Responses from legislation proponents — Report 15 of 2020[1]

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The Hon Ken Wyatt AM MP

Minister for Indigenous Australians
Member for Hasluck

Reference: MS20-000689

Senator the Hon Sarah Henderson
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Chair

I refer to your correspondence of 13 November 2020 to the Attorney-General, the Hon Christian Porter MP, regarding the Parliamentary Joint Committee on Human Rights' Report 13 of 2020 and the Native Title Amendment (Infrastructure and Public Facilities) Bill 2020.

The *Native Title Act 1993* and the Bill fall under the responsibility of the Attorney-General. However, I am leading this important body of work given the provision primarily affects my portfolio interests. I appreciate the Committee's time in reviewing the Bill and for the opportunity to provide further information on the matters set out at paragraph 1.19 (a) to (f) of the Committee's report. I respond as follows:

Subdivision JA is part of the 'future acts regime' of the Native Title Act, which specifies how acts that affect native title can be validly done. Subdivision JA identifies certain types of infrastructure to be provided either directly for the benefit of Indigenous Australians on Indigenous land or with a sufficient nexus to that purpose.

The provision's intent is to strike an appropriate balance between the timely construction of critical public infrastructure and the rights and interests of native title holders. Subdivision JA has been used mainly for the provision of public housing, as well as emergency facilities such as women's shelters, fire brigades, police stations and child safety housing; public education and health facilities and staff housing for public school teachers and public health employees.

Subdivision JA requires government bodies to notify native title holders and registered claimants about the proposed act and provides them with the opportunity to be consulted about the impact of the proposed act on their native title rights and interests. The notification and consultation process is an essential component of the provision, with the specific requirement under subsection 24JAA (14) for the government body to consult about ways to minimise the future act's impact on native title holders' rights and interests:

(14) *If a request to be consulted is made within the time specified in paragraph (11)(b), the action body must consult with the claimant or body corporate about ways of minimising the act's impact on registered native title rights and interests in relation to land or waters in the area, and, if relevant, any access to the land or waters or the way in which any thing authorised by the act might be done.*

Section 24JAA(16) also requires the Commonwealth Minister to be provided with a report on the things done in relation to the notification and consultation provisions regarding the future act. This oversight provides an additional layer of transparency with respect to the appropriate use of the provision.

Indigenous Land Use Agreements (ILUAs) are required to do acts of the kind to which subdivision JA applies. ILUAs are voluntary agreements made between native title groups and other parties (including governments) about the use of land and waters.

The Queensland and Western Australian governments, who have been the primary users of the provision, have advised that negotiating an ILUA for the kinds of infrastructure covered by subdivision JA can take between 18 months and three years to complete. For this reason, subdivision JA operates as an important mechanism between an ILUA and compulsory acquisition to enable a future act to be validly done when expediency is needed and alternative approval processes have stalled.

From consultations, I understand governments who have used subdivision JA, consider doing so on a case-by-case basis and have usually looked to negotiate an ILUA in the first instance. In some cases, once native title holders and claimants have been notified about the proposed use of subdivision JA, they have chosen not to opt-in to be consulted, given the intended use of the provision for public infrastructure, such as housing. I note the provision has only been used 127 times over the last 10 years.

Including a requirement for the future acts regime to be utilised as a measure of 'last resort' only if all avenues for agreeing to an ILUA have been exhausted would frustrate the policy objective of providing an expedited process for the provision of critical public infrastructure. There are also difficulties in appropriately defining concepts such as 'last resort' because ILUAs are voluntary agreements negotiated between parties without defined parameters or time limits, and as such can always be the subject of further negotiation.

In relation to compensation matters, section 24JAA(8) of the Native Title Act provides native title holders with an entitlement to compensation for an act to which subdivision JA applies in the following circumstances:

1. if the act could not have been validly done if the native title holders instead held ordinary title (generally meaning a freehold estate)
2. if the act is to some extent in relation to an offshore place
3. if the act is one for which compensation would be payable if the native title holders instead held ordinary title.

Under the Native Title Act, this entitlement to compensation is on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests.

To date, the only judicial determination of the principles governing this entitlement has been the Timber Creek compensation claim (Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples [2019] HCA 7).

The High Court awarded the Ngaliwurru and Nungali native title holders compensation totalling $2.53 million, made up of:

- $320,250 for economic loss, based on the freehold value of the relevant land, with the non-exclusive native title rights and interests in question valued at fifty percent of the freehold value;
- $910,100 for interest on the economic loss, based on simple interest accruing from the date of the compensable act, although the Court did appear to leave open the possibility of compound interest being awarded in different factual circumstances; and
- $1.3 million for what the Court termed 'cultural loss', based on what the Court held was an intuitive process to determine what 'in the Australian community, at this time, is an appropriate award for what has been done; what is appropriate, fair or just'.

In relation to review mechanisms, none exist to challenge a decision to use Subdivision JA rather than negotiating an ILUA. However, Subdivision JA applies to limited categories of acts and in relation to limited areas. For an act to be valid under Subdivision JA procedural requirements relating to the provision of notice, an opportunity to comment and a report to the Commonwealth Minister must be met. An act is invalid if it is done or commenced before the end of the consultation period.

Thank you for the Committee's consideration of the Bill and I trust this information is of assistance. I have provided a copy of this letter to the Attorney-General.

The Hon KEN WYATT AM MP
Minister for Indigenous Australians

27 / 11 / 2020

cc. The Hon Christian Porter MP, Attorney-General

The Hon Nola Marino MP

Assistant Minister for Regional Development and Territories
Federal Member for Forrest

Ref: MS20-001859

Senator the Hon Sarah Henderson
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
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Dear Senator

Thank you for your email of 13 November 2020 from the Parliamentary Joint Committee on Human Rights (the Committee) regarding the Territories Legislation Amendment Bill 2020 (the Bill).

The Bill seeks to amend various Acts to improve the legal frameworks applying to the territories of Norfolk Island, Christmas Island, the Cocos (Keeling Islands) and the Jervis Bay Territory. In relation to the concerns raised by the Committee I provide the following information.

What is the objective of conferring jurisdiction on a prescribed state or territory court in relation to Norfolk Island and what evidence is there of a pressing or substantial concern to which the proposed amendments are directed.

The primary objective is to allow the courts of the state or territory which provides state-type services in Norfolk Island to adjudicate matters arising under the laws of that state or territory.

These amendments complement amendments to the *Norfolk Island Act 1979* in the Bill which allow state or territory laws to be applied in Norfolk Island. These measures are part of the Australian Government's ongoing work to build a strong and sustainable Norfolk Island community, with rights and responsibilities comparable to other Australians. In particular, these measures are intended to ensure that Norfolk Island has modern and comprehensive governance arrangements in place, including with respect to its justice system.

The previous governance arrangements in Norfolk Island required the former Norfolk Island Administration to be responsible for Commonwealth, state and local government functions. This wide range of services and the complexity involved in maintaining an effective and up-to-date body of state-type legislation meant the former Administration was unable to deliver an adequate level of services to the community. The application of a modern body of state or territory laws to Norfolk Island with access to a corresponding justice system are intended to address these governance concerns.

Provisions to permit the courts of a prescribed state or territory to have jurisdiction in relation to Norfolk Island would only be utilised if the Australian Government entered into a comprehensive agreement with a state or territory government for the delivery of state-type services and it was considered appropriate for that state or territory's courts to also operate in Norfolk Island.

This is the same as the arrangement which is currently in place in Christmas Island and the Cocos (Keeling) Islands where the Western Australian Government provides a range of state-type services in these Islands and the courts of Western Australia have jurisdiction as if these territories were part of Western Australia.

A secondary objective of the provisions is to provide for the courts of that state or territory to sit outside of Norfolk Island if to do so would not be contrary to the interests of justice.

These provisions are modelled on similar provisions in the *Norfolk Island Act 1979* which authorise the Supreme Court of Norfolk Island to hear criminal trials outside of Norfolk Island. In a small and remote community of approximately 1800 people, these provisions address the concern that it may not be possible to empanel an impartial local jury in some cases.

How will transferring the jurisdiction of the Norfolk Island courts to a prescribed state or territory court be effective to achieve the stated objective.

Article 14 of the International Covenant on Civil and Political Rights (ICCPR) recognises that every person is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge against them, as well as in the determination of their rights and obligations in a suit at law.

As is the case in Christmas Island and the Cocos (Keeling) Islands, transferring the jurisdiction of the Norfolk Island courts to the courts of the state or territory with responsibility for delivering state-type services would enhance the operation of the justice system on Norfolk Island and complement the application of an effective and up-to-date body of state-type legislation. This is because those courts would already have the necessary knowledge of the legislative framework under which the services are being delivered and extensive experience case managing and adjudicating those matters.

Similarly, criminal trials would only take place outside Norfolk Island in circumstances where the interests of justice require it. As a general rule, the venue of a trial is 'local' in the sense that it is located at the place where the alleged offence was committed, by a jury composed of residents of that place. However, it is conceivable that there may be cases where holding a trial on Norfolk Island, given its small size and remote location, is not consistent with the interests of justice. For instance, it may be difficult to find jurors who do not know the accused, the victim, or other witnesses.

As discussed in the Explanatory Memorandum, these provisions in the Bill dealing with the conduct of criminal trials outside Norfolk Island are modelled on 2018 amendments to the *Norfolk Island Act 1979*, contained in the *Investigation and Prosecution Measures Act 2018*, which similarly authorise the Supreme Court of Norfolk Island to hear criminal trials outside Norfolk Island in its criminal jurisdiction if the court is satisfied that the interests of justice require it.

Concerns about empanelling a jury on Christmas Island, which has a similar population to Norfolk Island, also led to similar provisions being made for trials to be conducted in Western Australia.

Whether the accused person would be liable to cover all or part of the costs associated with relocating the trial, for instance, the travel costs of their lawyer, witnesses or other support persons to the prescribed state or territory to prepare their defence.

Under the *Legal Aid Act 1995* (NI), accused persons have access to legal aid which may be used to cover the legal costs of the accused, including the travel expenses of lawyers. If an agreement were reached with a state or territory government for the delivery of state-type services in Norfolk Island and jurisdiction was conferred on that state or territory's courts, access to legal aid would continue to be available.

As is the present situation with the Supreme Court of Norfolk Island, if an accused was ordered by the court of a state or territory to be removed from Norfolk Island to stand trial in that state or territory (proposed section 60F as amended) the expense of this removal and any subsequent detention in a state or territory custodial facility would be at the expense of the Commonwealth. Such detention would only be authorised in accordance with procedures that are established by law, consistent with the requirements of Article 9(1) of the ICCPR.

Similarly, under proposed section 60L as amended, if the accused is acquitted, or not required to serve a sentence of imprisonment, after their trial in a state or territory, the Commonwealth is, on application to the Secretary, obliged to provide the persons with the means to return to Norfolk Island.

As is the case with criminal matters arising in other remote communities, travel costs for lawyers, witnesses or other support persons may also be reduced through the use of modern communication technologies, such as telephone and video conferencing.

What, if any, financial support is available to an accused person from Norfolk Island to assist them in covering costs associated with the relocation of criminal proceedings.

Please refer to previous response.

Whether an accused person would be transferred from Norfolk Island before or after any bail application and whether there is a risk that an accused person from Norfolk Island would be less likely to be granted bail, having regard to any potential practical and logistical challenges for an accused person to attend court in a place outside Norfolk Island or meet bail conditions in a place that is not their usual place of residence.

The question of bail for an accused, including bail conditions, would be a matter for the relevant judicial authorities considering the evidence before them. Should the jurisdiction of the courts of Norfolk Island be conferred on the courts of a state or territory in the future, that court would consider applications for bail in accordance with the requirements of that state or territory's legislation relating to the granting of bail. The circumstances of the accused, including any practical or logistical challenges, are likely to be considered by the court when making its decision. Depending on the circumstances of the trial, arrangements could include the accused undertaking bail in Norfolk Island while awaiting trial in the state or territory.

However, under the proposed provisions, the state or territory court can only order that a trial take place outside Norfolk Island when satisfied that the interests of justice require a criminal trial outside Norfolk Island. While this decision would be made independently of any decision with respect to bail, case law indicates that the court will consider any potential hardship on the accused, including any possible implications for the remand of the accused.

Furthermore, consistent with present arrangements, an accused required to be remanded for significant periods would be transferred to the mainland. This is because Norfolk Island has very limited remand facilities and this would not change under any future criminal justice arrangements.

Whether the safeguards in place are sufficient to ensure that these measures constitute a proportionate limitation on the rights to a fair trial and liberty.

State and territory courts serving remote communities adopt a range of practices to ensure appropriate access to justice, including circuit visits and the use of technology such as telephone and video conferencing. Many of the existing services of the Norfolk Island courts are already delivered remotely by judicial officers sitting on the mainland and it is expected that these arrangements would continue. In practice, if these provisions were ever utilised, the experience of defendants and practitioners would be very similar to the present administration of the Norfolk Island courts.

As mentioned above, where the courts consider relocating a criminal trial from Norfolk Island to the mainland, the judiciary would take into account a number of factors when determining whether it would be in the interests of justice to do so. Case law indicates that these factors would include the court considering any potential hardship on the accused, including potential reduced access to witnesses or evidence. Under the provisions in the Bill, the accused could make submissions to the court on whether a trial should be heard in a prescribed state or territory, rather than Norfolk Island, including making submissions on access to legal representation, evidence and trial support in their specific circumstances.

The provisions in the Bill would therefore not significantly change the manner in which the courts presently exercise their jurisdiction in Norfolk Island and constitute a proportionate limit on an accused's rights to a fair trial and liberty. By authorising proceedings to be relocated and the empanelment of a jury in the alternative venue, the Bill also promotes the right to a fair trial in cases where there are concerns about empanelling an impartial local jury.

Thank you for bringing your concerns to my attention and I trust this is of assistance.

Yours sincerely

Nola Marino