangret that defence personnel are subject to the Defence Force Discipline Act and that 'regardless of whether we are in New South Wales or in the ACT the laws at the time really do not affect us'.[33]

6.13 Options

6.13.1 The Committee has considered a number of options regarding the status of Jervis Bay Territory. These include:

- retaining the Territory as a Commonwealth Territory, reforming the applicable ACT laws as required and retaining the current administrative arrangements;

[33] Evidence, p.1266.

- retaining the Territory as a Commonwealth Territory, applying the laws of New South Wales and retaining the current administrative arrangements;

- retaining the Territory as a Commonwealth Territory, applying the laws of New South Wales and changing the administrative arrangements;

- changing the status of the Territory so that it is absorbed within the state of New South Wales.

6.13.2 The Committee notes the variety of views expressed on these options by the residents and other interested bodies. Some expressed no clear view; others accepted that there were arguments in favour of Jervis Bay Territory being incorporated into the State of NSW; still others indicated that they would prefer to retain the status quo.

6.14 Conclusions and Recommendations

6.14.1 The Jervis Bay Territory does have a body of law which extends similar benefits, rights and protection under the law to those enjoyed by other citizens of the Commonwealth of Australia. However, the Committee is of the opinion that the issues brought to their attention suggest a need for consideration to be given to revisions in the legal and administrative regime - for example, the Committee, having regard to the evidence that it has received, remains convinced that, with the establishment of self-government in the ACT in May 1989, laws passed by the ACT Government would have increasing irrelevance to the residents of Jervis Bay. Further, it is envisaged that administrative problems will continue to arise in determining which of the ACT laws would be suitable and applicable for the Jervis Bay Territory.

6.14.2 The Committee is also cognisant of the difficulties experienced by the police in the performance of their duties, both on land and within the marine precincts which come under their jurisdiction by the application of both Commonwealth and ACT laws.

6.14.3 Further, the Committee acknowledges that difficulties may exist in the land management policies relating to development and conservation of the environment because of the application of two sets of laws, and that difficulties do exist for the Aboriginal community at Wreck Bay because of inadequate legislative provisions relating to land management.

6.14.4 That the residents of Jervis Bay Territory are currently denied their democratic right to State and local government representation is a further concern to the Committee.

6.14.5 The Committee also believes that the argument for the national capital to have sea port access, the traditional reason for the Commonwealth acquiring Jervis Bay Territory, is no longer valid; nor is the secondary argument that the site be available for the purpose of locating a nuclear reactor. The Commonwealth's principal interests in the Jervis Bay Territory are now:

(i) to ensure adequate environmental protection for the area, both on land and within the marine precincts of the Territory; and

(ii) to ensure that the needs of Aboriginal people are respected and their rights assured.

6.14.6 In conclusion, the Committee is of the opinion that the application of NSW laws to the Jervis Bay Territory offers the best alternative for the future of the Territory as it would overcome many of the issues of concern raised by Territory residents, as well as the Committee's principal concerns. This would be best achieved if the Territory were reincorporated into NSW. Administration by a local government body, rather than an administrative centre some distance away, would also seem to be a practical advantage if this approach were adopted.

RECOMMENDATION 36

6.14.7 The Committee recommends that discussions be held between the Commonwealth and the NSW Governments in relation to the future status of the Jervis Bay Territory, the application of NSW law, and the Territory's possible incorporation within the State of NSW. Further, that these discussions be subject to assurances from the NSW Government that:

1. **existing parks and other environmentally sensitive areas are protected;**
2. **the Village area not be substantially extended;**
3. **the policing of the Territory be continued by officers sensitive to the needs of the community, especially the Wreck Bay community, and that consideration be given to policing the Wreck Bay community by the Australian Federal Police on a contract basis.**

RECOMMENDATION 37

6.14.8 The Committee recommends that, as an interim measure, and to facilitate the local administration of the Territory, discussions also be held between the Commonwealth and NSW Governments in relation to the possible administration of Jervis Bay Territory by the Shoalhaven City Council.

6.14.9 In making this recommendation, the Committee wishes to add that, although the Shoalhaven City Council is well placed geographically to administer a neighbouring local area, evidence before the Committee suggests that the Council will have to put particular emphasis on the implementation of environmentally sound management practices.