

Ms Christine McDonald
Secretary
The Senate Standing Committee on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

20 January 2014

Inquiry into the Environment Legislation Amendment Bill 2013

Dear Ms McDonald,

On behalf of the members of the Indigenous Advisory Committee (IAC) I would like to thank The Senate Standing Committee on Environment and Communications (the Committee) for seeking our views on the Environment Legislation Amendment Bill 2013 (the Bill). While we are interested in all aspects of the proposed changes to the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*, this submission focuses on the amendments related to the poaching, illegal trade and illegal transportation of turtle and dugong.

We regret that time and other constraints have not enabled the IAC to provide a more comprehensive submission. We hope that the information contained in this submission will guide the Parliament in its deliberations about the virtues of the proposed changes and would welcome the opportunity to elaborate on the issues we have raised in any hearings held by the Committee on this matter.

Amendments related to approved conservation advice

As members of a statutory advisory body we are concerned about the intent and the impact of the proposed changes to the EPBC Act. More to the point, we are confused. Our confusion does not arise out of the desire for a decision maker to be able to reject advice related to a decision under the EPBC Act. It arises out of creating a legal obligation for a decision-maker to consider 'approved conservation advice' if the rejection of that advice has no legal effect.

Why not simply state that the Minister or their delegate 'may' take advice and identify the potential sources of that advice in addition to the department and the Minister's advisers?

The IAC is concerned that these changes will impact on the transparency of environmental decision-making processes. The IAC would be comforted by these changes if it includes a requirement for the Minister or their delegate to make the reasons for their decisions publicly available.

Amendments related to turtles and dugong

Aboriginal and Torres Strait Islander peoples in northern Australia have successfully managed their customary use to turtles and dugong since time immemorial. Notwithstanding that species of turtles and dugong are under threat and need to be managed carefully the proposed

changes to the EPBC Act seemingly presume that it is this customary use that represents the most significant threat. This is simply not the case.

Members of the IAC have taken up the concerns of many traditional owners in northern Australia about the incidents of poaching turtle and dugong by other Aboriginal and Torres Strait Islander people without their authority. We are therefore pleased that the Commonwealth government is acting to address these concerns.

Regrettably, the approach being taken by the Commonwealth government through these proposed amendments to the EPBC Act is in our view a poorly targeted over-reaction. Further to this the IAC is concerned that these proposed changes have been initiated prior to undertaking any meaningful consultation with traditional owners in northern Australia.

It is the understanding of the IAC that there are a large number of threats to turtle populations across Northern Australia in particular predation by other animals. With respect to dugong populations the primary threat is habitat loss due to cyclones and nutrient run-off from land into the sea. While a significant concern, poaching and the illegal trade of turtle and dugong does not represent the threat to species populations that is implied in these proposed changes, and to date there have been no prosecutions around this activity.

Increased Financial Penalties

Increasing financial penalties associated with the poaching and illegal trade of turtle and dugong is clearly viewed by the Commonwealth government as providing the deterrence required to arrest the practice. In our view this is a false assumption because it is not the financial rewards associated with poaching of turtle and dugong that is the main driver. The primary driver is the enjoyment of the consumption of turtle and dugong meat and the importance of hunting practices for the maintenance of culture and customary lifestyles. The issue of the illegal trade/sale of turtle and dugong meat is a major concern to traditional owners across Northern Australia, however to date there has not been a prosecution. In the State of Queensland particularly there are existing legislative frameworks that provide penalties for this exact reason and no one has been prosecuted. Traditional owners within Queensland particularly welcome any moves to 'catch' those people who are doing the wrong thing, however they also recognise that this can not be done in isolation of their determined 'Cultural Authority'.

Further to this the level of increase in the penalties is too high. Logic would suggest that it has been deemed that increasing the terms of incarceration for the offences of poaching and the illegal trade of turtle and dugong would either be ineffective and/or have other unintended consequences. The IAC is concerned that increasing the financial penalties will simply result in offenders defaulting on their fines thus leading them to be incarcerated anyway. This will have potentially serious social and financial implications for the families of the offenders which are likely to have long-term consequences.

Strict Liability

Applying strict liability for the application of the proposed changes also places Aboriginal and Torres Strait Islander peoples in northern Australia in serious disadvantage because it assumes that Aboriginal and Torres Strait Islander people will be fully aware of and responsive to the law.

While the IAC is not in favour of the proposed changes if they are to proceed we would at least request that the amended law be applied through a due diligence test. Due diligence measures are applied in many cases with respect to the protection of Aboriginal heritage¹. In the interest of fairness it is appropriate that a similar approach be adopted with respect to these proposed changes to the EPBC Act.

Human Rights Compatibility

The IAC acknowledges that the proposed changes do not have the intent of negatively impacting on the rights of any Australians, however, it is our view that their implementation will likely have this effect. For example, when traditional owners are engaged in their customary practice of hunting turtle and dugong the assumption that will likely be made by the regulatory authorities is that it is being undertaken illegally.

This will cause tension between traditional owners and the regulatory authorities rather than build the required cooperation that is needed to remove the threats to turtle and dugong population numbers.

It is worth noting that the sustainable customary use of biological resources by Indigenous peoples is protected under article 10(c) of the Convention on Biological Diversity (CBD). While this instrument is not recognised in the Human Rights (Parliamentary Scrutiny) Act 2011, as a signatory to the CBD Australia has both international and domestic obligations to ensure that article 10(c) is not breached.

The implementation of the amended law also has the potential in our view to contravene article 27 of the International Covenant on Civil and Political Rights (ICCPR) because it has the potential to impair the rights of traditional owners to practice their culture.

Further, the IAC is concerned that the implementation of the proposed changes will systematically discriminate against Aboriginal and Torres Strait Islander peoples on the basis of race. This is because it is predominantly Aboriginal and Torres Strait Islander people who harvest turtle and dugong are overwhelmingly Aboriginal and/or Torres Strait Islander.

Appropriate Legal, Policy and Program Responses

In many respects the most disappointing and frustrating aspects of these proposed changes is that it undermines cultural authority of traditional owners and their capacity to manage their internal and external relationships. That is, to oversee and respond to the actions of their own people as well as work in cooperation with other traditional owner groups to help combat poaching and illegal trade and deal with offenders in an appropriate cultural manner.

¹ See for example the National Parks and Wildlife Act 1974 (NSW)

Ultimately, sanctions handed down through customary law to those who poach and conduct the illegal trade of turtle and dugong is going to deliver more effective outcomes than simply increasing financial penalties.

Rather than adopt a heavy handed punitive approach it is the view of IAC members that the challenges associated with the management of turtle and dugong could be better addressed through the building of cooperative measures with traditional owners in northern Australia. In our view the related resources being directed to the Australian Crime Commission, for example, could be better applied by engaging traditional owners to increase their level of monitoring and examining options for placing appropriate restrictions on their rightful customary activities.

There is no benefit to be gained by undermining the cultural authority of traditional owners and simply putting traditional owners in the category of being a part of the problem rather than the solution is both offensive and will be counter-productive. The IAC encourages the Parliament of Australia to ensure that traditional owners have been appropriately engaged in discussions and debate about the proposed changes before they are passed into law.

Yours sincerely

Melissa George

Chair

Indigenous Advisory Committee