NACCHO
National Aboriginal Community Controlled Health Organisation

25 January 2019

Senator James Paterson
Chairperson
Senate Finance and Public Administration Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Via email: fpa.sen@aph.gov.au

Dear Senator

INQUIRY BY SENATE FINANCE AND PUBLIC ADMINISTRATION LEGISLATION COMMITTEE INTO THE CORPORATIONS (ABORIGINAL AND TORRES STRAIT ISLANDER) AMENDMENT (STRENGTHENING GOVERNANCE AND TRANSPARENCY) BILL 2018

SUBMISSION BY THE NATIONAL ABORIGINAL COMMUNITY CONTROLLED HEALTH ORGANISATION AND ITS STATE/TERRITORY AFFILIATES

Who We Are

This submission is prepared by the National Aboriginal Community Controlled Health Organisation (NACCHO) with its State and Territory Affiliates from across Australia, namely the Aboriginal Health Council of South Australia, Victorian Aboriginal Community Controlled Health Organisation, Queensland Aboriginal and Islander Health Council, Aboriginal Health Council of Western Australia, Tasmanian Aboriginal Centre, Aboriginal Medical Services Alliance Northern Territory, Aboriginal Health & Medical Research Council of New South Wales, and Winnunga Nimmityjah Aboriginal Health and Community Services in the Australian Capital Territory. NACCHO and these other Peak Bodies are all non-government organisations.

The Peak Bodies are membership based and represent 145 Aboriginal Community Controlled Health and Substance Misuse Services (ACCHSs) across Australia. These services are in urban, regional and remote Australia and range from large multi-functional services employing several medical practitioners and providing a wide range of services, to small services which rely on Aboriginal Health Workers and/or nurses to provide the bulk of primary care services, often with a preventive, health education focus. The services form a network, but each is autonomous and independent both of one another and of government.

Each Peak Body offers a wide range of support services to their members, including but not limited to governance support and advocacy in connection to state, Territory and national policy. ACCHSs contribute to improving Aboriginal and Torres Strait Islander health and wellbeing through the delivery of primary health care, by integrating and coordinating care and services, and by advising and supporting other providers to deliver better quality healthcare. In addition, ACCHSs play a significant role in improving Aboriginal health through addressing the social determinants of health by employing, educating and training Indigenous peoples and by being a practical expression of Indigenous self-determination.

Why is the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act) important to us?

To the extent the Aboriginal and Torres Strait Islander health sector, particularly ACCHSs, are a practical expression of Indigenous self-determination, they are like no other in Australia. ACCHSs date back to 1971 and were some of the first non-government organisations established by Aboriginal people to represent and deliver frontline services to their people. Their services are delivered and predominately managed by professional Aboriginal and Torres Strait Islander staff. ACCHSs are governed by boards made up of Indigenous directors chosen by corporation members belonging to their own communities. With health outcomes continuing to lag for Aboriginal and Torres Strait Islander peoples, ACCHSs play a critical role in Closing the Gap, a key national priority for Australia. At least half of the Aboriginal and Torres Strait Islander population of Australia is supported by ACCHSs and of the 145 which are members of NACCHO and Affiliates, 84 are registered under the CATSI Act.

Accordingly, it is an understatement to say that the CATSI Act is important to the Aboriginal and Torres Strait Islander health sector. It is a primary vehicle that has been available, in its original form since 1976, for Aboriginal and Torres Strait Islander people to control and take responsibility for their own health. It facilitates self-determination and sets out rules for how our members and directors ae appointed from our communities. The CATSI Act also provides the rules to establish policies for the governance of our organisations, for their financial management, control and reporting. It has a significant impact on our costs and benefits to Aboriginal and Torres Strait Islander peoples.

Setting the Context

The CATSI Act is Commonwealth legislation that is not just of great significance to the Aboriginal and Torres Strait Islander health sector. It is also very important for Aboriginal and Torres Strait Islander peoples and Australia as a whole. It provides the governance structure that most of our organisations across all sectors use to represent our people and deliver services to them. It also provides a vehicle that Federal and State/Territory governments use to fund substantial programs and services that support Closing the Gap.

For Aboriginal and Torres Strait Islander peoples the CATSI Act is first and foremost a vehicle for us to achieve some measure of self-determination in modern Australia. This has always been an underlying principle starting with the Aboriginal Councils and Associations Act 1976 which the CATSI Act replaced. The Coalition Minister for Aboriginal Affairs who brought the Councils and Associations Act into the Parliament, the Hon Ian Viner QC, had this to say in the second reading speech:

> The Bill is a tangible indication of this Government's commitment to the principle that Aboriginals and Islanders should be as free as other Australians to determine their own future and to take their rightful place as citizens in the Australian community.

This principle of self-determination is core to how we, as First Australians, perceive the underlying reason Commonwealth legislation exists to facilitate Indigenous corporations. It remains as relevant today as it was in 1976. Importantly, there is nothing in the Government's Statement of Compatibility with Human Rights attached to the Explanatory Memorandum for the Bill which is not consistent with our understanding. In fact, the Statement indicates that the right to self-determination is an underlying principle.

The Statement of Compatibility also confirms that the CATSI Act is a special measure for the purposes of subsection 8(1) of the Racial Discrimination Act 1975 (RDA). The preamble to the CATSI Act makes it very clear that this is the case which reads as follows:

> The Parliament of Australia intends that the following law will take effect according to its terms and be a special law for the descendants of the original inhabitants of Australia.
>
> The law is intended, for the purposes of paragraph 4 of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination and the Racial Discrimination Act 1975, to be a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders.

Special measures, according to the Australian Human Rights Commission[1], aim to foster greater equality by supporting groups of people who face, or have faced, entrenched discrimination so they can have similar access to opportunities as others in the community. Special measures are sometimes described as acts of 'positive discrimination' or 'affirmative action'. They are allowed under federal anti-discrimination laws.

The Australian Human Rights Commission has also produced guidelines for understanding special measures in the RDA[2] which include criteria to meet the requirements of special measures based on the judgements of Australian courts. Those criteria are as follows:

- the measure must confer a benefit;
- on some or all members of a class of people whose membership is based on race, colour, descent, or national or ethnic origin;
- the sole purpose of the measure must be to secure adequate advancement of the beneficiaries so they may equally enjoy and exercise their human rights and fundamental freedoms;
- the protection given to the beneficiaries by the measure must be necessary for them to enjoy and exercise their human rights equally with others; and
- the measure must not have yet achieved its objectives (the measure must stop once its purpose has been achieved and not set up separate rights permanently for different racial groups).

An important matter for this submission that is also explored in the Commission's guidelines is the extent to which the intended beneficiaries of a special measure need to agree to it. In short, does a special measure like the CATSI Act and a Bill to amend it need to have the agreement of Aboriginal and Torres Strait Islander people? The Aboriginal and Torres Strait Islander Health Sector believes that this is an obligation in respect to special measures. According to the Australian Human Rights Commission, the UN Committee on the Elimination of Racial Discrimination says that:

> State parties should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities.

According to the Commission, the Committee has also called upon parties to the Convention to ensure that:

> Members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent. [14]

[1] (url:https://www.humanrights.gov.au/quick-guide/12099)

[2] https://www.humanrights.gov.au/publications/guidelines-understanding-special-measures-racial-discrimination-act-1975-cth-2011

The Declaration on the Rights of Indigenous Peoples, signed by the Australian Government in 2009, also supports our position that consent is needed. Article 19 states:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

That said, the Australian Human Rights Commission indicates in its guidelines that Australian Courts have stopped short of making the process of consultation and consent a mandatory requirement for a valid special measure, especially where there are legitimate reasons for not consulting. They have, however, as the Commission says:

> recognised that the wishes of the intended beneficiaries are of importance in establishing whether the measure is a special measure - describing meaningful consultation as 'highly desirable' and important in ensuring that the measure is appropriately designed and effective in achieving its objective.

It has been the lack of meaningful consultation and agreement in respect to different policy initiatives including special measures over the past two decades which unfortunately has led to significant conflict between the Australian Government and Aboriginal and Torres Strait Islander peoples. The Northern Territory Emergency Response is a stand-out. Effectively the Government has acknowledged this problem by starting, from 2017, to commit "to do things 'with', not 'to' Indigenous Australians". The Prime Minister stated in his speech tabling the 2017 Closing the Gap report that the "national interest requires a re-commitment to the relationship with Aboriginal and Torres Strait Islander peoples, but there can be no relationship without partnership and there can be no partnership without participation".[3] The Prime Minister's Closing the Gap report for 2018 confirmed the commitment to a major shift in the relationship saying:

> One of the key lessons we have learned is that effective programs and services need to be designed, developed and implemented in partnership with Aboriginal and Torres Strait Islander people.[4]

NACCHO and its Affiliates strongly support this new commitment. Our concern is that it is not being fulfilled. This was the case in respect to the Council of Australian Government's (COAG) Closing the Gap Refresh process led by the Department of the Prime Minister and Cabinet in 2018. The consultation process was demonstrably inadequate, it only engaged us with the targets rather than the framework to achieve them and did not involve us in any of the decision making. At the urging of Indigenous peak organisations for different sectors, led by NACCHO, the new Prime Minister and other First Ministers of COAG agreed in December 2018 to a historic formal partnership on Closing the Gap. There is no doubt in the mind of the Aboriginal and Torres Strait Islander sector that the commitment to a new partnership with Indigenous Australians by the Australian Government should also apply to any changes to the CATSI Act.

[3] https://www.malcolmturnbull.com.au/media/closing-the-gap-report-statement-to-parliament

[4] https://closingthegap.pmc.gov.au/

Problems with the process for reviewing CATSI and drafting a Bill

The process for reviewing the CATSI Act and drafting the Bill has not been conducted to the standard that would be expected of national legislation that goes to supporting a national priority, it hasn't incorporated self-determination and the process has effectively ignored the fact that the CATSI Act is a special measure. The Bill does not have the free, prior and informed consent of Aboriginal and Torres Strait Islander peoples. Most disappointing is that the process has not reflected the Australian Government's stated commitment to a new partnership with Aboriginal and Torres Strait Islander peoples. In our assessment, the CATSI Bill is another unfortunate example of 'things being done to us rather than with us'.

The CATSI Act has been law for more than 10 years and it is common for the Australian Government to carry out comprehensive reviews of its laws after this length of time. In the case of the CATSI Act, there can be no doubt that a comprehensive review carried out in partnership with its key Indigenous stakeholders was due. As a special measure for the purposes of the RDA, it is expected that state parties re-examine at appropriate intervals whether a special measure is still needed. Moreover, significant issues have arisen in recent years that have, in at least one case, resulted in significant conflict between Indigenous stakeholders and the Australian Government. That issue went to the guidelines of the Indigenous Advancement Strategy (IAS) requiring that all Indigenous organisations receiving funding of more than $500,000 be incorporated under the CATSI Act, which many Indigenous stakeholders consider is racially discriminatory. The Australian Government also normally appoints independent reviewers, often from large consulting firms, to undertake a comprehensive review that includes a public submission taking process.

In this case, however, the Government decided, without any consultations with Indigenous stakeholders, to undertake what it describes as a technical review. The technical review had narrow terms of reference, also developed without any input from Indigenous stakeholders, which focused on specific issues which are ultimately the subject of the amendments. Issues that went to whether the CATSI Act was achieving its objectives including as a special measure, what benefits were provided to Aboriginal and Torres Strait Islander peoples, what the implications are of the IAS condition and whether there were other ways to provide them, were excluded. It was not a comprehensive review even if two public discussion papers were produced for comment by ORIC. Submissions were not published and nor was any report published on the outcomes of the review.[5] There is no evidence that any stakeholders beyond Indigenous stakeholders, such as State and Territory governments, participated in the review.

As for advancing self-determination, the participation of Aboriginal and Torres Strait Islander peoples in the review and preparation of amendments was very limited. The review was undertaken by an external non-Indigenous legal firm engaged by the Registrar. In our view it should have been the Department of the Prime Minister and Cabinet to avoid any perceived conflict of interest. At least the Department of the Prime Minister and Cabinet was included in a steering committee with ORIC representatives which oversaw the review and provided a confidential report to the Minister for Indigenous Affairs on the findings of the review. However, Indigenous stakeholders were not represented on the steering committee, made up of public servants only and had no opportunity to comment on the findings of the review. Such a process left Aboriginal and Torres Strait peoples and their representative organisations as bystanders, only able to provide feedback to discussion papers but not able to be involved in any shape or form in the decision-making process.

[5] We note that the submission of the Department of the Prime Minister and Cabinet to this inquiry attaches the Technical Review Report completed by the legal firm, DLA Piper. This is the first time that anyone outside the Government will have been given the opportunity to see the report and it is well after the consultation process was concluded.

Meaningful consultation with the intended beneficiaries is a key feature of special measures even if there is legal doubt about whether they require consent. The review of the CATSI Act did include two rounds of consultations. However, they were framed narrowly in terms of the issues that the Government wanted to address. In fact, the second round only sought feedback on how the Government's proposed amendments ought to be implemented. No consultation report has been produced and there is no way for Indigenous stakeholders to know what feedback was provided and the extent to which it was considered by the Government in making decisions.

The lack of meaningful consultations has continued with the Bill introduced into the Parliament without an exposure draft being provided for comment. We were advised by ORIC that the Bill was going to be introduced into the Parliament by the end of October 2018 which wasn't the case and there was no reason not to provide an exposure draft in November 2018 before it was ultimately introduced. The Bill is now being inquired into by a Senate Committee, but over the Christmas period when Indigenous stakeholders are like most others on leave and submissions are due on 18 January. While we appreciate the Committee gave NACCHO an additional week to submit its submission, it was not prepared to agree to our request to extend the timelines for the inquiry to the end of February at least to give more time for Indigenous stakeholders to participate.

There has been no partnership with Indigenous stakeholders in developing these amendments and we see no reason why the Government could not have instituted a process which reflected the commitment of the Prime Minister in the 2017 and 2018 Closing the Gap reports. The Government is proceeding with a package of amendments to the CATSI Act which, at least in the case of the Aboriginal and Torres Strait Islander health sector, include parts which are not agreed. More importantly, there was no opportunity given to resolve our concerns. We asked for this in our second submission in September 2018 and specifically proposed that the Registrar resource and convene one or more workshops with Indigenous stakeholders to see if differences could be resolved and a package agreed before legislation was brought into the Parliament. While ORIC met with us, it was only to confirm that it was proceeding with the package of proposals that were listed in the second discussion paper.

Problems with the Bill

The Aboriginal and Torres Strait Islander Health sector does not believe it is reasonable to expect us to have a final position about any of the amendments. There has only been very limited time made available to scrutinise the Bill which has 19 parts to it and is 77 pages long including complex transitional provisions. Nor has there been the opportunity to consult directly with those affected. There has not been a comprehensive evidence-based review that allows us to know whether the amendments are the best options to achieve the Government's objectives. Nor do we know what other Indigenous and non-Indigenous stakeholders have put to the Government because the technical review was closed. In our two submissions to the review, we have indicated support for many of the Government's proposals. However, the reality is that we don't know if there are better options to reduce red tape and improve accountability of corporations to members or whether the amendments implement the proposals that we were prepared to support.

As to parts of the Bill which we do not support, we have been crystal clear from the outset that while we agree to the simplification of the classification test for determining the size of corporations, we do not support small corporations being able to avoid holding AGMs. While the period for small corporations not to have an AGM has been reduced from the original proposal of three years to two years in the amendments, we believe that corporations that are active in Indigenous communities, even if the consolidated revenue is only $250,000, must hold Annual General Meetings. They serve as a touch point for the communities the corporations serve and provide the best way for members to ask questions about their management and results.

Another worrying part for us is Part 7 which goes to new reporting arrangements for corporations (including their subsidiaries) to members and ORIC concerning the work history and remuneration of Key Management Personnel. The Government says in the Explanatory Memorandum that this is to increase their transparency. In its second round of consultations, it was proposing that the new requirements would be for medium and large corporations and we took issue with the reporting of remuneration for these corporations.

However, the legislation appears to apply to all corporations, subject to the making of regulations. Moreover, the Government has justified this proposal by stating that it is consistent with the remuneration reporting done by listed companies. However, listed companies are large businesses on the ASX trading in shares. Indigenous corporations are not of this nature nor size. Remuneration reports are not a requirement for normal companies including not-for-profits incorporated under the Corporations Act 2001 including Indigenous companies. We are not opposed to greater transparency around remuneration in principle for all corporations if it will have a positive impact.

However, it is not clear what the problem is that the legislation is seeking to address and whether the proposed solution will make a difference. We consider that to the extent that the Government perceives there is a problem with remuneration being too high in CATSI corporations, we need evidence that justifies that this is in fact the case and evidence that its solution is the best one. In the meantime, there is no doubt for us that the measure will be disruptive and impact on our capacity to recruit and maintain Key Management Personnel.

If it is not appropriate to introduce this measure for mainstream companies similar in size and nature to CATSI corporations, the Government needs to explain why. Otherwise, there is a serious risk that Indigenous stakeholders will perceive this measure as racially discriminatory whatever the intentions of the Government. There is also no explanation given for why regulations are to be used to require remuneration reports.

We have other concerns including the penalty provisions in the legislation which are difficult to understand and appear to be at the absolute discretion of the Registrar. There is also significant use made of regulations in the Bill which was not referred to at all in the consultations. ORIC's summary of the legislative proposals is misleading in that it does not make any reference to regulations being used. The regulations also appear to go to contentious matters in some cases such as the new requirement for remuneration reports. In the meantime, we have no idea of when the regulations are to be introduced and whether there will be any consultations with Indigenous stakeholders beforehand.

The Government also says that the Bill is compatible with the human rights and freedoms recognised by Australia. However, we don't think the process that has been followed in reviewing the CATSI Act and drafting the Bill allows us to make any judgement about whether or not this is the case. That process was not transparent or evidence- based and Indigenous stakeholders were excluded from decision-making. That does not augur well for whether the Bill complies with human rights instruments and we also are concerned about whether Part 7 on Key Management Personnel may be racially discriminatory. It is appropriate, in these circumstances, that the Committee seek the views of the Australian Human Rights Commission before reaching a position on the Government's statement.

Another concern we have with the Bill is that no implementation plan is provided. We expected this given that the second round of consultations sought feedback on implementation of the proposals decided by the Government. In an Indigenous context, implementation issues are vital to the success of legislation given that it has to be applied in contexts including remote Australia in communities and corporations where English is not a first language, there are different cultural priorities and there may be significant costs for low income CATSI corporations. We asked the Registrar in our second submission made in September 2018 that the Registrar form a committee that included

Indigenous stakeholders to develop, publish and implement an implementation plan. That has not been agreed.

What should the Committee Do?

(1) Recommend that the Bill not proceed at this time

In response to the concerns that we have raised, particularly as the Bill is amending a special measure, that the Bill has not been based on a comprehensive and transparent review in partnership with Indigenous stakeholders, and the risk that some of its measures may be racially discriminatory, we propose that the Committee not support a Bill at this time. In that regard, we note there are only eight sitting days before a Federal Election in May 2019 and no reasons have been advanced for why the Bill is urgent and needs to be passed by July 2019.

(2) Support instead the undertaking of a comprehensive review in partnership with Indigenous stakeholders that reflects that the CATSI Act is a special measure

The CATSI Act after 12 years needs a comprehensive and transparent review that is conducted in a way that the Australian Government normally reviews legislation of this importance and has a strong focus on collecting evidence. Importantly the review needs to take account of the fact that it is a special measure designed originally to promote self-determination and the terms of reference need to include the benefits that the Act has provided to Aboriginal and Torres Strait Islander peoples and whether it is still needed. Unfortunately, the technical review that has been undertaken has had a narrow focus and has not been transparent or allowed our peoples to be involved as a partner including participating in decision- making. That review should also examine the current Bill and whether all, or some of the clauses should be enacted on the basis it is possible that, after examining the evidence, they are beneficial.

Yours sincerely

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