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ACT | Aboriginal and
Torres Strait Islander
Elected Body



Mr Steve Doszpot MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

	A.C.T. LEGISLATIVE ASSEMBLY COMMITTEE OFFICE
SUBMISSION NUMBER	3
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Dear Mr Doszpot

Human Rights Amendment Bill 2015

The Aboriginal and Torres Strait Islander Elected Body (ATSIEB) is pleased to provide the Standing Committee on Justice and Community Safety with a submission to the Committee's current inquiry into the *Human Rights Amendment Bill 2015*.

ATSIEB was established through legislation by the ACT Government to provide a representative voice for Aboriginal and Torres Strait Islander people in the ACT, and support the development of government policies to meet community needs and priorities.

ATSIEB's strategic plan seeks to focus ACT Government policy and services under the COAG Indigenous Reform Agenda framework's strategic areas for action:

- Health
- Schooling
- Safe communities
- Governance and leadership
- Economic participation
- Healthy homes
- Early childhood

The Aboriginal and Torres Strait Islander Social Justice Commissioner recognises the diversity of the cultures, languages, kinship structures and ways of life of Aboriginal and Torres Strait Islander peoples. There is not one cultural model that fits all Aboriginal and Torres Strait Islander peoples.

Aboriginal and Torres Strait Islander peoples retain distinct cultural identities whether they live in urban, regional or remote areas of Australia.

The word 'peoples' recognises that Aboriginal peoples and Torres Strait Islanders have both a collective and individual dimension to their lives. This is affirmed by the *United Nations Declaration on the Rights of Indigenous Peoples*.

There is strong debate about the appropriate terminology to be used when referring to Aboriginal and Torres Strait Islander peoples. The Social Justice Commissioner recognises that there is strong support for the use of the terminology 'Aboriginal and Torres Strait Islander peoples', 'First Nations' and 'First Peoples'.

ATSIEB Secretariat

Office for Aboriginal and Torres Strait Islander Affairs | Community Services Directorate

| ACT Government | Level 8, 11 Moore Street | GPO Box 158 Canberra ACT 2601 | Phone 02 6205 2551 | Email: atsieb@act.gov.au | www.atsieb.com.au



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The Elected Body are requesting that a reference to 'Indigenous people' in the *Human Rights Bill 2003* be amended to 'Aboriginal and Torres Strait Islander peoples' in the new Act. This will allow Aboriginal and Torres Strait Islander peoples not to be represented as a homogenous group with a uniform cultural heritage and identity, but rather acknowledged and recognised as being a diverse group of peoples with differing histories, aspirations and relationships.

The Elected Body met with officers from the Justice and Community Safety Directorate and the Human Rights Commission on 6 February 2015 and sought advice from the ACT Solicitor-General on a set of words to give effect to cultural rights.

At that meeting it was agreed to support the inclusion of cultural rights into the Human Rights Act in the following form:

27 Rights of (Aboriginal, Torres Strait Islander People and) minorities

- (1) Anyone who belongs to an ethnic, religious or linguistic minority must not be denied the right, with other members of the minority, to enjoy his or her culture, to declare and practise his or her religion, or to use his or her language.
- (2) Aboriginal and Torres Strait Islander peoples hold distinct cultural rights and must not be denied these rights to maintain, control, protect and develop their:
 - a. Cultural heritage and distinctive spiritual practices, observances, beliefs and teachings;
 - b. Languages and knowledge; and
 - c. Kinship ties.
- (3) The material and economic relationships Aboriginal and Torres Strait Islander peoples have with the land and waters, and other resources, must be recognised and valued, as they have a significant connection under traditional laws and customs.

Note: Under Section 31 of this Act, international law may be considered in interpreting these rights. The *United Nations Declaration on the Rights of Indigenous Peoples* would be a relevant document to the interpretation of this provision.

An amendment to the Human Rights Act to include these rights was drafted by the Parliamentary Counsel's Office with some changes to the structure of the provision to be consistent with best drafting practice. The following amendment was agreed to by Cabinet on 23 March 2015 and was introduced into the Legislative Assembly in the Human Rights Amendment Bill 2015 on Thursday 26 March 2015.

Cultural and other rights of Aboriginal and Torres Strait Islander Peoples and Other Minorities – New Section 27(2)

To be inserted

- (2) Aboriginal and Torres Strait Islander peoples hold distinct cultural rights and must not be denied the right –
 - a. to maintain, control, protect and develop their –
 - i. cultural heritage, and distinctive spiritual practices, observances, beliefs and teachings;and

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- ii. languages, and knowledge; and
- iii. kinship ties; and
- b. to have their material and economic relationships with the land and waters and other resources with which they have a connection under traditional laws and customs recognised and valued.

Note: The primary source of the rights in Section (2) is the *United Nations Declaration on the Rights of Indigenous Peoples*, Article 25 and Article 31.

The Human Rights Amendment Bill 2015 explanatory statement states that:

The intention behind the amendments to insert s 27(2)(b) is not to confer property rights through the recognition of native title (which has been extinguished in the ACT), [emphasis added] but to require the ACT Government to recognise the prior and continuing relationships of Aboriginal and Torres Strait Islander peoples with the Canberra region and environment as first owners and custodians and to value the importance of those relationship as in integral part of the history, cultural heritage and ongoing protection of the Canberra region and environment.

In relation to extinguishment of native title in the ACT we draw attention to the *Native Title Information Handbook, Australian Capital Territory*, published by the Native Title Research Unit at the Australian Institute of Aboriginal and Torres Strait Islander Affairs (Updated to January 2014, accessed 11 August 2015) which states that:

- The ACT enacted the *Native Title Act 1994* (ACT) on 1 November 1994 to validate past acts invalidated because of the existence of native title (s 3(a)) and to confirm existing rights to natural resources and access to waterways and public places (s 3(b)).
- The *Native Title Act 1994* (ACT) confirms Crown ownership of all natural resources, rights to use, control and regulate the flow of water and existing fishing access rights; as well as existing public access to and enjoyment of waterways, beds, banks and foreshores of waterways and areas that were public places as at 31 December 1993.
- The ACT Government has not enacted any legislation confirming extinguishment of native title by particular types of tenure.

Based on the intentions stated in the *Human Rights Amendment Bill 2015* explanatory statement for the amendment to insert s 27(2)(b), we seek clarification on the following questions:

- Does the ACT consider native title a property right?
- When and how was native title extinguished over the whole of the ACT?
- What does *Part 3 Confirmation of Rights and Access* in the *Native Title Act (ACT) 1994* mean if native title has been extinguished in the ACT?
- If native title was extinguished in the ACT, on what basis was the ACT in mediation with Native Title claimants up until 2008?
- What is meant by the term Canberra region? How extensive is the region referred to?

In relation to traditional owner status:

- The statement that the intention of s 27(2)(b) of the Bill is “to require the ACT Government to recognise the prior and continuing relationships of Aboriginal and Torres Strait Islander peoples with the

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Canberra region and environment as first owners and custodians and to value the importance of those relationship as in integral part of the history, cultural heritage and ongoing protection of the Canberra region and environment” suggests that the ACT contemplates that there were and continue to be ‘traditional owners’ or ‘custodians’ of the Canberra region. Does this statement intend that were it not for ‘extinguishment’ of native title, there are identified groups of Aboriginal people, who would satisfy the native title requirement of a local descent group with continuing law and custom associated with the ACT?

- Why is there discussion of ‘Torres Strait Islanders’ as first owners and custodians of the Canberra region? Perhaps the inclusion of ‘Torres Strait Islanders’ is an oversight in the drafting of the explanatory statement.

I trust this information is of assistance to the Standing Committee on Justice and Community Safety.

Yours sincerely

Rod Little
Chairperson
ACT Aboriginal and Torres Strait Islander Elected Body
14 August 2015

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