



Our Reference:
Your Reference:

17 April 2012

Ms Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
Legislative Assembly for the ACT

	A.C.T. LEGISLATIVE ASSEMBLY COMMITTEE OFFICE
SUBMISSION NUMBER	6
DATE AUTH'D FOR PUBLICATION	26/04/12 RL

Dear Ms ~~Dunne~~ *Vicki*

**STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
INQUIRY INTO THE CRIMES LEGISLATION AMENDMENT BILL 2011
AND THE CRIMES (OFFENCES AGAINST POLICE) AMENDMENT BILL 2012**

I refer to your letter of 12 April 2012.

Thank you for the opportunity for outlining the DPP approach on this issue. I will attempt to do so in writing, but would also be most willing to appear before the Committee if the Committee deems this of value.

Please pardon the length of this letter but it is worth setting out the background to the current legislative regime at some length.

Background: ACT policing arrangements

The situation regarding the current arrangements is quite complex, but my understanding is as follows. In effect the ACT cannot legislate with respect to police services per se, but can otherwise legislate with respect to law and order.

Section 7 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) establishes the ACT as a "body politic under the Crown". The ACT Legislative Assembly has power (section 22) to make laws for the peace, order and good government of the Territory subject to some exclusions. Those exclusions include under subsection 23(1)(c) "the provision by the Australian Federal Police of police services in relation to the Territory".

ACT DIRECTOR OF PUBLIC PROSECUTIONS

As such there is no Police Act or similar legislation in the ACT with the AFP being responsible for providing policing services to the ACT under Section 8 of the *Australian Federal Police Act 1979*.

Subsection 37(a) of the *Australian Capital Territory (Self-Government) Act 1988* provides that the ACT Executive has the responsibility of governing the Territory with respect inter alia to matters of law and order.

The legislative regime means that the ACT is policed by the AFP. Under the provisions of the *Australian Federal Police Act 1979* at subsection 8(1A), the Minister for Justice and Customs and the Australian Capital Territory may enter arrangements for the police services in relation to the Australian Capital Territory that are in respect of Territory functions as defined by section 3 of the *Australian Capital Territory Self Government (Consequential Provisions) Act 1988*.

There is such an arrangement, between the Minister for Justice and Customs of the Commonwealth and the ACT for the provision of police services to the ACT. Pursuant to that arrangement, there is an annual purchasing agreement between the relevant ACT Minister, the Commissioner of the AFP and the Chief Police Officer setting out the details of goods and services to be provided to the ACT and a framework for reporting on performance.

Paragraph 9(1)(b) of the *Australian Federal Police Act 1979* provides that in addition to any other powers and duties, a member of the Australian Federal Police has, when performing functions in the Australian Capital Territory, the powers and duties conferred or imposed on a constable or on an officer of police by or under any law (including the common law) of the Territory.

Assaulting or resisting police: the ACT and Commonwealth legislative regimes

This office often deals with allegations that police officers have been assaulted or resisted in the execution of their territory policing duties.

There are a number of potential charges in such matters.

These include the following **ACT offences**:

- Common assault under section 26 of the *Crimes Act 1900* [penalty 2 years, summary];
- Assault occasioning actual bodily harm under section 24 of the *Crimes Act 1900* [penalty 5 years, indictable, prosecution can elect summary]
- Obstructing a Territory public official contrary to section 361(1) of the *Criminal Code 2002* [penalty 2 years, summary]
- There is also a minor offence of obstructing a territory public official under section 363 of the *Criminal Code 2002* [penalty 6 months, summary]

Under section 300 of the *Criminal Code 2002*, "territory public official" means "a person having public official functions for the Territory, or acting in a public official capacity for the Territory", and includes "a police officer".

Of course at present there is no offence under ACT law of assaulting a police officer, nor is there a provision such as in NSW where a higher penalty applies if the victim of an assault is a police officer.

There are also a number of potential offences under the **Commonwealth Criminal Code**.

Those offences include:

- Section 147.1 of the *Criminal Code* (Commonwealth) causing harm to a Commonwealth public official. The penalty if the Official is a Commonwealth law enforcement officer is thirteen years – which makes the offence an indictable only matter. However, the matter may be dealt with summarily with the consent of the defendant and the prosecutor.
- Section 147.2 of the *Criminal Code* threatening to cause harm to a Commonwealth public official. The penalty if the Official is a Commonwealth law enforcement officer is imprisonment for nine years. This makes the matter indictable but able to be dealt with summarily pursuant to section 4J of the *Crimes Act 1914* with the consent of the defendant and the prosecutor.
- Section 149.1 of the *Criminal Code* makes it an offence to obstruct a Commonwealth public official, with a two year penalty. This makes the matter indictable but able to be dealt with summarily pursuant to section 4J of the *Crimes Act 1914* with the consent of the defendant and the prosecutor.

“Commonwealth public official” includes “a member or special member of the Australian Federal Police”. “Commonwealth law enforcement officer” includes (section 146.1) “a member or special member of the Australian Federal Police”.¹

Differences between the regimes

There are two major differences between the ACT offences on the one hand, and the Commonwealth offences on the other.

A **first** obvious difference is that the Territory offences of assault, assault occasioning actual bodily harm, and obstruction are either summary or at least able to be dealt with summarily on the election of the prosecutor, whereas the Commonwealth offences are able to be dealt with summarily only with the consent of the defendant.

This means that if a Commonwealth offence is charged, it is in the hands of the defendant whether the matters will be dealt with in the Supreme Court. Often the allegations involved in these sorts of matters are straightforward (which is not to say they are not serious) and ideal to be dealt with by the Magistrates Court. If the defendant elects to have the matter committed to the Supreme Court, this burdens the lists of that court with matters that could be dealt with, far more speedily, in the Magistrates Court.

¹ For completeness, note section 64 of the *Australian Federal Police Act 1979*:

64 Assault etc.

The court convicting a person of an offence against section 147.1 or 149.1 of the *Criminal Code* that relates to a member, special member, protective service officer or special protective service officer may, order the offender to pay such compensation as the court thinks fit for any damage or injury caused by the offender to the uniform, clothing or accoutrements of the member, special member, protective service officer or special protective service officer concerned or for any medical or other expenses incurred in consequence of personal injury sustained by him or her by reason of the offence.

The **second** difference is that the Commonwealth offences are quite complex in so far as the number of elements and applicable fault elements. The ACT offences are less complex.

To exemplify the relative complexity of the Commonwealth provisions, consider section 147.1 of the *Criminal Code* (Commonwealth). It is hardly a shining example of the draftsman's art. It provides:

147.1 Causing harm to a Commonwealth public official etc.

Causing harm to a Commonwealth public official

(1) A person (the **first person**) is guilty of an offence if:

- (a) the first person engages in conduct; and
- (b) the first person's conduct causes harm to a public official; and
- (c) the first person intends that his or her conduct cause harm to the official; and
- (d) the harm is caused without the consent of the official; and
- (e) the first person engages in his or her conduct because of:
 - (i) the official's status as a public official; or
 - (ii) any conduct engaged in by the official in the official's capacity as a public official; and
- (ea) the public official is a Commonwealth public official; and
- (eb) if subparagraph (e)(i) applies—the status mentioned in that subparagraph was status as a Commonwealth public official; and
- (ec) if subparagraph (e)(ii) applies—the conduct mentioned in that subparagraph was engaged in by the official in the official's capacity as a Commonwealth public official.

Penalty:

- (f) if the official is a Commonwealth judicial officer or a Commonwealth law enforcement officer—imprisonment for 13 years; or
- (g) in any other case—imprisonment for 10 years.

(1A) Absolute liability applies to the paragraphs (1)(ea), (eb) and (ec) elements of the offence.

(1B) If:

- (a) a person is charged with an offence against subsection (1); and
- (b) the public official concerned is a Commonwealth judicial officer or a Commonwealth law enforcement officer;

a court of summary jurisdiction may, with the consent of the defendant and the prosecutor and if the court is satisfied that it is proper to do so, determine the charge summarily.

(1C) If a court of summary jurisdiction convicts a person of an offence against subsection (1) in accordance with subsection (1B), the penalty that the court may impose is a sentence of imprisonment not exceeding 2 years or a fine not exceeding 120 penalty units, or both.

The offence has about seven physical elements, each accompanied by a fault element. The proof of the offence is complex, and the offence is difficult to explain to juries.

Spitting and like conduct

The Commonwealth offence of causing harm to a Commonwealth public official is seen by police as offering some advantages in a particular situation – unfortunately encountered only too often – of defendants spitting at police officers. Often this spitting is accompanied by threats – uttered by the defendant – of disease infection.

The definition of “harm” (see section 146.1) is wide, including “any physical contact with a person that the person might reasonably object to in the circumstances”, as well as harm to a person’s mental health.

If an infectious disease resulted from a spitting assault, then the defendant could be charged with assault occasioning actual bodily harm or even grievous bodily harm. However such infection would take some time to manifest itself, and it would often be impractical to recharge a defendant with an aggravated assault in these circumstances.

Further, because testing for an infectious disease can take time, the mental anguish occasioned to the victim while they await the results can be considerable.

In these sorts of cases, the Commonwealth offences may provide a more appropriate alternative to the Territory offences.

Policy of the DPP

With that background, I come to the policy of the DPP in such matters. The Office position is that ACT offences should be generally preferred to alternative Commonwealth offences, particularly where the incidents leading to the charges arise in a community policing context.

This position is based on the following considerations:

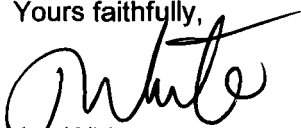
- Given that the ACT is self governing with respect to criminal law, and that specific consideration has been given to some issues, and specific provision made with respect to others, it seems to follow that specific ACT provisions should be preferred to more general Commonwealth provisions;
- The ACT provisions allow for matters to be dealt with summarily which is usually preferable in these cases;
- The Commonwealth provisions are notably more complex than the ACT provisions.

Accordingly, where the allegation is one of obstructing, hindering, intimidating or resisting a police officer providing ACT police services, the matter should be charged under section 361 of the *Criminal Code 2002* (and where appropriate section 363) rather than under section 149.1 of the *Criminal Code* of the Commonwealth.

Where the allegation is one of assaulting a police officer, the charge of common assault or if appropriate aggravated assault is to be preferred to section 147.1 or 147.2 of the *Criminal Code* of the Commonwealth. This is not completely to rule out the possibility of proceeding with Commonwealth offences. There may be occasions where the Commonwealth offences provide options that would not otherwise be available under the ACT legislation. An example may be an offence of causing harm to a Commonwealth public official in appropriate circumstances.

I trust this clarifies the position, and remain at your disposal should any further explanation be necessary.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Jon White', with a stylized, cursive script.

Jon White

Director of Public Prosecutions