

Dear Chair, and PJCLE Committee Members,

Sovereignty (Respectfully Uncle Kevin Gilbert's [1933-1993], spelt version form from

“1988: MAKE A TREATY THIS TIME”, see attached image, and <https://damiano85.files.wordpress.com/2011/08/thesis.pdf>), refers to the Self Determining power of First Nations Peoples to exercise Our Rights and Enjoyment of Custodial Responsibilities to look after People and Country. This Submissioner Supports the broadest ‘Remedial’ nature of the Commonwealth’s application and acknowledgement of those bundled Inherent Rights and Interests in relation to Domestic and International Laws and Instruments that are related to Custodian First Nations Peoples Responsibilities, such as with the Commonwealth Native Title Act 1993 and the Inherent Rights Internationally espoused in the United Nations Declaration of the Rights of Indigenous Peoples, UNDRIP, in referring to this Inquiry’s Term of Reference ‘c’, ‘ToRc’.

[PJCLE Inquiry’s Terms of Reference, ‘ToR’: Pursuant to section 7 of the Parliamentary Joint Committee on Law Enforcement Act 2010, the committee will inquire into and report on the operation of the Australian Crime Commission Amendment (Special Operations and Special Investigations) Act 2019 (SOSI Act, [‘SOSI’]), with particular reference to whether the SOSI Act has:

appropriately streamlined the process by which the Australian Criminal Intelligence Commission (ACIC) Board determines to authorise the ACIC to undertake a special operation or special investigation;

b) ensured the validity of, at that time, current, former and future special operation and special investigation determinations of the ACIC;

c) effectively achieved its aim of enabling the ACIC to continue to fulfil its statutory obligations without interruption; and,

d) any other relevant matter.]

A Legal context to a remedial approach exists at Paragraph 73 of this Australian Federal Full Court Judgement:

<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/1995/1624.html>

Chronology: The PJCLE SOSI Inquiry Committee is asked by this Submissioner to follow the events and documents set out in this chronology in Hopefully ascertaining that there are serious constitutional flaws in the SOSI Act Amendments to the ACC Act.

2019, April 3, Federal Court Full Court Judgement handed down in CXXXVIII versus, v, the Commonwealth\ACIC &Anor:

<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2019/54.html>

2019, December 5, SOSI Act passed by Commonwealth Parliament as referred to in Home Affairs Minister Dutton’s letter to this Inquiry, and ACIC’s Submission 1 to this Inquiry at page 2:

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Law_Enforcement/SpecialOpsAct/Additional_Documents

Also see, at page 12, ACIC Chair’s Annual Report 2018-2019:

<https://www.acic.gov.au/sites/default/files/2020-10/ACIC%20Chair%20Annual%20Report%202018-19.pdf>

“In December 2019, the ACC Act was amended by the Australian Crime Commission Amendment (Special Operations and Special Investigations) Act 2019. The amendments have changed the way the board exercises its powers and authorises special investigations

and special operations. As this report covers the reporting period to 30 June 2019, it describes investigations and operations as determined under the ACC Act prior to those amendments.”

2019, December 18, High Court Matter (A11) A30 of 2019

transcript\Hearing in CXXXVIII v Commonwealth:

https://www.hcourt.gov.au/cases/case_a30-2019

<http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCATrans//2019/251.html>

As the proposed Timeline for this Inquiry may not allow me to fully respond to the PJCLE Committee with a full comprehension of information received thus far from the High Court relevant to this Inquiry, I request Consideration to be allowed to appear before a Public Hearing for this SOSI\ACC Act Inquiry?

In the meanTime I refer to the ACIC\ACC Submission submitted to this Inquiry:

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Law_Enforcement/SpecialOpsAct/Submissions

Regarding the comment written by ACIC\ACC to this Inquiry in ACIC\ACC’s Submission at page 2:

"Challenges to the use of ACIC’s coercive examination powers during CXXXVIII v Commonwealth of Australia in the High Court (2019) highlighted the need to clearly define, beyond any doubt, the manner in which the Board authorise a Special Investigation or Special Operation, thus authorising the use of the ACIC’s unique examination capabilities to target a specific area of serious and organised criminal activity impacting Australia.

If they had been successful, these legal challenges could have resulted in a number of serious and direct consequences for the ACIC, with effects felt in the wider law enforcement community.”:

it is requested that ACIC be called upon to explain to the Inquiry the full circumstances and meaning of that particular section of ACIC’s Submission 1 to the SOSI Inquiry, because as is ascertainable from the following chronology and material, the Appellant CXXXVIII’s High Court Constitutional Validity Section 78B Judiciary Act Notices and arguments have in fact already lead to ‘serious and direct consequences for the ACIC, with effects felt in the wider law enforcement community.’”

I ask that this Inquiry Committee fully consider the High Court Justices' comments made by Justices Gordon and Nettle which can be found in full at the following High Court hyperlinks that start to discuss\question the constitutional validity of the legislative generality created by the SOSI Act Amendments to the ACC Act and apply the points raised by the Justices in meeting the ToR for this Inquiry’s exploration:

<http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCATrans//2019/251.html>

High Court Justices Gordon and Nettle have commented (2019.12.18) in the CXXXVIII High Court Matter A30\2019 on the SOSI Act Amendments as raising potential Constitutional Validity issues which required the Appellant, CXXXVIII, to file and lodge with the Commonwealth\State\Territory Attorney-Generals Section 78B Judiciary Act Notices of Constitutional matters in January 2020.

Extracts from that 18 December 2019 High Court Transcript are here:

"GORDON J: Mr Abbott, in Plaintiff S157 there was some suggestion by at least some members of the Court that a very general law raised serious questions about whether or not it had sufficient content to be a law. Do you challenge the validity of this legislation on those bases?

MR ABBOTT: Yes, we will. We will challenge on that basis.

....

MR ABBOTT: Yes. We say there are serious reasons to doubt the constitutional validity of section 55 if, on its proper construction, it has the effect of requiring courts to proceed on the basis that a particular investigation existed in circumstances where no such investigation in fact existed. We make two points basically. We say that, firstly, it means that there would be deemed to be an investigation, even if the Crime Commission had decided as a matter of fact that, like Strickland, there was not to be a special investigation.

GORDON J: Would that not require a 78B notice?

MR ABBOTT: Yes, we accept that if this matter is to go ahead then paragraphs 19 and – paragraph 19, in particular, and the way we have dealt with – and we did this very briefly, but paragraph 18 as well may require 78B notices, but we are prepared to issue them. If the Court allows this matter to proceed we would issue 78B notices in relation to the construction of the amending Act.

NETTLE J: Mr Abbott, over and above the points identified in paragraphs 18 and 19, which appear to turn on the need for an investigation, have you given any thought to the idea that the amending legislation, inasmuch as it gives purportedly to the Board the power to determine that there is federally relevant criminal conduct to be defined in the generality that it appears to permit, and to determine without reference to any criteria that it is in the public interest to do so is so lacking in specificity as not to meet the minimal requirement for constitutionality?

MR ABBOTT: We have given very preliminary thought to that because it seems to us, as your Honour has just said, that what section 55 is trying to do is do away with the requirement for there to be a particular investigation to which a determination can relate. It seems to be an attempt - we say an unsuccessful attempt to exclude the necessity for there to be an investigation.

GORDON J: I think the question is more direct than that, Mr Abbott. The question is more general, that is not limited just to the investigation. It is looking at the amending Act in its new terms and it is the lack of discernable criteria which the relevant authority has to consider in determining whether or not to proceed. It is the issues raised in Plaintiff S157 at paragraphs 101 to 103 and there is a relevant article written by Lisa Crawford about the extent to which you have a law which on its face may not be a law because of its generality.

MR ABBOTT: If your Honour pleases, that is an argument which, obviously, we have not addressed in our written outline. I must apologise, we have only had very limited time in which to prepare these submissions. I am not dropping that as an excuse, but merely to explain that we do not attempt, in our written outline, to unpack, as it were – I know that is a horrible word – to unpack what we say in paragraphs 18 and 19 about the requirement

for this amending Act to impose retrospective criminal liability founded on a fiction as to the existence of a particular investigation.

....

NETTLE J: Mr Solicitor, may I ask you – I understand the point but if, let us say for argument’s sake, it were ultimately discerned that the prospective provisions were constitutionally invalid would a question then arise as to whether severance would operate so as to save the retrospective provision?

....

NETTLE J: Is it as clear as all that that the two sets of provisions would be separable so as to save the perspectives and leave the prospectives if they were invalid or might it be thought that it would so change the compositional nature of the Act that Parliament cannot intend it to stand that way?

....

NETTLE J: I think that is fair enough. I will vary the orders thus far made to substitute for 22 January as the date for filing and service of the new submissions and 78B notice 21 January 2020, otherwise the orders will stand. I shall reserve the costs of this day’s hearing.

The Court will now adjourn until Tuesday, 28 January 2020.
AT 9.53 AM THE MATTER WAS ADJOURNED”

2020, February 11,
https://cdn.hcourt.gov.au/assets/cases/01-Adelaide/a30-2019/CXXXVIII-Commonwealth_Int1.pdf

2020 April 3, Appellant CXXXVIII’s Reply Filed in the High Court

2020, April 9, Appellant CXXXVIII’s ‘Further Notice of a Constitutional Matter’

2020, August 5, Appellant CXXXVIII (and Proposed Intervener CXXXVIX) versus Respondents Commonwealth of Australia, ACIC & Anor:
<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCATrans/2020/102.html>

2020, August 5, High Court Matter A30\2019 concluded with The Commonwealth paying the Appellant’s costs and also Consenting to the withdrawal of the ACIC SOSI Summons and Notice to Produce previously issued in relation to a Determination by the ACIC Board now brought into question by the High Court:

“IN THE HIGH COURT OF AUSTRALIA

Office of the Registry

Adelaide No A30 of 2019

B e t w e e n -

CXXXVIII

Appellant

and

COMMONWEALTH OF AUSTRALIA

First Respondent

AUSTRALIAN CRIMINAL INTELLIGENCE COMMISSION

Second Respondent

JEFFREY ANDERSON

Third Respondent

KIEFEL CJ

BELL J

GAGELER J

KEANE J

NETTLE J

GORDON J

EDELMAN J

TRANSCRIPT OF PROCEEDINGS

FROM CANBERRA BY VIDEO LINK TO BRISBANE, SYDNEY AND MELBOURNE
ON WEDNESDAY, 5 AUGUST 2020, AT 10.00 AM

Copyright in the High Court of Australia

KIEFEL CJ: The parties in this proceeding filed a consent on 3 August 2020. On behalf of the entire Court the following orders are made by consent:

Upon the undertaking of the respondents that each of:

- (a) the summons issued to the appellant on 28 June 2018;
- (b) the notice to produce issued to the appellant of 28 June 2018 and;
- (c) the summons issued to the intervener on 25 June 2018,

will be withdrawn by 5.00 pm on 4 August 2020, the parties consent to the making of the following orders in this proceeding:

1. The appeal be discontinued.

The first respondent pay the costs of the appellant (including costs associated with the grant of special leave to appeal) to the time of discontinuance as agreed or taxed.

The first respondent pay the costs of the intervener to the time of discontinuance as agreed or taxed.

Paragraph 2 of the order of the Full Court of the Federal Court of Australia dated 3 April 2019 be set aside, and in its place, order that the first respondent pay the appellant's costs.

Paragraph 2 of the order of the Federal Circuit Court of Australia dated 31 August 2018 be set aside, and in its place, order that the first respondent pay the applicant's costs.

I publish those orders.

AT 10.02 AM THE MATTER WAS CONCLUDED”

The PJCLE SOSII Committee are asked here to Consider that Appellant CXXXVIII's (and Intervener CXXXVIX's) High Court challenge involving questions raised about Constitutional Validity of the SOSI Act Amendments to the ACC Act were in fact vicariously successful and that the SOSI Act Amendments to the ACC Act if left unamended may see future legal\High Court challenges to ACIC's Special Investigations and Special Operations, with the similar results in future cases of the Commonwealth having to literally bear the costs of an unsuccessful prosecution, as well as throwing away ACIC's resources spent in devotion, via Special Operations and Special Investigations, to bringing High Risk Criminal Targets, HRCTs, to Justice (ToR a,b,c).

Further caution about the High Court Justices' comments on the separability\severability of SOSI Act and other ACC Act clauses is requested to be examined by this Inquiry as a means to Consider not only the SOSI Act Amendments but the whole ACC Act as affected by the SOSI Amendments in light of Justice Nettle's comments, which seem to contemplate that the SOSI Act Amendments threaten the Constitutional Validity\Standing of the ACC Act:

“NETTLE J: Is it as clear as all that that the two sets of provisions would be separable so as to save the perspectives and leave the prospectives if they were invalid or might it be thought that it would so change the compositional nature of the Act that Parliament cannot intend it to stand that way?”

We draw the attention of the PJCLE to a quote from a 2019 media release from Mr Moses, President of the Law Council, at the Time the SOSI Act went through Parliament, along with other legislation also mentioned:

“.. Mr Moses SC said the legal profession also had significant concerns about the erosion of the rule of law if legislation was passed introducing mandatory minimum sentencing and repealing Medevac.

"If the Government succeeds this week in passing these laws, this will add to the damage already done to the rule of law. Gradually shifting power from a system of rules to the Government and criminal intelligence agencies and away from the Parliament and Courts undermines our democracy.

“The rule of law hardly ever disappears overnight - it is dismantled brick by brick until it can't reasonably be said to function with fairness, accountability, and transparency.””

This Submissioner Supports comments made in the Law Council's Submission 2 to this Inquiry, and the recommendations for statutory safeguards made at page 5 of that Submission in relation to SOSI Act Amendments, Section 7 and Schedule 1, Items 55 and

56, of the ACC Act.

As other relevant ToRd matters this Submissioner says that members of the First Nations Community do not feel safe in its relationship with Law Enforcement in Australia due to the 'Blak deaths in custody', 'Blak Lives Matter', issues, and so seeks more ACIC work in investigating and healing this relationship.

Our Community with the transgenerational Trauma of displacement from Our Traditional Country and other effects of adverse government policy (Mandatory Sentencing, Stolen Generations) still regard looking after Country and People as a responsibility that needs proper Law Lore Enforcement and Hope that Inquiries like this can Consider ways and means to positively effect the Sovereign assertion of those responsibilities for Our People.

We are perhaps as colonised Peoples more susceptible to both being Victims of crime and in proximity to what crimes are defined upon Us by the dominant politic, but We are just as forthright in asserting Our Hope and Energy towards ridding Our Communities of hard drugs like ICE, Heroin etc and the organised systems that peddle this horror and devastation into Our Homes and upon Our Kids and Youth.

We ask that this Inquiry in The Public Interest and in the Interests of Justice avail itself of the information and discussion around the Section 78B Notices questioning the Constitutional Validity of the SOSI Act Amendments and related arguments/questions/documents by High Court Judges (Gordon, Nettle), Appellant CXXXVIII and Proposed Intervener CXXXVIX as a means for this Inquiry to recommend to Parliament ways to improve the efficacy of the ACC Act and thereby the means by which the ACIC\ACC is able to more securely combat serious crime\criminals with a confidence and safety based on less challengeable legislation.



