



LEGISLATIVE ASSEMBLY

FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

Mrs Giulia Jones MLA (Chair), Ms Bec Cody MLA (Deputy Chair), Mr Deepak-Raj Gupta MLA

Evaluation of Current ACT Policing

Submission 9

ACT Human Rights Commission

Date authorised for publication – 28 April 2020



ACT HUMAN RIGHTS COMMISSION

Australian Capital Territory

The Committee Secretary
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
CANBERRA ACT 2601

[By email: LACommitteeJCS@parliament.act.gov.au]

14 February 2020

Dear Committee Secretary

Submission to the Inquiry evaluating current ACT Policing arrangements

The ACT Human Rights Commission welcomes the opportunity to make a submission to the Standing Committee on Justice and Community Safety's inquiry and review of current ACT Policing arrangements and practices. We understand that the Committee is undertaking this review as part of its general powers of inquiry into the matters referred to it by the Legislative Assembly at the commencement of the 9th Assembly in 2017, pursuant to Standing Order 216.

We commend the Committee for resolving to examine this important issue. Community policing that is effective and accountable is fundamental to building a cohesive and safe society. Community policing is at its core about upholding human rights.

As independent office holders with key oversight responsibilities for the promotion of human rights and welfare of people in the ACT, the Commission is interested in ensuring that current policing practices and arrangements reflect best practice. Our submission seeks to identify some of the areas where we believe the current arrangements and practices could be improved to effect better policing outcomes for the ACT as a human rights jurisdiction.

We would be pleased to discuss any of the matters raised in this submission with the Committee.

Yours sincerely,

Dr Helen Watchirs OAM
President and Human
Rights Commissioner

Heidi Yates
Victims of Crime
Commissioner

Karen Toohey
Discrimination, Health Services,
and Disability and Community
Services Commissioner

Jodie Griffiths-Cook
Public Advocate and
Children and Young
People Commissioner

ACT Policing and the ACT Human Rights Act 2004

1. Members of ACT Policing are subject to the public authority obligations under the *Human Rights Act 2004* (HR Act). Section 40 of the HR Act expressly declares a member of the Australian Federal Police (AFP) to be a 'public authority' for the purposes of the HR Act when exercising a function under a Territory law. As a public authority, members of ACT Policing are therefore required to act and make decisions compatibly with human rights in the exercise of their functions in the Territory.
2. Successive Policing Arrangements from 2011 have recognised that 'as part of compliance with the statutory framework of the ACT public sector participants in the justice system, including ACT Policing, are expected to promote and protect human rights when exercising a function under an ACT law.'¹
3. The Commission is pleased to see that the current Policing Arrangement, which commenced in June 2017, makes express reference to the public authority obligations of members of ACT Policing under s 40 of the HR Act:

Under the *Australian Federal Police Act 1979* (Cth) (AFP Act), the Commonwealth Minister responsible for the AFP and the Territory Minister responsible for policing on behalf of the Territory, can enter into arrangements for the provision of police services for the ACT (s 8(1A)) and for the doing of anything incidental or conducive to the provision of those services (s 8(2B)). Having entered into an arrangement and subject to its terms, the functions of AFP members extend to the provision of police services in relation to the ACT (s 8(1)(a)) and anything incidental or conducive to the provision of those services (s 8(1)(c)). When a member is performing those functions in the ACT they have the powers and duties conferred or imposed on a constable or on an officer of police by or under any law of the Territory (including the common law) (s 9(1)(b)). Under the *Human Rights Act 2004*, a member is expected to act consistently with human rights when exercising a function under a Territory law (section 40) and any power or function conferred on a member by a Territory law is to be read consistently with human rights as far as possible consistent with the purpose of that law (section 30).²

4. The Commission has sought to maintain an open dialogue with ACT Policing about human rights issues, including through the provision of human rights training to members of ACT Policing on request, and opportunities to provide feedback on the development and implementation of legislation and policies consistently with the HR Act. Commissioners and their staff also meet with the CPO and members of ACT Policing on a routine basis to discuss issues of common interest. We have appreciated ACT Policing's generosity in communicating its work with us and for being receptive to our ongoing feedback.

¹ See, Preambles to Policing Arrangements of 2011-2016, and 2016-2017.

² See, Policing Arrangement, commencing June 2017, p 2.

Recent examples of engagement with the Commission on human rights issues

The Commission has welcomed increasing opportunities in recent years to work proactively with the legislation and policy division of ACT Policing by providing advice to inform their development of human rights compatible legislation and policy. Commission staff also presented a workshop to ACT Policing legislation and policy staff in October 2019 on the obligations of public authorities under the HR Act and embedding respect for rights in policy design.

(i) Conducted Electrical Weapons (Tasers)

In June 2018, the former ACT Chief Police Officer (CPO), Justine Saunders APM, invited Dr Watchirs, as the ACT Human Rights Commissioner, to review the AFP's *Commissioner's Order on Operational Safety* (CO3) and provide views about improving safeguards regarding deployment and use of conducted electrical weapons (CEWs, or Tasers).

The Commission reviewed an unredacted copy of the order for its consistency with the *Human Rights Act 2004* (HR Act) and provided advice to Assistant Commissioner Saunders' successor, Assistant Commissioner Ray Johnson APM, in March 2019. This advice included seven recommendations highlighting:

- the need to simplify guidance about the threshold for using CEWs;
- recognition that use of CEWs is potentially lethal, rather than 'less than lethal'; and
- specific notice of the contextual risks and parameters for use, particularly on vulnerable subjects.

ACT Policing observed in its reply that it is presently assisting the coronial inquest into the death of Mr Anthony Caristo, which occurred in October 2017, and indicated it would engage with the Commission on our advice when the matter is finalised.

As this inquest is continuing, the Commission looks forward to considering its advice in light of any coronial recommendations and liaising further with ACT Policing about any amendments to the CO3 or enactment of an ACT-specific protocol for use of CEWs in the administration of a Territory law, similar to those introduced by the AFP in 2016 in relation to vehicle pursuits by ACT Policing.

(ii) Body-Worn Cameras

From March 2019, ACT Policing officers were issued with Body Worn Cameras (BWCs) that activate automatically where a CEW or firearm is drawn and/or activated.

ACT Policing announced in August 2019 that it would expand the use of BWCs to officers at their discretion while in a public place or with express consent of an occupant when inside private premises.

As of October 2019, the Commission has been working collaboratively with ACT Policing staff at their request to explore human rights compatible proposals to authorise the use of BWCs by ACT Policing officers. As limitations of the right to privacy (s 12, HR Act) must be both lawful and not arbitrary, the Commission has encouraged ACT Policing to explore opportunities with government to enact a suitable legislative authorisation. In this context, we have also recommended the Policing Arrangement contemplate reporting of complaints related to use of BWCs by officers.

We commend ACT Policing's willingness to engage with us constructively in identifying safeguards that ensure the use of BWCs is reasonable and proportionate but also operationally viable.

Areas for improvement

5. In addition to the two areas of police operations described above that we believe may merit the introduction of ACT-specific legislative guidance or protocols, the Commission considers that the following aspects of the current arrangements also warrant further attention. These broadly relate to:

- 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 assault matters; and
- The adequacy of data collection and reporting.

(i) Lack of accessible local complaints mechanisms

6. The Commission commends the new direction set out in the Community Focused Police Services Model (PSM), which aims to enhance service delivery to the most vulnerable people in our community. We are strongly supportive of reforms that are aimed at ensuring that ACT Policing keeps pace with contemporary best practice policing and that are better aligned with community-focused service models.
7. Local mechanisms for oversight and accountability are ordinarily an essential part of any community-focused policing model that aims to enhance social cohesion. However, the unique policing arrangements in the ACT means that many of the standard complaints pathways that are available elsewhere in Australia with regard to police conduct are not present locally in the ACT.
8. For example, it has been a long-standing area of concern for the Commission that police services in the ACT are not subject to ACT discrimination laws. The Commission currently does not have the ability to handle discrimination complaints in relation to ACT Policing. The ACT *Discrimination Act 1991* does not automatically apply to members of ACT Policing because they are AFP officers and perform their ACT policing functions by arrangement.
9. In this regard, the ACT stands alone among Australian jurisdictions in failing to provide local pathways and remedies for dealing with discrimination issues concerning police. We believe that it is important to ensure that the ACT community has the same options and protections in relation to the local police service as is available in other Australian jurisdictions.
10. Access to local remedies is particularly important for vulnerable people in our community. There would be clear benefits for people in the ACT to have access to a local process for consideration and conciliation of complaints regarding discrimination by police officers in the exercise of their functions in the Territory. The current situation, in which a complainant must

apply to the Australian Human Rights Commission in Sydney to have a complaint considered, presents barriers to vulnerable people, particularly Aboriginal and Torres Strait Islander people, in our community. It is also a pathway that is rarely utilised, in our experience.

11. Access to local remedies would also, in our view, have a positive impact on Justice Reinvestment outcomes by assisting ACT Policing to demonstrate transparency and accountability with the community. Extending the Commission's conciliation and alternative dispute resolution processes to the police would enhance their ability to address any concerns about systemic discrimination in police interactions with the community, as well as concerns about the impact of unconscious bias potentially leading to discrimination (see also discussion below in part (iv)).
12. The Commission appreciates that any amendments of this nature will have to be tailored to ensure their conformity with the requirements of the ACT Self-Government Act. However, we consider that it is possible to amend the Discrimination Act, consistently with the ACT Self-Government Act, to extend its application to AFP officers when they are exercising a function under a Territory law. The achievability of this proposal is evidenced by other existing ACT laws that expressly impose duties on members of the AFP in particular circumstances, such as the HR Act.
13. We consider that there would also be benefit to providing an accessible complaints mechanism in the HR Act for the Commission to deal with human rights complaints, similar to that provided under the Queensland *Human Rights Act 2019*, and as recommended in the recently released report by the ACT Law Reform Advisory Council on 'Canberra -becoming a restorative city'.³
14. The Commission would welcome the Committee's consideration of these matters.

(ii) Reliance on Commonwealth laws for police criminal investigative powers

15. Since self-government, the ACT has relied in part on Commonwealth laws to regulate the use of police criminal investigative powers in the ACT. For example, the ACT relies on the procedures set out in Part 1C of the Commonwealth's *Crimes Act 1914* for the conduct of criminal investigations.
16. To reform and modernise the ACT's law in this field, the then ACT Attorney-General, Mr Simon Corbell MLA released a detailed discussion paper in 2010 to progress a review of police criminal investigative powers.⁴ The discussion paper noted that:

³ ACT Law Reform Advisory Council, 'Final Report: Canberra – becoming a restorative city', Recommendation 3, available at: http://cdn.justice.act.gov.au/resources/uploads/JACS/PDF/LRAC_final_report_-_Canberra_becoming_a_restorative_city_-_online.pdf.

⁴ ACT Department of Justice and Community Safety, 'Discussion Paper: Review of Police Criminal Investigative Powers', April 2010, available at: http://www.justice.act.gov.au/resources/attachments/paper_PolicePowers_LPB_20102.pdf.

It is unsatisfactory that the ACT should continue to rely on Commonwealth legislation for its investigative powers, in particular in relation to important protections for alleged offenders. The review has identified that the ACT needs to enact its own equivalent of Part 1C. In fact, it was always envisaged by the Commonwealth that this would occur. The primary question to be determined is what the ACT scheme will look like.⁵

17. While there are benefits for the AFP in being able to employ a single scheme for the investigation of both Commonwealth and ACT offences, there are also obvious disadvantages for the ACT, which cannot directly amend Commonwealth legislation and any request to do so must be made, and considered, by the Commonwealth in the context of its priorities and legislative reform agenda.⁶

18. The discussion paper identified various concerns about relying on Commonwealth legislation in this regard, including the following:

Many pieces of Commonwealth legislation relied on by the Territory have been amended and repealed. This has left the Territory in the awkward position of relying on legislation that remains on the statute books only for the Territory and on the understanding that the ACT moves towards introduction of its own legislation.⁷

19. The Commission is unaware of whether this review was ever finalised but would suggest that the concerns raised in the discussion paper remain valid. We consider that the ACT should develop its own comprehensive set of laws for police criminal investigation powers. To fail to do so would undermine the intention and effectiveness of the ACT having a HR Act.

(iii) The role of ACT Policing in relation to Family Violence Orders

20. Family violence is endemic in our society,⁸ and results in enormous individual, community and economic impacts. The Commission acknowledges ACT Policing's ongoing commitment to the prevention of family violence and the implementation of best practice policies and procedures when responding to incidents of family violence.

21. Family Violence Orders (FVOs) are one part of a range of interventions aimed at improving the safety of family violence victims. There are times, however, when an application for an FVO, or the service of an FVO, can increase the risk of harm,⁹ and in some matters an applicant will be safer if the application is made by police, rather than by the individual. This was noted by

⁵ Ibid, at p 31.

⁶ Ibid, at p 16.

⁷ Ibid.

⁸ For example, approximately one in four women having experienced violence by an intimate partner, see Australian Bureau of Statistics, Personal Safety Survey, 2016.

⁹ For example, in 2015 Tara Costigan was tragically murdered in the ACT by her ex-partner the day after she applied for an order against him.

stakeholders during the development of the *Family Violence Act 2016*, and the Act accordingly clarifies legislative provisions to enable police to be applicants and for police to have greater flexibility as applicants.¹⁰

22. However, the vast majority of FVOs continue to be applied for by family violence victims. This contrasts with most other Australian jurisdictions where police prosecutors make the majority of applications.
23. Data collected by members of the FVIP in the months of July and August 2019 indicates that the majority of individuals making interim FVO applications do so without any assistance from key support agencies, ACT Policing, Legal Aid ACT, and the Domestic Violence Crisis Service on the day their application is made. This appears to be due to a large increase in the number of interim orders applied for compared to the previous year in which data was also collected, but no corresponding increase in resources or capacity for the support agencies. While this was a relatively rudimentary data collection exercise it does indicate a clear need for increased assistance to FVO applicants.
24. The Commission considers one of the key challenges for ACT Policing continues to be a limited capacity to employ legal counsel in FVO applications. Legal expertise is required not only where an application proceeds to a final hearing, but also in the initial stages of an application, including determination of merit and preparing and presenting evidence for interim applications.
25. In particular, legal expertise is required to address complexities that arise in FVO applications regarding:
 - ensuring the conditions of the FVO relate to the specific need for protection, for example, potentially excluding the respondent from the home or workplace or safely providing for the return of property; and/or
 - the inclusion of all appropriate persons to be protected by the FVO, for example, the inclusion of children; and/or
 - where matters are contested.
26. Applications made without the benefit of legal expertise expose family violence victims to safety risks arising from either the FVO not being made at all or the FVO being made but without the appropriate terms and/or inclusion of appropriate protected persons.

¹⁰ Sections 16, 71 *Family Violence Act 2016*. See also Explanatory Statement "This clause [clause 71] allows greater flexibility for police officers who act as applicants under the FV Bill. It allows clarity for police officers that if they apply for a protection order, or if they are appointed as the applicant for court-initiated protection orders, they are taken to be the applicant for the proceedings. It is the intention of the legislation that whoever is an applicant, including ACT Policing officers, they will be the applicant for the entire proceedings unless the applicant applies for and is granted the right to substitute the applicant for another named applicant." p22-23.

27. The Commission thus recommends that ACT Policing are adequately resourced, as a priority, to obtain appropriately skilled legal counsel to assess and apply for interim FVOs where appropriate, and to proceed to final hearings where required, as provided for in the *Family Violence Act 2016*.
28. The Commission also notes the need for people considering applying for a FVO to fully understand the potential impact and implications of the order. The Commission has observed a number of matters where a parent, acting on the recommendation of police, has applied for an order with their child as respondent but has not fully understood what the order means. For example, the parent has not understood or thought through the implications in respect of their child no longer being able to live at home with them given the nature of the order they are pursuing.

(iv) ACT Policing response to people with diverse needs

29. The Commission recognises the efforts and progress made by ACT Policing in responding to the complex needs of diverse communities within the ACT. We note the effects of crime and resulting trauma can be vastly different for people from different communities, including people from Aboriginal and Torres Strait Islander communities, people from culturally and linguistically diverse (CALD) backgrounds, people identifying as lesbian, gay, bisexual, transgender, intersex and/or queer (LGBTIQ+), people with disability and younger and older persons. We further note the compounded challenges raised by intersectionality, for example, where a person is from an Aboriginal and Torres Strait Islander community and also lives with a disability.
30. We further note that people with diverse needs are disproportionately affected by crime yet often face additional barriers in accessing the criminal justice system. For example, people with disability, people from Aboriginal and Torres Strait Islander communities or CALD communities and LGBTIQ+ people are more vulnerable to family and sexual violence.¹¹ However, specific barriers to accessing the justice system arise for people with diverse needs, including:
- challenges obtaining interpreters and translators;
 - lack of culturally appropriate support services;
 - mistrust in or fear of authorities;
 - lack of supports and adjustments for people with disability;
 - specific challenges in providing evidence and participating in the criminal justice system for children and young people;
 - negative attitudes and stereotypes towards people with diverse needs; and

¹¹ ANROWS Fast Facts, 'Impacts of family, domestic and sexual violence', referencing Australian Institute of Health and Welfare, 'Family, domestic and sexual violence in Australia: continuing the national story 2019' accessed at <https://d2rn9gno7zhxqg.cloudfront.net/wp-content/uploads/2019/09/05032315/Impacts-of-FDSV-2019-AIHW-update.pdf>.

- lack of awareness of the justice system, including laws and legal processes.
31. As noted above, the Commission welcomes the new PSM. We further note the ACT Disability Justice Strategy, which aims to ensure people with disability in the ACT have equal access to justice and to support their right to equality before the law.
 32. There remains however a need for tailored, trauma-informed and culturally competent responses to victims of crime where trauma from the effects of crime is compounded by other challenges, including language and cultural differences, disability and discrimination.
 33. Without a proper appreciation of the challenges that people with diverse needs face there is a risk that trauma symptoms and/or behaviours that arise from different cultural backgrounds or disability or age (for example, a young child) can be misinterpreted and result in erroneous assessments about the credibility or competence of victims. Matters may not proceed due to a perception that a witness is unable to provide evidence, whereas with assistance the witness may well be able to do so. The Commission therefore recommends:
 - ACT Policing continue to work with representatives and advocates from diverse communities in the ACT to identify and develop ways to improve police response to people with diverse and complex needs;
 - ACT Policing is adequately resourced to provide interpreters and translators where required;
 - ACT Policing access intermediaries who are communication specialists, to help police and courts to communicate with people with communications difficulties; and
 - ACT Policing is adequately resourced to provide comprehensive, ongoing and specialised training for all police officers on trauma and diversity. Such training should address:
 - trauma informed practices and the effects of trauma on victims of crime;
 - identifying disability and provision of appropriate supports and adjustments;
 - cultural competency; and
 - challenging and eliminating negative attitudes and stereotypes towards people with diverse needs.¹²

(v) ACT Policing response to sexual assault matters

34. The Commission notes the steady increase in sexual assault matters reported or made known to ACT Policing in recent years, with matters increasing from 380 in 2014 to 560 in 2019.¹³ We are keen to ensure the corresponding expansion in workload for ACT Policing is adequately

¹² We note the Domestic Prevention Council Report from the Extraordinary Meeting held on 4 April 2018 identifies the need for consultation with children and young people as well as the need for training to ensure appropriate and culturally competent responses for children and young people experiencing family and sexual violence.

¹³ ACT Policing Crime Statistics, accessed at <https://police.news.act.gov.au/crime-statistics-and-data/crime-statistics>.

resourced in order to allow police to appropriately respond to the complexity of issues and challenges presented by sexual assault matters, both in relation to adults and children.

35. The Sexual Assault and Child Abuse Team (SACAT) in particular can be critical in providing victims of sexual assault with specialist expertise and support. However, the Commission's experience is that current limited resourcing means that many sexual assault victims are not referred to SACAT and instead must report to General Duties Police. The Commission considers the specialist support and expertise provided by SACAT to be essential in providing an appropriate response to sexual assault victims. The Commission therefore recommends additional funding for SACAT to ensure that all sexual assault victims can access the criminal justice system with the aid of specialist support from SACAT.
36. The Commission further notes with concern the recent ABC report 'Rough justice: How police are failing survivors of sexual assault'.¹⁴ This Report indicates that in the ACT there has been:
- an overall decrease in the number of sexual assault reports where 'legal action' is taken from 50% in 1998 to 17% in 2017;¹⁵
 - a recent increase in the number of sexual assault reports that are 'unfounded' from 3% in 2010 to 21% in 2017;¹⁶ and
 - a significant proportion, ie 17% in 2017, of sexual assault matters that were 'withdrawn' by victims.¹⁷
37. The Commission considers there is a need to better understand the data presented in this Report and why it appears that proportionately fewer sexual assault matters are being progressed through the criminal justice system. In particular, there is a need to understand the reasons why decisions are made not to proceed with sexual assault matters and for specific information regarding people with diverse needs in order to understand how resources can best be used to meet the needs of people more vulnerable to sexual violence.
38. We welcome any further information from ACT Policing in regard to this Report and we recommend continued and expanded collection of data and information to further monitor and understand these trends.

¹⁴ ABC News, 'Rough justice: How police are failing survivors of sexual assault', accessed at <https://www.abc.net.au/news/2020-01-28/how-police-are-failing-survivors-of-sexual-assault/11871364>.

¹⁵ The Report states 'legal action taken' means police have taken legal action against the perpetrator/s and closed the case. Includes arrest, warrant, summons, summons applied for/brief submitted, court proceedings/appearance notice, formal caution, community or diversionary conference, etc.

¹⁶ The Report states 'unfounded' means police do not believe that a sexual assault occurred. Some states require police to have found evidence to support this view; in others, lack of evidence to show the crime occurred is sufficient. The exact definition in the ACT is not provided.

¹⁷ The Report states 'withdrawn' means police believe a crime has occurred, but the victim has instructed police not to take further action. Some jurisdictions require formal affirmation, others do not.

(vi) Adequacy of data collection and reporting

39. The lack of effective data collection on the use of police powers has been an ongoing issue of concern for the Commission. Practices that disproportionately or unfairly target particular groups, or a community perception of actions as disproportionate or unfair, are likely to undermine the efforts to build positive relationships with the community.
40. We have previously recommended that consideration should be given to trialling a receipting scheme in the ACT to address such concerns. In our view, the implementation of such a scheme has the potential to increase police accountability. It is also beneficial that the receipts will provide individuals with the reason why they were stopped by police and may assure community members that they were not stopped arbitrarily.
41. Annual reports are also an important accountability mechanism and provide transparency about implementation of public authority obligations. The Commission considers that there is scope for the ACT Policing's Annual Reports, which are provided to the Minister for tabling in the Legislative Assembly, to report against the human rights matters identified in the Chief Minister's Annual Report Directions.
42. The 2019 Directions, for example, requires reporting entities to report on implementation strategies and progress in incorporating human rights standards into their operations, including information about education and training of staff on human rights principles, and reviews undertaken of internal policies and procedures for compatibility with human rights.
43. ACT Policing's Annual Reports used to contain information about these matters.¹⁸ The inclusion of such information, however, ceased from Annual Report 2014-15 onwards.¹⁹ It is not clear why this practice was stopped, but we consider that it would be desirable for it to be reinstated. Reporting against human rights indicators provides an important measurement of police legitimacy and serves to enhance public trust and confidence in the community policy framework.

¹⁸ See, for example, ACT Policing Annual Report 2011–12, p 148, available at: <https://police.act.gov.au/sites/default/files/PDF/act-policing-annual-report-2011-12.pdf>.

¹⁹ See, ACT Policing Annual Report 2014–15, available at: <https://police.act.gov.au/sites/default/files/PDF/ACT%20Policing%20Annual%20Report%202014-2015.pdf>.