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STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
Mr Peter Cain MLA (Chair), Dr Marisa Paterson (Deputy Chair),
Mr Andrew Braddock MLA

Submission Cover Sheet

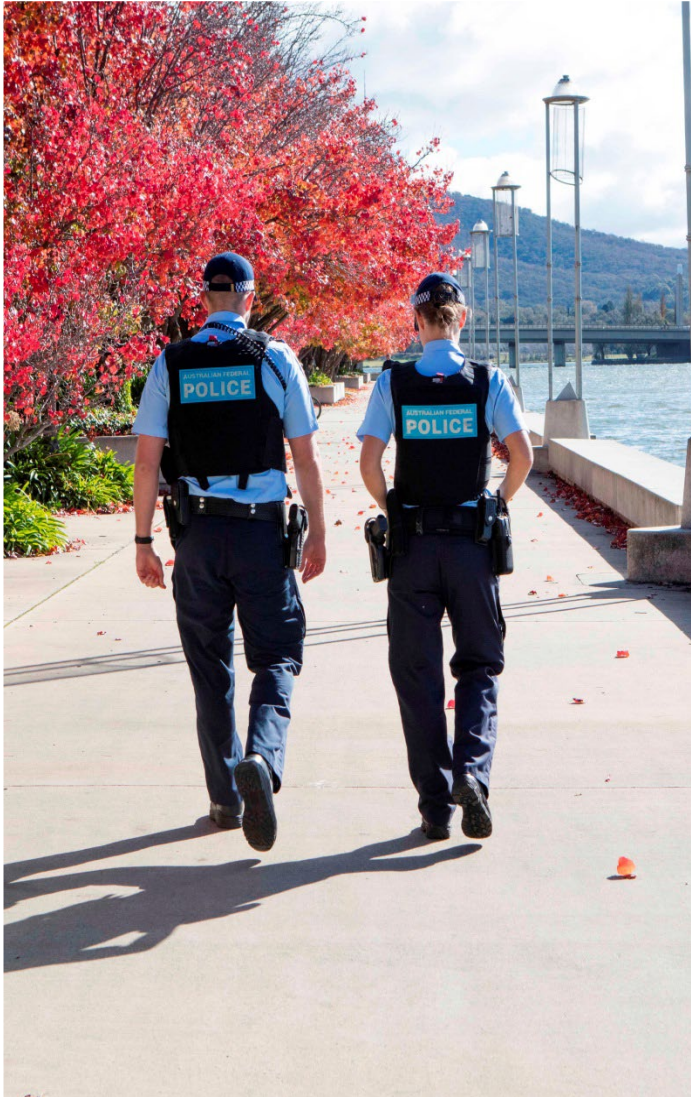
Inquiry into Petition 32-21 (No Rights Without Remedy)

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Inquiry into the *Human Rights Act* 2004 (ACT)

April, 2022

Submission by ACT Policing

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Introduction

ACT Policing appreciates the opportunity to provide a submission into the Justice Committee's *Inquiry into Petition 32-21 (No Rights Without Remedy)* which emphasises the importance of bolstering complaint mechanisms for breaches of the *Human Rights Act* (2004). This petition terms of reference proposes the expansion of the ACT Human Rights Commission's remit for complaints to be heard and investigated on all matters in the ACT, in the following way:

- Enable a complaint about any breach of the *Human Rights Act* (HR Act) to be made to the Human Rights Commission for confidential conciliation; and
- If conciliation is unsuccessful, enable a complaint about a breach of the Human Rights Act to be made to the ACT Civil and Administrative Tribunal for resolution.

ACT Policing makes considerable efforts to protect individual human rights across the organisation's work. At present, there is a level of considerable oversight that ACT Policing is subject to in relation to human rights and complaints processes.

At present, the ACT Human Rights Commission can only investigate individual complaints about unlawful discrimination, health services, services for older people, disability services and services for children and young people. The proposed expansion of remit would mean that any breach of the HR Act relating to police could be made to the ACT Human Rights Commission (beyond the areas listed above), and if conciliation is unsuccessful, an aggrieved person could lodge a complaint under the ACT Civil and Administrative Tribunal (ACAT). This submission details the complexities of this proposal noting the legal arrangements for ACT Policing as federal officers, and emphasises that this proposed new pathway of oversight potentially would not provide the most appropriate outcome for the victim or individual seeking conciliation.

Current Legal Arrangements

The current legal arrangements remain quite complex given that ACT Policing are the community policing arm of the Australian Federal Police (AFP), contracted to provide policing services to the ACT community. However, by virtue of operating in the Australian Capital Territory, ACT Policing are subject to the public authority obligations under the HR Act. Section 40 of the HR Act declares a member of the AFP to be a 'public authority' for the purposes of the HR Act when exercising a function under Australian Capital Territory legislation. In short, this means under the HR Act, a member of ACT Policing is expected to act consistently with human rights when exercising a function under the Act/Territory legislation, and any power or function conferred on a member by a Territory law (section 30) is to be read consistently with human rights as far as possibly consistent for the purpose of that law. By virtue of the HR Act applying in the ACT, all legislation coming into effect since the introduction of the HR Act in 2004 that is relevant for policing - must be consistent with human rights. This is ensured by the oversight of legislation to ensure human rights consistency, embedded in the HR Act and overseen by ACT Government. All federal laws through the legislation-making process in the Australian Parliament are also subject to human rights scrutiny.

At present, the ACT Human Rights Commission can only investigate individual complaints about unlawful discrimination, health services, services for older people, disability services, and services for children and young people. The Human Rights Commissioner does not

investigate individual complaints about breaches of the HR Act, although the Human Rights Commission can provide general information about human rights.

It remains unclear what would occur if a complaint related to police is to be made to the Human Rights Commission under the proposed expanded remit, and subsequently ACAT, about an alleged breach of the HR Act. This civil complaint would be in reference to police matters and/or the ACT criminal justice system, of which a number of complaints pathways already exist in both ACT and federal law. ACT Policing expects that this may be left to the Registrar to determine an appropriate remedy, based on the extent of alleged negligence/misconduct. At present, it is unclear if a territory tribunal could mandate the providing of Commonwealth information from the AFP, thereby reiterating that an individual would be expected to endure a complex, long-term complaints process for an outcome that may be less appropriate than the already existing pathways.

ACT Policing's Current Complaint Processes

A concern or complaint can be raised with ACT Policing directly, in which the agency takes all reasonable and proactive steps to resolve the concern or complaint in a timely way. Any member of the public can make a complaint to any member of the AFP, local police station or AFP Professional Standards (PRS). All complaints are treated confidentially and are resolved in accordance with the AFP National Guideline on Complaint Management. Complaints are categorised and may be forwarded to the relevant area of the AFP for resolution.

Minor complaints relating to discourtesy, minor misconduct and underperformance issues will be actioned by managers within the workplace and will generally involve an independent AFP appointee engaging directly with the complainant to resolve the issue.

Minor complaints can commonly be resolved through explanation of the law, explanation of police practice or by bringing the complainant's concerns to the attention of the AFP appointee who is the subject of the complaint. The Professional Standards portfolio oversees outcomes of minor complaints. Serious complaints will be investigated by the AFP Professional Standards portfolio.

Complaints relating to corruption matters will be referred by the AFP Commissioner to the Australian Commission for Law Enforcement Integrity (ACLEI) for appropriate action.

Internally, any complaints against police are investigated and handled by the Professional Standards (PRS) Operations Committee, who meet on a weekly basis to achieve a holistic approach for managing severe conduct matters. The Operations Committee also involves key stakeholders from a variety of business areas, including, but not limited to, professional standard, organisational health, security, and people strategies. There is also a PRS Complaint Coordination Team which is an initial point of contact for all conduct related complaints.

The mechanisms for a member of the public to initiate police complaint remains highly accessible with ACT Policing being a 24/7 service, with each police station manned by police obligated to take a complaint and/or escalate it to a higher rank accordingly.

ACT Policing ensures that there are accurate reporting mechanisms for alleged instances of police misconduct, concerns raised, and the investigations into suspected instances are handled appropriately. At present, Professional Standards or the responsible Command (depending on the seriousness of the complaint) investigate these complaints and ensure

accurate record-keeping, and robust governance to ensure timely and thorough investigations are conducted.

The Office of the Commonwealth Ombudsman is required to inspect AFP complaint records and report to the Australian Parliament, commenting on the adequacy and comprehensiveness of how the AFP has dealt with conduct and practices issues, as well as its handling of inquiries ordered by the relevant minister. This process ensures that there is external oversight of the AFP for these matters.

Level of Oversight

Victims Charter

The current complaints and resolutions processes for ACT Policing are far broader than what is stipulated within the Petition's terms of reference, which only makes reference to the Supreme Court. For those who have experienced a police action that could amount to an alleged breach under the HR Act, ACT Policing must respect and uphold obligations and makes every effort to support victim rights and recovery, as stipulated within the *Victims of Crime Act 1994* (ACT).

ACT Policing refers victims of crime to relevant support and therapeutic services through 'SupportLink', which engages a range of community and support services within the ACT. These services can often be linked to a range of issues, including substance abuse, homelessness, family violence, and more. ACT Policing takes every step possible to support victims in navigating this pathway to ensure the most beneficial and appropriate outcome is achieved for the victim.

If there is a low-level complaint against ACT Policing, the respective Team Leader/person at Sergeant level can take the complaint and hear the relevant concerns raised by the member of the public (which is diarised for accurate record-keeping and involves talking to the officer/s involved). For complaints regarding a higher level of severity, this is often escalated to investigative action by AFP PRS. When it is a complaint against actions against an officer and/or handling of a criminal investigation, updates are provided to the complainant every six weeks to ensure they are kept engaged with the processes involved.

There are extensive oversight arrangements in place for ACT Policing to ensure that complaints are handled appropriately. In the ACT, the *Charter of Victims Rights* (the Charter) protect and promote the rights of victims of crime when they engage with justice agencies in the criminal justice system, commenced in January 2021 and is contained within the *Victims of Crime Act 1994* (ACT). ACT Policing is one of the justice agencies that must uphold the Charter.

The Charter presents extensive oversight of ACT Policing and related justice agencies, allowing for the raising of concerns with the Victims of Crime Commissioner, the Disability and Community Service Commissioner, and/or Victim Support Staff. This process thus far presents, in ACT Policing's view, adequate levels of accessibility and support for those who may feel their rights have been impinged, or those who wish to raise a concern/complaint.

There are numerous obligations ACT Policing must continue to uphold under the Charter in the process of delivering quality and effective policing services in the ACT. ACT Policing primarily promotes preserving public safety, thereby obligations are held with the utmost

importance with respect to an individual's privacy, preferred outcomes, referral to relevant support services, and assisting an individual in navigating the complexities of police-related or criminal justice system processes.

ACT Policing continues to work with ACT Government, and constructively take on criticism to ensure we are constantly evolving, growing and improving as an agency. ACT Policing continues to establish new efforts to protect individuals from all potential forms of crime and harm. ACT Policing ensures training for officers to enable trauma-informed responses and safeguard members of the public's individual human rights in the course of carrying out their duties.

Further bodies providing oversight

An individual can make a complaint to other relevant complaints bodies, such as the ACT Ombudsman or ACT Integrity Commission. Further to this, additional oversight over ACT Policing includes mechanisms under the *Australian Federal Police Act 1979* (Cth), coverage by the Australian Commission for Law Enforcement Integrity, the Information Commissioner, and Commonwealth Ombudsman.

The ACT Human Rights Commission has historically expressed wishes to broaden its remit over ACT Policing. In the Human Rights Commission's submission to the Legislative Assembly on the '*Evaluation of Current Act Policing*' (Submission 9 – April 2020), the Human Rights Commission expressed that it sees the following as areas for improvement:

- The lack of accessible local mechanisms to deal with police complaints;
- The continued reliance on Commonwealth legislation to regulate police criminal investigative powers;
- The adequacy of resourcing to ensure quality service provision to victims, in particular in relation to Family Violence Orders, people with diverse needs, and in sexual assaults matters; and
- The adequacy of data collection and reporting.

ACT Policing notes that these comments were before the introduction of the Victims Charter, which inserts additional obligations on ACT Policing to uphold victims' rights throughout the criminal justice process.

It is important for ACT Policing to address any perception of a 'reliance' on the Commonwealth legislation to regulate police criminal investigate powers, given that ACT Policing constitutes a branch of the overarching Australian Federal Police, a federal agency. The reliance on federal powers is due to the very nature of the organisation, and on the basis of the contractual arrangement to provide services to the ACT community. These federal powers exist in every state and territory. Federal agencies across Australia are ultimately guided and regulated by Commonwealth legislation.

Each agency providing oversight of the AFP in a national and local context has extensive complaints and appeals mechanisms to ensure matters are resolved. It would be open to an individual to include references to alleged breaches of the Act if they wished to do so. While the nature of how each external agency investigates any complaint would vary, it is ACT Policing's understanding that all complaints are investigated holistically, and could result in members receiving disciplinary action/suspension/further consequences, as well as

recommendations for systemic reform being made and adopted for AFP policies and procedures.

Orders ACAT can make

There are presently a number of orders that ACAT can make. For example, types of civil disputes include:

- a debt – to recover a debt and/or interest owing on a debt
- damages – to recover damages caused by negligence or other tort
- goods – dealing with the provision of goods or services (for the value of goods or services, the recovery of goods, the provision of services, or for damages caused by the detention of goods)
- contracts – including damages for breach of contract
- a nuisance – to deal with interference with use or enjoyment of land (such as an overflow from a neighbour’s burst sewerage pipe on your land), including to deal with the interference, monetary damages and/or an order to stop the interference
- a trespass – to deal with unauthorised entry onto property including to seek monetary damages and/or an order to stop the trespass (for example, an order requiring a squatter to leave your land)
- a debt declaration – to declare the amount, or the maximum amount, that you owe to someone, or to declare that you are not indebted to another person at all (attach a copy of the letter of demand that has been sent to you)
- authorising laws – such as the Australian Consumer Law.

A number of these matters naturally cross-over with the matters that police deal with day-to-day. Generally, the civil and criminal pathways exist in separate realms. However, this proposal for the HRC to essentially oversee matters that police regularly deal with could mean that ACAT is attempting to examine federal police conduct. If ACAT finds that a breach of human rights has occurred, yet an officer has acted lawfully (for example, an officer as deprived someone of their liberty through the exercise of their powers for a lawful purpose) - the aggrieved person will only achieve redress in situations where there is gross negligence. This shows the complexity of the intersection between civil and criminal legal systems, which may not produce a faster or more satisfactory outcome for an aggrieved person, as compared to other pathways.

As a further example, the *Discrimination Act 1991* sets out protected attributes, the areas or activities in which it is unlawful to discriminate and the exceptions that may apply. The *Human Rights Commission Act 2005* sets out the orders ACAT can make. If ACAT is satisfied that the person complained about engaged in an unlawful act, ACAT can make orders which can include that the respondent:

1. not repeat or continue an unlawful act
2. perform a stated reasonable act to redress any loss or damage suffered by the applicant because of the unlawful act
3. pay to the applicant a stated amount by way of compensation for any loss or damage suffered by the applicant because of the unlawful act.

However, this would require ACAT to make an assessment of what is unlawful in a nexus between civil versus criminal burdens. Should such orders be made against police in such ways, there is no enforcement mechanism by what ACAT could ensure that the Australian Federal Police adopt recommendations. However, organisations such as the federal

Ombudsman, ACLEI and others have mechanisms to provide redress to the AFP and ACT Policing to ensure recommendations are adopted, and aggrieved people receive redress.

Jurisdictional Comparison

It is important to consider the mechanisms operating in other human rights jurisdictions (Victoria and Queensland) within Australia to maintain and implement best practices for victims.

The Queensland Human Rights Commission handles complaints under the *Anti-Discrimination Act 1991* (QLD) and the *Human Rights Act 2019* (QLD). In Queensland, the process is similar to the ACT, where the Human Rights Commission assists in facilitating a conciliation-process, in which complaints are often resolved. In Queensland, the Human Rights Commission does not provide legal advice, nor are they a court or tribunal, thereby the Queensland Human Rights Commission do not hold the power to decide if discrimination, harassment, or limitation on human rights have occurred.

In Victoria, all complaints about Victorian police can be made to the Police Conduct Unit, which is held within the Victorian Police agency. An individual can also complain to the Independent Broad-Based Anti-Corruption Commission (IBAC), which is not a part of Victoria Police, with IBAC investigating serious corruption and police misconduct. Impingement upon an individuals' human rights within Victoria is guided by the Victorian *Charter of Human Rights and Responsibilities Act 2006* (VIC), which can also be reported to the Victorian Equal Opportunity and Human Rights Commission, which also offers a dispute resolution (not a court/criminal process). In Victoria, complaints to the Victorian Human Rights Commission are then forwarded to the respective agency involved.

ACT Policing appreciates the importance of the ACT Human Rights Commission's work, and the broad community benefit regarding remedial pathways for breaches of human rights. However, it is ACT Policing's view that the many current processes for remedial pathways are providing sufficient oversight for ACT Policing actions.

Conclusion

ACT Policing will continue to prioritise beneficial outcomes for victims and ensure trauma-informed best practices for victims who have experienced a breach of their human rights under the Act. Noting the considerable legal complexities yet to be settled under this proposal, ACT Policing welcomes further discussion with ACT Government and the Human Rights Commission on these issues.