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Serving the Legal Profession and community of Norfolk Island in the South Pacific

Committee Secretary
Joint Standing Committee on the National Capital and External Territories
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Canberra ACT 2600

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24 March 2023

Dear Secretary,

INQUIRY INTO LOCAL GOVERNANCE ON NORFOLK ISLAND

SUBMISSION OF THE NORFOLK ISLAND LAW ASSOCIATION INC ON BEHALF OF THE LEGAL PROFESSION OF NORFOLK ISLAND

I write to you on behalf of the legal profession of Norfolk Island registered and entitled to practice in Norfolk Island under the *Legal Profession Act 1993* (Norfolk Island) regarding the above Inquiry for which submissions close on Friday 24 March 2023.

The Norfolk Island Law Association Inc respectfully seeks the opportunity to directly speak on these submissions with the Joint Standing Committee during its upcoming attendance on Norfolk Island for local hearings of the Inquiry and requests the allocation of at least 45 minutes to 1 hour for that purpose on the island.

The Norfolk Island Law Association Inc (NILA) submits as follows to the Joint Standing Committee as follows:

1. TERMS OF REFERENCE – TOR

It is regrettable that little or no effort appears to have been made by the TOR drafting team of the Department of Infrastructure to provide the widest possible scope for the Joint Standing Committee to assess what other forms of governance for Norfolk Island may be better suited to the return of democratic voting rights and democratic self-determination human rights to the people of the remote South Pacific community of Norfolk Island.

In effect, the legal profession of Norfolk Island through the NILA expresses significant concern that the objective of the drafting team seems to have been to limit or restrict the power of the JSCNET to only considering a continuation of local government / local council style governance to the exclusion of all other options and models for governance of the territory.

To the extent that the present TOR purport to restrict the JSCNET inquiry to a particular outcome or result, there is a serious concern that the TOR are seeking to limit the power of the Australian parliament to properly and fully explore all options for governance of Norfolk Island into the future as times and technology change.

Other options for governance seemingly currently and deliberately by government officials excluded from the TOR to be considered by the JSCNET seem to be as follows:

- (a) **Territory level full self-governance** – i.e. return to locally elected territory level governance having regard to the current continuation of territory level governments for the internal territories of Australia such as to discriminate against the external territories – whether the island community has the legal framework building blocks, the necessary governance skills and capacity building training systems to properly handle full self-governance should be a matter for clear and careful examination by the JSCNET in the view of the Norfolk Island Legal Profession.
- (b) **Return of Norfolk Island to the governance of Great Britain as a British possession** which was temporarily placed at the time due to WW1 under the authority of the Commonwealth of Australia (even if negotiations are required with the new sovereign in council for compensation to the Commonwealth of Australia for its expenditure on Norfolk Island since 1914)?
- (c) **Cooperative autonomy for Norfolk Island where Norfolk Island is assisted by Australia to attain limited independence (with a view to increasing autonomy later)** in return for irrevocable Australian foreign policy guidance, cooperative defence policy, coinage, and medical support agreements being established.

- (d) **Transfer of Norfolk Island to the authority and governance of the Dominion of New Zealand (as New Zealand was formerly known within the British Empire)** by agreement with the Crown in Right of Australia, the Crown in right of New Zealand and the Crown in right of Great Britain?
- (e) **Obtaining by the Commonwealth of Australia of a full final and conclusive agreement of the sovereign and seeking final Royal Orders in Council (subject to amendment of the Australia Act 1986 (CTH) to enable fresh final Royal Orders in Council to be made for the full irrevocable transfer of sovereignty right title and interest in the governance of Norfolk Island to Australia or to Norfolk Island itself -** for the resolution of any and all doubts as to the legal meaning of the scope and intent of the phrase “under the authority of the Commonwealth of Australia” in the previous 1914 Royal Orders in Council.
- (f) **Referral of Norfolk Island to the supervision and governance of the Trusteeship Council of the United Nations with the cooperation of the Commonwealth of Australia in the implementation of UN Mandated Territory resolutions and decisions** concerning Norfolk Island (compare other UN mandated territory backgrounds and structures as an example only)
- (g) **As permitted by section 122 of the Commonwealth Constitution, to have the Australian parliament establish a locally directly elected seat for each external territory of Australia in the Australian parliament (the section 122 voice to parliament for territories)** to ensure that territory community voices and concerns are properly received by the parliament directly rather than being filtered and sanitized through any government officials or departments?
- (h) **The establishment of a structured training and resource development program under a local government / local council model for conversion of the local council system into a FULL territorial level governance model within a period of ten (10) years maximum.**
(the current TOR do not seem to provide any scope for examination of opportunities for conversion of any local government structure into a territory governance model.
- (i) **Whether the department of infrastructure and the current senior management of the local government entity known as the Norfolk Island Regional Council are each properly acting to ensure the urgent return to locally elected governance of any local government regional council entity**

2. ISSUES TO BE ADDRESSED BY THE TERMS OF REFERENCE AS CURRENTLY LIMITED

Assuming that the current TOR cannot be interpreted by the JSCNET in any manner other than that the JSCNET is legally bound to only find that a local government body is the only form of governance available to or allowed to be used for Norfolk Island, the Norfolk Island Law Association on behalf of the legal profession of Norfolk Island seeks the following from the JSCNET:

- (a) A finding by the JSCNET that a clear timetable of not more than 24 months / 2 years must be put in place by the Commonwealth of Australia government and the parliament

of Australia for the reinstatement and removal of all suspensions of elections on Norfolk Island immediately and unconditionally.

- (b) A finding by the JSCNET that the question of appointment and of removal of a general manager and/or senior staff officers of any local government body of Norfolk Island should be the subject of a 2/3 majority of the elected council including that of any elected Mayor / Chief Minister as well as by a referendum of 2/3 majority of the eligible voters of the community of Norfolk Island through the reinstatement of the previous Referendum Act (Norfolk Island)
- (c) That the provision of the Local Government Act 1993 (NSW)(NI) limiting the ability of councilors to seek information or documents from operational staff of the NIRC should not be allowed to be interpreted as a barrier or obstacle to councilors obtaining directly from council staff information and documents needed for the making of council decisions but should instead be defined clearly to be a anti-corruption mechanism to prevent Councilors approaching operational staff of council for personal benefits or favors for the Councilor concerned and vice versa for the operational staff – the provision should not be available to be used by Council operational management to hide or mislead Councilors as to the truth of any governance or financial situation regarding Council or to keep information adverse to operational decisions and activities of the operational branch of Council from the elected branch of Council at any time.
- (d) Complaints by operational staff regarding the GM or any senior management of Council should not be required to be lodged with or viewed by the senior manager or GM of the Council so as to enable such complaints to be “lost, mislaid or destroyed” or sanitized before they reach the elected body of council – the legislative provision of the Local Government Act 1993 (NSW)(NI) regarding operational versus elected body communications should also exclude from any such barrier any complaints mechanism for staff and the local community to draw the attention of the elected body to any relevant concerns regarding any aspect of council expenditure or operations (one of the previous dismissal of elected councilors findings being that the elected councilors failed to adequately exercise control over council expenditure or financial actions?)
- (e) That all contracts of a General Manager and of senior staff should be publicly disclosed and published on any governance website for Norfolk Island such as the NIRC website and that no confidentially or privacy clauses whatsoever should be permitted in any such appointment/employment contracts and that no Council Administrator, Council General manager, territory CEO, or senior officers of a governing body should hold or enjoy more than one office of profit or income producing appointment under any Crown (whether federal, state or both – as seems to be the alleged situation of the current Council Administrator for the Norfolk Island Regional Council who is also apparently focused on and paid for a council administration for a state local government body on the mainland as well – see 2023 recent senate estimates committee evidence, M. Coleavy.
- (f) That any review of the performance of ay GM/CEO and of senior staff should not be done “behind closed doors” internally by council officials or by the Commonwealth but be done by a public committee of randomly selected ratepayers and elected councilors

with any adverse findings to be reported to the Council as well as to the federal Minister.

- (g) That amendments be made to the federally applied version of the Local Government Act 1993 (NSW)(NI) to ensure that clear timelines and targets for action / milestones are established as part of the process of the appointment of any Council Administrator on dismissal of elected councilors in the future so that the recent evidence of the Council Administrator to a senate estimates committee allegedly to the effect that the Council Administrator did not see their role to be one of establishing financial stability systems to take effect after the end of their Council Administrator term of office with the return of elected councilors to the Council body should never be available as an excuse for seeming inaction or delay for the return of elections to Norfolk Island. If councilors are dismissed on an alleged financial management incapacity, then the role of a Council Administrator must always be to establish proper mechanism during their term of appointment for ensuring no such failures occur in the future after the Council Administrator term is ended – a claim in evidence to a Senate Estimates committee of Australia that the current Council Administrator does not see any contractual or administration TOR basis for them to be concerned about what happens in terms of capacity building to take effect after the Council administrators term is over must never be acceptable to any parliament of the Commonwealth of Australia nor to the parliament of any State or Territory of Australia

Further, the progress and milestones achieved by a non-elected council administrator replacing the elected council should be the subject of a combined local community and Commonwealth review panel every 6 months to assess whether or not progress is being made regarding the resolution of any problems which led to a council dismissal in the first instance.

- (h) That the JSCNET should make it clear in its findings regarding the operation of the Local Government Act 1993 (NSW)(NI) as applied and modified for Norfolk Island that a concern by any Commonwealth department or official or Minister that persons nominating for election to the Local Council body might not be sympathetic to or may be outspoken against Commonwealth actions or objectives for Norfolk Island should never ever be a proper or lawful basis of any kind at all for the suspension of any elections for Norfolk Island or elsewhere across Australia at any time – democracy is intended to enable the views of all persons to be heard regardless of whether those views find favour or disfavour with any federal officials or government policies at any time – to do otherwise is a slippery slope towards irrevocable loss of democracy for the defense of which countless numbers of humans have died in conflicts including many from Norfolk Island in years past.
- (i) In any public inquiry relevant to a proposed dismissal of elected councilors, the JSCNET is respectfully asked to ensure that all circumstances leading to incorrect decision making or to errors in council management should be available for examination including but not limited to operational v strategic barriers for information gathering by Councilors as well as for identification of incorrect advice received from operational officers by Councilors such that Councilors in turn may have made incorrect decisions based in incorrect or misleading advice received and relied upon – it is understood that the

previous public inquiry TOR for the proposed dismissal of the Norfolk Island regional Council were drafted so as to exclude from the public inquiry commissioner the right to examine any errors in advice or actions by either the Commonwealth department or by the senior management of the Council which may have resulted in errors by the elected councilors who are to be dismissed from office? The Local Government Act 1993 (NSW)(NI) as applied to Norfolk Island should be amended to include clear requirements for a public inquiry commissioner to have full authority to determine their own scope of inquiry where a momentous anti-democratic decision such as a dismissal of elected councilors recommendation is to be made – TOR must not be used as railway tracks to limit any public inquiry to a particular finding thereby usurping or controlling the functions and power and role of the public inquiry commissioner or of any parliamentary committee of inquiry or Royal Commissioner as a whole.

- (j) It is respectfully submitted that the JSCNET should inform the Federal Minister for Territories that the current TOR are not appropriate to a full and proper inquiry into the future governance of Norfolk Island and that the Minister should be requested to agree to an amended TOR being developed by the JSCNET secretariat in consultation with the people of Norfolk Island through relevant stakeholder bodies such as e.g. the Norfolk Island Law Association (for legal drafting aspects).
- (k) The Norfolk Island Law Association on behalf of the legal profession of Norfolk Island desires to reserve the right or ability to raise and/or respond to such further or other issues and concerns as may arise during any direct discussions with or hearings by the JSCNET Inquiry whether on Norfolk Island or not and whether originating from the Department, members of the public, Norfolk Island stakeholder bodies, local government bodies around Australia, territory governments around Australia and so on.

The members of this Law Association continue to express significant concern and alarm at the situation now faced by eligible voters in Norfolk Island where they are now not entitled to vote for any governance body at all in Norfolk Island with still no clear fixed timetable for return to democracy in place as yet despite a change of federal government and where a federal representative in parliament is so overloaded with mainland electorate concerns as to have little or no time or resources available to address the Norfolk Island external territory concerns.

Of further concern and alarm to the Norfolk Island Law Association (as well as to the Law Council of Australia and the South Pacific Lawyers Association of which the NILA is a member), is the current legislation still in place seemingly permitting a federal Minister to abolish at the mere stroke of a pen all the courts and tribunals of Norfolk Island even during the middle of jury trials already commenced and to force the transfer of all court and tribunal matters at great expense to parties and witnesses to a mainland applied jurisdiction court where the integrity of state courts is placed greatly at jeopardy in addition to the loss of a right to a fair trial by islanders before a jury of their peers in criminal matters and the right to a least costly simplified dispute resolution system through locally based courts and tribunals.

Such an abolition of territory courts completely would also see the legal profession of Norfolk Island effectively sidelined and marginalised due to the major increase in costs for clients in having to also engage lawyers in the applied jurisdiction courts who may not be at all familiar with the legal landscape of Norfolk Island.

The Norfolk Island Law Association Inc also seeks a recommendation from the JSCNET that such abolition legislation be immediately and unconditionally repealed forthwith to avoid the need for costly and repeated challenges in the High Court of Australia regarding the constitutional integrity of state courts versus applied jurisdiction transfer of federal territory jurisdiction to a state court or tribunal (or at the least a recommendation from the JSCNET that a separate inquiry be now held into that abolition legislation and the legal risks thereof).

The Norfolk Island Law Association Inc respectfully places before the JSCNET the above submissions and trusts that the above and direct discussions / hearings with the participation of the Norfolk Island Law Association before the JSCNET will be of assistance in meeting the governance needs of the territory of Norfolk Island into the future and not just in the political short term until the next federal election (where Norfolk Island voting numbers in the seat of Bean count for very little or nothing numerically).

Please do not hesitate to contact the Norfolk Island Law Association if the lawyers of Norfolk Island can be of any further or other assistance in any way.

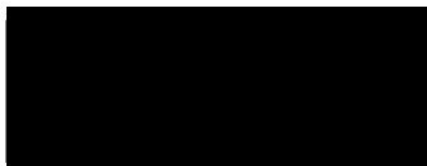
This Association is supported by the Law Council of Australia and the South Pacific Lawyers Association.

The objects of the Norfolk Island Law Association Inc. are as follows:

- a. To promote and uphold the rule of law
- b. To maintain and enhance the independence of the legal profession
- c. To assist and advocate on behalf of its members
- d. To promote regulation of the legal profession that is fair, proportionate and protects the interests of clients
- e. To support legal education and the study of law, including through continuing professional development and community education,
- f. To identify and advocate for necessary reforms to the laws of Norfolk Island
- g. To cooperate with other legal profession bodies, within Australia and internationally, to promote these objects, and
- h. To promote access to justice for the people of Norfolk Island.
- i. To do any and all lawful things necessary, convenient and appropriate for the proper conduct and operation of a Law Association for the legal profession in and for Norfolk Island.

We look forward to hearing from the committee urgently.

Yours Sincerely,



Geoffrey Atkinson
President and Secretary, *Norfolk Island Law Association Inc.*