Australian Federal Police Association

Submission to the ACT Department of Justice and Community Safety

Response to the Review of Criminal Investigative Powers Discussion Paper

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Dear Attorney-General,

RE: Response to the Review of Police Criminal Investigative Powers Discussion Paper

We are pleased to present this submission to the ACT Department of Justice and Community Safety Review of Police Criminal Investigative Powers on behalf of the members of the Australian Federal Police Association (AFPA.)

The AFPA represents the industrial, social and professional interests of Australian Federal Police (AFP) employees. As a long running representative of AFP sworn officers in the ACT we are well situated to advance an informative view on the potential areas of reform addressed in the Review Discussion Paper.

A range of legislation has been introduced to the ACT over recent months that will significantly assist our members in carrying out their duties. The AFPA has been highly supportive of measures such as the *Crimes (Assumed Identities) Bill 2009, the Crimes (Surveillance Devices) Bill 2009* and the *Crimes (Controlled Operations) Act 2008* as well as a host of additional law enforcement legislation. These reforms have ensured that the ACT is a pro-active jurisdiction when it comes to fighting crime. However, as the Discussion Paper acknowledges, the job is never done, and there are significant improvements that are still to be made.

The AFPA welcomes the central premise of the Discussion Paper, which is to streamline police criminal investigative powers into one Act. We have been advocating for such measures for many years and indeed, would like to see this as a first step toward wholesale harmonisation of all criminal offences in the ACT. Where the AFPA differs from the Department of Justice and Community Safety, is in the proposed separation from Commonwealth criminal legislation such as the *Crimes Act 1914.* This move would be antithetical to the AFPA's long term stance in favour of aligning crime-related legislation across all Australian jurisdictions.

Additional concern has been reflected in consultation with our members with regards to a number of the measures under consideration in the Review. In particular, strong objections have been raised against the potential move to 'reasonable belief' as the appropriate threshold for police powers such as arrest, stop and search and the issue of search warrants. It should be said that there are many important, positive proposals within the Discussion Paper and it is good to see these being addressed in such a comprehensive and forthright manner by the ACT Government. However, there appears to be an underlying trend away from effective and appropriate police powers, already enacted by the ACT Assembly and supported by the ACT Community, towards a potential dilution of the criminal legislation in favour of providing extensive rights to offenders beyond the norm applied within other States and Territories and in various international jurisdictions.

The following submission reflects the AFPA's conviction that greater powers, not less, are necessary in order to adequately protect the ACT community. We acknowledge that the ACT is a human rights jurisdiction and that this status brings with it certain additional considerations in the formulation of criminal law. Nevertheless, we are concerned that some of the proposals that have been put forward would rob police of the confidence and initiative that is crucial to the safe conduct of their duties. It is an unfortunate reality that the ACT is over-represented in comparison to other Australian jurisdictions when it comes to the incidence of car theft, burglary, affray and other associated petty crimes. A balance needs to be struck between defending the rights of the offender and the rights of the victim and/or police. The Review of Police Criminal Investigative Powers offers a rare opportunity to get this balance right and with that in mind I put forward the AFPA's submission for your consideration.

Yours faithfully,

Jon Hunt-Sharman
National President
Australian Federal Police Association

Review of Police Criminal Investigative Powers

Question relating to the adoption of police powers and responsibilities legislation

1. Should all of the relevant provisions relating to police criminal investigation powers be situated in a single piece of legislation?

The AFPA supports the notion of streamlining relevant provisions relating to police criminal investigation powers into a single piece of legislation. We have been arguing in favour of such a move in the ACT for a number of years and are confident that it is in the interests of our members as well as the wider community. By collating these powers, the ACT Government will be taking steps to simplify the criminal justice system thus empowering police to more effectively carry out their duties and engendering greater public confidence. Indeed, the AFPA has in the past advocated in favour of bringing the majority of criminal offences under the coverage of a single Act as is already the case in a number of Australian jurisdictions.

However, we limit our support to such instances where the unification of police powers is implemented in such a way as to preserve the operational and investigative framework that exists. The AFPA is concerned that such legislative upheaval could be taken as an opportunity to degrade appropriate police powers that are vital to maintaining law and order in the Territory. Bringing the relevant provisions relating to police criminal investigation powers into a single piece of legislation is a significant change in and of itself and should not be complicated by unnecessary reform.

The AFPA believes that where harmonisation with federal legislation exists, it should be maintained to ensure a seamless and appropriate balance between the federal and ACT legislative frameworks.

The AFPA strongly recommends the establishment of a joint Commonwealth/ACT drafting committee so that amendments are mirrored in Commonwealth and ACT legislation. This would also help ensure that agreement is reached between the ACT Attorney General and the Federal Attorney General for a fast-tracking process to exist to ensure that such amendments are enacted in a timely manner and with consistency to ensure harmonisation of legislation.

Questions relating to the application and safeguards in the Crime Act 1914, Part 1C

2. Are the safeguards, protections and police powers relating to suspects in police custody in the Commonwealth *Crimes Act 1914* (Cwlth) Part 1C, as currently expressed, consistent with the Territory's obligations under the *Human Rights Act 2004*?

The AFPA is satisfied that sufficient protections exist for suspects in police custody. There has been much attention given to the impact of recent counter-terrorism and national security-related amendments to the *Crimes Act 1914 (Cwlth),* particularly as it relates to the detention of suspects. Some have questioned the degree to which such measures are compliant with the ACT's *Human Rights Act 2004.* We are confident that there are no substantive or theoretical issues with the safeguards that are in place and this has been vindicated through the smooth operation of these laws since they were passed in 2005? The AFP officers that operate within these laws are amongst the best-trained law enforcement professionals in the world and this has been reflected in the fair treatment that suspects have received while in police custody since the powers came into being.

3. Should the ACT enact identical provisions to those in Part 1C or should the ACT develop its own laws for criminal investigation powers?

The AFPA has been a long-time advocate in favour of harmonisation of police powers across all Australian jurisdictions. This has been particularly necessary in the ACT where AFP personnel are regularly required to move between ACT and Federal Operations. If the ACT were to develop its own laws for criminal investigation this would risk confusing those who work within the criminal justice system and undermining confidence in both police and the courts. It is possible that prosecution cases would be weakened due to confusion surrounding the operation of competing provisions as has occurred when state police officers have attempted to charge individuals under federal offences.

The successful harmonisation of criminal investigative powers between the ACT and Commonwealth has been used by the AFPA as an argument for other jurisdictions to adopt similar measures. For the ACT to move away from such a model would be a step backwards in the national fight against criminal activity and organised crime.

4. Do the <u>protections</u> contained in Part 1C as currently drafted require updating?

There is no doubt that Part 1C requires modification and updating. As with most legislation, it is not perfect and will continue to be a source of debate and reform. The AFPA reiterates that this is already happening through proposed legislation such as the National Security Legislation Amendment Bill 2010 that has recently been looked at by the Commonwealth Senate Legal and Constitutional Affairs Legislation Committee. A comprehensive and vigorous review process is taking place in which important reforms, such as changes to the protections located in Part 1C, are already being discussed.

In addition, feedback from ACT Policing indicates that further clarification is required over the definition of a person in custody. There is currently a high degree of confusion surrounding the distinction between persons under arrest and protected suspects.

The AFPA recommends that the ACT Government participate in the inquiry that is taking place in response to the aforementioned legislation and not enact separate amendments until the inquiry has made its recommendations. Ideally, the AFPA would like to see this as the model by which the ACT develops its criminal law. We believe that participating in the development of Commonwealth public policy will give the ACT a voice without compromising the benefits of harmonised legislation.

5. Should the safeguards and protection provisions apply to summary offences in the same way as they apply to indictable offences?

The AFPA is satisfied that the safeguard and protection provisions should apply to summary offences in the same way they apply to indictable offences. Part 1C is familiar to ACT Police, they operate effectively under the current regime and it, along with other legislated provisions and powers, has provided long-standing and sufficient protections.

6. Should the *Crimes Act 1900* (ACT), section 187 (2) which exempts road transport offences from Part 1C protections continue as is, be extended or be removed?

A strict liability approach is adequate for basic offences such as road transport offences. Offenders have the right to challenge the infringement notice and when offenders are taken into custody for PCA matters they are treated fairly and are either released to be summonsed at a later date, into the custody of friends/family or into the custody of the watch house (they therefore come under the legislative safeguards in that instance) until sober enough to be released and without further harm to other road users. Road transport offences should remain exempt from Part 1C and be extended to cover road side drug testing.

Questions relating to the treatment of detainees under Part 1C

7. Does the *Crimes Act 1914* (Cwlth), section 23Q statement requiring that a person under arrest be treated with humanity and respect for human dignity adequately reflect the Territory's human rights context?

Yes, we believe so.

8. Should an ACT equivalent to section 23Q refer specifically to the *Human Rights Act 2004*?

No. The Act applies to all relevant legislation in the ACT so it is not necessary to specifically articulate it in this case.

9. If the ACT were to adopt legislative safeguards and protections equivalent to those in Part 1C, should they apply to protected suspects in the same way that they apply to 'arrested persons'?

The AFPA believes that the ACT should maintain the police powers articulated in Part 1C and that these provisions are adequate in their present format.

10. How should protected suspect be defined in the ACT?

The AFPA believes that the definition of protected suspect provided at section 23B (2) of the *Crimes Act 1914 (Cwlth)* appears sufficient but would require clarification for the purpose of harmonisation with ACT criminal and other legislation.

11. Are the rights and interests of Aboriginal and Torres Strait Islander people or people with a disability adequately protected in current Part 1C protections?

Yes. Allowances have already been made for Aboriginal and Torres Strait Islander people in Part 1C such as a decreased period of arrest and enhanced provisions throughout the investigation period. People with a disability are not treated differently according to the Part 1C provisions and the AFPA is not aware of any evidence that suggests that this should be amended. As a guiding principle, we wish to see individuals treated equally by the criminal justice system except in circumstances where clear necessity, supported by experience, exists as is the case with regards to Aboriginal and Torres Strait Islanders.

12. Is there a category of people who are particularly vulnerable, for whom enhanced protections should apply?

There is little doubt that there are certain categories of people who, for various reasons, can be classified as vulnerable during the criminal investigation process. Some of these, such as minors and Aboriginal and Torres Strait Islanders, already receive enhanced protections in order to protect their interests. The AFPA supports these measures and wishes to see them maintained. Nevertheless, such vulnerabilities need to be balanced with the equally valid principle of equality before the law. This principle demands that people be treated equally to the greatest extent possible in order to maintain the integrity of the justice system. With this in mind, the AFPA posits that the existing protections are sufficient and additional classes of vulnerable people should not be included unless clearly justifiable.

Questions relating to investigation periods

13. What is the maximum period of time that should be allowed to elapse during which police officers conduct investigations (the investigation period) before the detainee must be released from custody, released on police bail or brought before a magistrate?

The AFP is one of the only law enforcement agencies in Australia where a four hour rule is imposed to limit the time that an arrested person can be detained for the purpose of interview in relation to an investigation. Section 23C of the *Crimes Act 1914 (Cwlth)* places this restriction on investigating officials investigating Commonwealth offences. Under section 23D the investigation period may be

extended for a period not exceeding eight hours and must not be extended more than once. Legislation in most other jurisdictions does not place this limitation on police services and law enforcement agencies. For example the Victorian Police have a 'reasonable time' rule with no specific time limits applying.

The AFP operates within a dynamic and complex law enforcement environment involving transnational organised crime and other serious crime impacting on the Commonwealth. Operationally, the four hour rule has now become impractical when interviewing persons in relation to complex criminal activity, particularly in the areas of complex frauds, high tech crime and international drug importations. In the current AFP environment such interviews are routinely extended by the investigating officer through application for an 'extension of the investigation period'.

The AFPA asserts that the current restrictions under section 23C are obsolete and unnecessary. The AFPA makes this assertion based on the fact that under section 23F the investigating official must, before starting to question the person, caution the person that he or she does not have to say or do anything, but that anything the person does say or do may be used in evidence.

Under section 23G the investigating official must also inform the person that he or she may communicate, or attempt to communicate, with a friend or relative to inform that person of his or her whereabouts; and communicate, or attempt to communicate, with a legal practitioner of the person's choice and arrange, or attempt to arrange, for a legal practitioner of the person's choice to be present during the questioning. The investigating official must defer the questioning for a reasonable time to allow the person to make, or attempt to make, the communication and, if the person has arranged for a legal practitioner to be present, to allow the legal practitioner to attend the questioning.

Any person participating in an interview is clearly doing so voluntarily and often with legal counsel present. They can cease participation in the interview process at any time.

It can be argued that the limitation of a four hour investigation period can directly conflict with the desires of the arrested person who may wish to continue to speaking voluntarily under criminal caution. It also creates unnecessary administrative processes, time delays and additional court and police costs, without providing any substantial benefit to the person being interviewed.

ACT Policing has implicitly supported the AFPA's stance on this issue by publicly stating that four hours is often not long enough to accomplish the initial investigative process.

For the reasons listed above, the AFPA believes that the legislation should be reversed so that the initial investigation period is up to eight hours with the investigating official having the option to submit an application for an extension of the investigation period for a maximum of a further four hours. The net result is the same in that the maximum period that a person can be interviewed is still

twelve hours which is the current case under legislation. If the courts and society accept that a voluntary interview of twelve hours does not place undue stress or duress or fatigue on an individual, then surely an initial eight hour period is not overburdening for a person, particularly when they can in fact cease their participation at any time within that eight hours.

That being said, the AFPA recommends that the ACT Government monitor the recommendations handed down by the Commonwealth Senate Committee in relation to this area of the law instead of enacting changes that are inconsistent with federal legislation.

14. What should be the limit on the investigation period for any detained Aboriginal or Torres Strait Island person?

The AFPA is satisfied with the provisions currently contained in section 23C (4) of Part 1C of the Crimes Act (Cwlth) 1914 in relation to the investigation period being half the normal investigation period of non-indigenous persons. However, as per the above response, the AFPA recommends a reversal of the extension arrangements allowing a maximum four hours at the initial period without extension.

15. What should be the limit on the investigation period for any detained child or young person?

The AFPA is satisfied with the provisions currently contained in section 23C (4) of Part 1C of the Crimes Act (Cwlth) 1914 in relation to the investigation period being half the normal investigation period for children and/or young people. Again, the AFPA recommends a reversal of the extension arrangements allowing a maximum four hours at the initial period without extension.

16. What periods of time should be excluded from the calculation of the investigation period?

The circumstances outlined in section 23C (7) of Part 1C of the *Crimes Act 1914 (Cwlth),* including travel, intoxication, injury and sleep, have proved to be reasonable and adequate exclusions in calculating the investigation period. Forensic analysis time/delay should also be excluded from the calculation of the investigation period where it directly applies to evidence that may be obtained relating to a person in custody.

17. How should extensions to the investigation period be granted?

The AFPA is satisfied with the current provisions located at Section 23D of the *Crimes Act 1914 (Cwlth)* that outline how an extension of the investigation period may be granted.

18. Who should be empowered to extend the investigation period?

The AFPA is satisfied with the current provisions located at Section 23D of the *Crimes Act 1914 (Cwlth)* that outline who is empowered to extend the investigation period.

19. What should be the maximum period of extended time for an investigation period?

As discussed above, the AFPA is in favour of a reverse whereby the initial investigation period is up to eight hours with the investigating official having the option to submit an application for an extension of the investigation period for a maximum of a further four hours.

20. What mandatory criteria should be used in the assessment of applications for an extension of the investigation period?

The AFPA is satisfied with the current provisions located at Section 23D of the *Crimes Act 1914 (Cwlth)* that dictate the mandatory criteria that should be used in assessing an application for an extension of the investigation period.

Questions relating to police cautions

21. Is the wording of the current caution provision in the *Crimes Act 1914* (Cwlth), section 23F adequate?

The phraseology of the current criminal caution creates an impression that it is best not to speak to police rather than cooperate with police investigations.

The current criminal caution has the two fold negative effect of:
1. 'Stopping' innocent people providing a legitimate explanation at the time and therefore 'wasting' police, DPP and court resources as the legitimate explanation has not been provided until the Court case; and
2. Allowing a guilty person to fabricate an explanation at Court based on any perceived gaps in the evidence presented by the Prosecution.

This issue has been identified in the United Kingdom leading to the development of a criminal caution that encourages innocent people to cooperate with investigators and that potentially negate false defences at court.

The adoption of the UK criminal caution, with slight variation for the Australian context, would benefit police, DPP, courts, victims of crime and the community at large both in relation to reducing public expenditure and in establishing the truth in relation to criminal investigations.

The UK criminal caution is as follows:

'You do not have to say or do anything, but it may harm your defence if you do not mention, when questioned, something which you later rely on in court. Anything you do say or do may later be given in evidence'.

22. Should the audio recording provisions apply to less serious offences?

Ideally, audio recording provisions should apply to all types of offences as a means of protection and clarification for both the person under arrest and the investigating officer/s. However, the reality is that it is not always practical or possible to conduct an audio recording due to a variety of factors such as background noise and faulty equipment.

Moreover, an additional consideration is that when police start recording, and inform the person that they are doing so (as required) the suspect will not always speak on tape. In light of this, it should be legislated as adequate for police to make contemporaneous notes on cautions and other police powers with the caveat that the notes are countersigned by a team leader or equivalent.

23. Should the audio recording provisions apply to all offences, including traffic offences?

For the reasons provided directly above, the AFPA believes that it is not practical or realistic to apply the audio recording provisions to all offences.

While officers working in Traffic routinely record their conversations, generally because of the number of traffic stops they do, it is not easy for general duties officers to make audio recordings at all times on account of the often challenging environment that they are required to operate in.

24. Does the legislation adequately take into account the advances in technology?

Obviously legislation has failed to keep pace with advances in technology and there is a need to update the relevant provisions to ensure that anomalies such as the current references to 'tape recording' are rectified in this age of digital recording devices. Moreover, there are very real issues relating to the location of any recording due to the advent of mobile technology. This is also neglected in current legislation. ACT Police are uniformly issued with digital hand-held recording devices and this needs to be reflected in our laws through urgent attention.

25. How should the legislation be drafted such that it captures future technology?

It remains a vexed issue as to how to best incorporate technological advances into the criminal investigative framework. There is no easy answer and a balance will need to be achieved that manages the use of digital and/or mobile recording devices while acknowledging the uncertainty and difficulties that face police as they conduct investigations away from the station. Regardless of what legislation is put in place, police will always be forced to rely on their judgement in the subjective environment of a call-out and/or 'general duties.' The AFPA believes that this is best dealt with through drafting measures that make reference to 'reasonableness' rather than firm principles that could leave doubt in the mind of an officer at a time when they need to be decisive in order to deal with potentially evolving and unpredictable events.

26. Should provisions relating to requirements to record cautions, admissions and other processes apply equally regardless of location?

We believe that the current provisions are clear and effective with regard to the recording of cautions and admissions in the station environment. However, a distinction needs to be made between physical locations where the police can expect to carry out their duties without events intervening and those that are subject to a range of external stimuli. In such instances, the new provisions should refer to the judgement of the 'reasonable law enforcement professional' to determine the appropriateness of recording a caution and/or admission.

27. When should it be mandatory for police officers to audio record a caution to a person and to audio record the person's response to the caution?

With the advent of mobile recording devices that can be attached to a police officer's equipment this possibility is becoming ever more viable. Certainly the AFPA recognises the benefits for transparency and public confidence that would accompany mandatory recording of the caution. Nevertheless, unless all police are to be equipped with mounted recording devices that are constantly activated it will be onerous and impractical to dictate the recording of the caution in all situations. There will always be instances where, for a range of reasons such as an uncompliant or intoxicated individual, it is unfeasible for police to record the caution even if the means are available. The AFPA is satisfied that the current requirement of recording the caution 'where applicable' is the most viable option and strikes a balance between accountability and flexibility.

28. Should provisions be modified to provide for more onerous requirements if the conversation takes place in a police station?

No, the current requirements are appropriate and do not need to be more onerous.

29. What role do work safety issues play in the requirement to record cautions, admissions and other processes?

We estimate that significant occupational health and safety issues would arise in the event that mandatory recording of cautions was included in the ACT's criminal investigative provisions. Moreover, overly detailed principles governing the 'practicability' of recording cautions and admissions for general duty police officers will further undermine workplace safety by creating an unnecessary element of doubt in the minds of officers as they seek to carry out their duties in the highly complex and fluid environment that they are required to work. It may be that certain guidelines are necessary in order to assist the police in making the decision of whether or not to record their investigation although these should be suitably accommodating in giving ACT police the initiative to deal with an incident according to their own judgement of the situation 'on the ground.'

30. Should "not practicable" be clarified by setting out in the legislation some of the factors that a Court should take into account in instances where recording requirements have not been satisfied?

This would be a highly beneficial reform. Such measures would give police confidence and clarity when investigating a potential offence that the Court will take into account the subjectivity that they face when making key decisions such as whether or not to record an admission. The factors that are outlined in such legislation should be broad, non-exhaustive and non-prescriptive in order to account for the range of circumstances and environments in which police are required to conduct investigations.

31. Should legislation or Ministerial guidelines set out the circumstances in which it is not practicable to record a caution?

Legislation would offer the most certainty to police in guiding the conduct of their duties.

Questions relating to legal practitioners

32. Should ACT legislation refer specifically to an ACT based Aboriginal legal services to ensure legal practitioners are familiar with ACT law?

No, the current provisions are adequate and provide more flexibility with regard to contacting an Aboriginal legal aid organisation considering the Territory's proximity to New South Wales.

33. At what rank should a police officer be able to refuse access to a legal practitioner?

Superintendent. The current laws have proved effective while maintaining appropriate safeguards. In addition, the size of the ACT would make it onerous to require a rank higher than Superintendent to refuse access to a legal practitioner as this is limited to the Chief Police Officer and his two deputies.

34. Are the criteria that allow for a police superintendent to refuse access to a legal practitioner for a person in police custody appropriate?

Yes.

35. Where a decision-maker decides to refuse access to a legal practitioner, should legislation include a requirement for the reporting of the decision?

The process is currently recorded and is accessible by the Courts. Additional legislation would be unnecessary.

36. Should the period of time allowed for a telephone response by a specific legal practitioner be limited in the legislation?

Yes, feedback from ACT police indicates that 30 minutes is sufficient.

37. How should the period of time allowed for a telephone response be treated by 'down-time' provisions?

It should be included in the 'down-time' provisions

Questions relating to interview friends

38. Should there be provisions that are specific to Aboriginal and Torres Strait Islander people in terms of the 'investigation period'?

The AFPA would prefer, where possible, that everyone is treated equally before the law. That being said, this is a policy decision for government.

39. Are there other measures that should be included in legislation in order to safeguard the rights and interests of vulnerable groups of people?

AFP Police officers are highly professional and will, at their discretion and holding the independent office of constable , take into account the rights and interests of vulnerable people. Legislation seems unnecessary as we are not aware of any complaints against AFP members in relation to the treatment of vulnerable groups or individuals.

40. Are there groups of people whose rights to a lawyer or to other support during police questioning are not adequately protected?

No. The legislation provides sufficient safeguards under Part 1C.

Questions relating to the provision of information

41. Should police be obligated to notify a person such as a next-of-kin when a person is arrested?

No. Obliging police to notify the next-of-kin of an arrested person is an onerous requirement that may not even be desired to the detainee. Furthermore, it may prove difficult to contact an appropriate individual and the time required to do so could detract from the investigating officer's core business of questioning the arrested person. The AFPA believes that current provisions governing the rights of a detained person are adequate and should not be interfered with.

42. Should police be required to take proactive steps to seek consent from the arrested person to make contact with an appropriate person to tell them of the current whereabouts of the detained person?

No. Except in the cases outlined above, such as minors and people of Aboriginal or Torres Strait Islander descent, the onus should be on the arrested person to make contact, or seek to make contact, with an appropriate person to inform them of their whereabouts.

43. When should attempts to contact an appropriate person occur during the period of arrest?

As an independent officer of the Crown, this should be left to the investigating officer's discretion and not prescribed by law.

Question referring to interpreters and consular officials

44. Are provisions relating to interpreters and consular officials adequate?

The AFPA believes that provisions relating to interpreters and consular officials are adequate. Where issues arise, such as the lack of qualified and available interpreters, these issues should be addressed through funding and alternative policy initiatives as opposed to legislation.

Questions relating to children and young people

45. Should the application of provisions relating to children and young people in the Territory be simplified?

Yes.

46. How should provisions relating to children and young people in the Territory be simplified?

The ability to form criminal intent is the key factor in determining how children and young people should be treated by the courts. Ideally, the AFPA would like to see less emphasis placed upon arbitrary age categories and more on the level of criminal intent able to be formed by a child or young person. This can be determined by a judge or magistrate through questioning and would substantially simplify the process.

47. Should the relevant laws, as they apply to young people, reflect the principle that the more serious the offence the more comprehensive the protections for suspects?

No. For the sake of simplicity, consistency and clarity, children or young people who are within the age categories dictated by legislation should be treated the same regardless of the offence they are suspected to have been involved in. Such an approach would create operational difficulties such as when the age or identity of a person cannot be substantiated or forged identification documents are produced.

Question relating to forensic procedures and Part 1C

48. Should Part 1C apply to forensic procedures in the Territory?

If the ACT is to draft legislation to replace Part 1C then the new Act should make reference to forensic procedures carried out according to the *Crimes Act (Forensic Procedures) Act 2000.* In the meantime, the AFPA is satisfied that the current provisions are working adequately despite the lack of a specific exclusion for forensic procedures conducted under the FP Act.

49. Is there any reason why 'down-time' should not include the period during which a forensic procedure is being conducted under the Territory forensic procedures regime?

No. We believe it should be included in 'down-time.' Again, any such amendment should be mirrored in Commonwealth legislation to ensure harmonisation and a seamless approach between the Commonwealth and the ACT.

Questions relating to Preventative Action

50. Do powers in the *Crime Prevention Powers Act 1998* give police appropriate powers to prevent a breach of the peace?

Yes. Move on powers and the *Intoxicated Person (Care and Protection) Act* as well as common law breach of peace principles provide a sufficient suite of tools to enable police to act to prevent a breach of the peace.

51. Do the limits in the *Crime Prevention Powers Act 1998*, section 4(5), adequately protect a person's right to freedom of peaceful assembly and association?

Yes.

52. Should police powers to prevent a breach of the peace be included in ACT legislation?

No. As mentioned above, there are sufficient powers across common law breach of the peace, the Intoxicated Person Act, Move On Powers and the *Public Order (Protection of Persons and Property) Act 1971 (Cth)* to enable police to prevent a breach of the peace.

Questions relating to the power of search and stop without warrant

53. Is 'reasonable suspicion' or 'reasonable belief' the appropriate threshold for the police power of stop and search without warrant?

The AFPA believes strongly that the interests of ACT police and the broader community are served by maintaining 'reasonable suspicion' as the threshold for stop and search powers without a warrant. Legislating 'reasonable belief' would inevitably take the initiative from police officers and would be out of sync with the standards set in other jurisdictions. Stop and search powers are an important tool for police in taking pro-active steps to prevent crime and reasonable suspicion has operated as an effective test since the ACT achieved self-government in 1988. To change the threshold could potentially undermine the balance between the public interest and personal liberties that we believe has evolved in the ACT.

Questions relating to use of animals by police

54. Should the ACT legislate for the use of animals by police?

Yes. While the ACT already contains provisions governing cruelty to animals, it is important that the unique contributions that animals make to policing in the ACT are reflected through specific provisions and enhanced penalties for actions taken against the well-being of these animals.

55. Should the legislation be crafted in general terms (i.e. assistance in lawful execution of duties) or should it apply only in specific circumstances?

The AFPA is in favour of general legislation for the use of police dogs and horses with specific provisions such as those which exist in the Northern Territory that make it an indictable offence to carry out an act that results in the injury or death of such animals.

56. What specific circumstances, if any, should be legislated for?

It is unnecessary and impractical to legislate for specific circumstances due to the evolving role that animals play in assisting police.

57. Should the use of drug detection dogs be specifically legislated for?

No. A general piece of legislation that allows for the use of police animals in conducting the full spectrum of police work would suffice.

58. Should the use of horses for crowd control be specifically legislated for?

No. (See comment above)

59. Should harming or killing a police dog or horse be an aggravated offence that carries a period of imprisonment of greater than 2 years?

Yes. A maximum period of five years imprisonment, as exists in the Northern Territory, would be appropriate.

Questions relating to search warrants

60. Should the threshold for the issue of a search warrant be 'reasonable suspicion' or 'reasonable belief' that the search would facilitate a criminal investigation?

The AFPA strongly agrees with ACT Policing that 'reasonable suspicion' remain the basis for conducting search warrants in the Territory. There exists a great deal of debate and conjecture surrounding the two standards and the AFPA believes with the greatest conviction that the current requirements are both reasonable and necessary to the safe and effective conduct of criminal investigations in the ACT.

To require 'reasonable belief' that evidence of a crime will result from a search warrant would take the ACT away from the prevailing laws in all other Australian jurisdictions and risks creating the impression that the Territory is a 'soft touch' for would-be criminals. Moreover, police officers utilise the search warrant to assist in the investigating of offences and the identification of offenders. A level of proof of 'reasonable belief' would significantly restrict police operations and make search warrants almost impossible to obtain, effectively removing this vital investigative process.

There are a range of safeguards in place that protect the public from the inappropriate use of police search powers such as the issuing officer, who must be satisfied with the case that is made in favour of obtaining a search warrant as well as the strict rules relating to the provision of sworn supporting material to be contained in the affidavit. As the discussion paper states, "Different statutory regimes for the issue of search warrants have the real potential for creating unnecessary complexity for law enforcement." To change the standard relating to search warrants would be in danger of doing exactly that.

61. Should a mechanism for the oversight of the application and issue of search warrants, such as the mechanism in the *Surveillance Devices Act 2004* (Cwlth), be included in the legislation?

No. There is no evidence that oversight of the application and issue of search warrants is either practical or necessary. There is already an established system of checks and balances in place that begins at the time of the application and extends to the admissibility of evidence obtained via a search during a court trial. To create additional regulations would be an inefficient and costly exercise that would not result in any measurable benefit. There is strong evidence to show that the public have a high degree of confidence in police to conduct their duties diligently and fairly and this could only be compromised by creating extra bureaucratic procedures.

62. Should the ACT Chief Police Officer be authorised under the Crimes (Surveillance Devices) Bill 2010 to allow the use of tracking devices without warrant for serious offences?

Yes. The AFPA is in full agreement with ACT Policing that this ability is a necessary aid in the fight against serious crime and that any requirement to obtain a warrant would be disproportionately onerous to the degree of intrusion on a person's privacy.

It appears that there is a jurisdictional consensus on this issue although there has been some debate as to who should be able to approve the use of tracking devices to aid a criminal investigation. The AFPA believes that the Chief Police Officer of ACT Policing is best placed to render such a decision as opposed to a judicial officer as recommended by some parties. The CPO is well-placed both in terms of their proximity to individual cases in the ACT and their seniority in the AFP hierarchy to ensure that such technology is used in an appropriate and effective manner.

63. Should a magistrate be able to issue an 'assistance order' for search warrants involving computers or data storage devices?

Yes.

Questions relating to the power of arrest

64. Is 'reasonable suspicion' or 'reasonable belief' the appropriate threshold for the police power of arrest?

'Reasonable suspicion' is the appropriate threshold for arrest as reflected in current legislation. The current laws reflect a careful balance between protecting the individual from arbitrary arrest and granting police the powers to act on their judgement in order to protect the public interest. The merit of this balance is demonstrated through the prevalence of 'reasonable suspicion' as the standard for arrest across Australian States and Territories and relevant international jurisdictions.

Those who would introduce 'reasonable belief' to carry out an arrest point to the inherent subjectivity of determining 'suspicion' to support their argument. The AFPA believes that current interpretations and procedures have accorded the term 'suspicion' with clear meaning. It is not enough for a police officer to genuinely believe their suspicion is reasonable but rather, their actions will be tested by the court.

Part of what makes for an effective police officer is an ability to read between lines and to accurately assess the subtleties and complexities of human behaviour and interaction. The law as it stands acknowledges the friction and uncertainty that accompanies an officer in the field and allows for this in its standard for arrest.

The AFPA has already sought amendment of the Commonwealth Crimes Act in relation to arrest.

Contemporary federal crime legislation refers to reasonable grounds to suspect consistent with the vast majority of State and Territory legislation. In the following legislation arrest is based on reasonable grounds to suspect:-

Crimes (Aviation) Act 1991 (Cth)
Crimes (Internationally protected persons) Act 1976 (Cth)
Migration Act 1958 (Cth)
Crimes Act 1900 (ACT), section 212
Police Offences Act 1935 (TAS)
Misuse of Drugs Act 2001 (TAS)
Summary Offences Act 1953 (SA), section 75
Crimes Act 1900 (NSW), section 352
Law Enforcement (Powers & Responsibilities) Act 2002 (NSW)
Police Powers and Responsibilities Act 2000 (Qld)
Crimes Act 1961 (NZ)

Rather than confuse matters by introducing 'reasonable belief' in contradiction to the legislation listed above, the ACT should be seeking to eliminate the inconsistencies that arise in sections 3W; 3X; 3Y and 3Z of the *Crimes Act 1914 (Cth*) and section 210 of the *Customs Act 1901 (Cth.)* These provisions should be amended to reflect reasonable grounds to suspect, and the Criminal Code should articulate that for offences under the Code, grounds for arrest by a constable is based on reasonable grounds to suspect.

65. Are the matters listed in *the Crimes Act 1900*, section 212 (1) (b) that guide whether a police officer should proceed by summons or arrest adequate?

No. Section 212 (1) (b) of the *Crimes Act 1900* does not make reference to the seriousness of the offence. The AFPA believes that certain crimes are of such a serious nature that they require immediate arrest even if none of the considerations listed in section 212 (1) (b) exist. This should be reflected through an addition to the legislation.

Questions relating to arrest for domestic violence offences

66. Should the threshold for the arrest of a person alleged to have committed a domestic violence offence include additional criteria?

The AFPA is satisfied that the current law in relation to arrest for domestic violence offences is appropriate and does not require additional criteria. The law does not constitute 'mandatory arrest' but rather dictates that in cases where arrest is deemed appropriate that the interests of the victim be considered paramount by taking the arrestee into custody. The evidence suggests that this has been a highly effective reform that is implemented with due diligence and discretion.

Questions relating to police powers of seizure

67. Are police powers of seizure adequate?

Yes.

68. Should legislation provide for compensation for property damages caused in the course of police entry and search for evidence relating to an offence?

The AFPA is in favour of the introduction of a compensation scheme whereby the Territory covers reasonable costs associated with any damage caused in the conduct of entry and search by the police where no evidence is found and no charges are laid.

69. Are provisions for the destruction of abandoned, illegal goods or hazardous goods adequate?

No. There is a need for legislation similar to that already in place in NSW that allows for the safe disposal of hazardous materials if approved by an officer of or above the rank of Superintendent.

Questions relating to crime scenes

70. Should the ACT adopt crime scene provisions similar to those in New South Wales and Queensland?

Yes. The introduction of crime scene provisions in the ACT is long overdue and it is pleasing to see that moves are already underway to rectify this gap in the law.

Both the New South Wales and Queensland laws are effective and would be appropriate in the context of the ACT. However, it may be advisable to introduce legislation that differs from NSW insofar as it does not place a time limit on the holding of a crime scene during the investigation period.

Questions relating to forensic procedures legislation

71. Should the provisions in the *Crimes Act 1900* and the *Crimes (Forensic Procedures) Act 2000* that apply to the same forensic procedures be amended?

Yes.

72. Which of the three options (discussed at 8.3) relating to reform of the statutory framework for forensic procedures is preferable?

The AFPA accepts that a duality exists between the forensic provisions located in the *Crimes Act 1900* and the *Crimes (Forensic Procedures) Act 2000* and is in favour of legislating to rectify the situation. Of the options presented in the Discussion Paper, Option 1 makes the most sense as it would amend the confusion and uncertainty

surrounding forensic procedures while dealing separately with the issues that pertain to forensic databases and the destruction of forensic material.

73. Should it be necessary for police to obtain consent from a suspect, or the suspect's guardian or parent, to conduct forensic procedures?

The AFPA believes that the concept of consent should be withdrawn from any legislative scheme on the grounds that it creates confusion and uncertainty in the mind of the suspect or serious offender as to their rights with regard to the collection of forensic material. Unfortunately, by requesting consent, the impression is given that a choice exists when this is not in fact the case. That the law allows police to take forensic samples of suspects or serious offenders, using reasonable force if necessary, is an acknowledgement of the importance of such processes in protecting the public interest via effective investigative techniques. As long as this imperative remains, it is superfluous and indeed harmful for officers to request consent in the sense that the suspect may well become less compliant due to a misplaced sense of injustice.

While the current system may be seen to provide the individual with a chance to cooperate, the AFPA does not believe that the likelihood of conflict is significantly decreased. Rather, mitigating against conflict is more likely to occur through clear, firm and fair instructions from the officer outside of any legal regulation.

74. Should the police be permitted to enter premises and arrest a serious offender in order to facilitate the carrying out of forensic procedures?

Yes. There is a clear anomaly in the law whereby a court order can be obtained by police giving them the right of entry and power of arrest in order to conduct an intimate forensic procedure on a serious offender while they cannot carry out the same action when it relates to a non-intimate procedure.

The offender's rights are protected, and should continue to be protected, the requirement to obtain either a court or police order in order to carry out a forensic procedure in which the direction must satisfy the test of being 'justified in all the circumstances.' Above and beyond this it is the public interest that must be held paramount and this would be achieved through the insertion of provisions that enable either the court or police to attach a power of entry and arrest to an order.

75. How should the drafting inconsistencies identified in paragraph 8.2.4 be rectified?

Without focussing on the specific wording of any future legislation, the AFPA believes that all references to consent or permission should be removed in recognition of the coercive powers that are retained by police with regard to the carrying out of forensic procedures on serious offenders. Once this inconsistency is clarified then it should be possible to clarify the intention of the relevant provisions

with some minor additional drafting amendments such as linking section 77(1) with the offence outlined in 78(3) as well as clarifying the intent of 78(3).

76. In relation to the carrying out of forensic procedures by police on serious offenders, is the current test of 'justified in all the circumstances' appropriate?

While the AFPA believes that the current test of 'justified in all the circumstances' is appropriate and should remain, we accept that the concept would be aided by the implementation of statutory guidance as to the factors that should be considered when contemplating whether the test has been satisfied. Such factors would serve to link the test more clearly to the rationale that supported the creation of the test in the Crimes (Forensic Procedures) Bill 2000.

However, it is important that the provisions are not narrowed to provide sole coverage of those convicted for serious sexual and violent offences. The recidivist tendencies alluded to in the explanatory statement of the Bill extend beyond those individuals that are identified as having committed a serious sexual or violent offence. Thus, it is in the interests of public safety to allow police to carry out forensic procedures on all classes of serious offender.

77. Should the provisions relating to people volunteering for forensic procedure be reviewed?

The AFPA believes that the provisions relating to volunteers are sufficient. The data cited in relation to the ratio of Volunteer Limited (580) versus Volunteer Unlimited (18,000) samples on the NCIDD are misleading on two counts; firstly, the figures are skewed by the eccentric categories of sample types that exist in the NT Legislation, secondly, people do not enter Volunteer Limited on NCIDD as typically the "limitation" is that the sample only be used for the specific case under question. Under that circumstance there is no value in adding the sample to NCIDD. In practice, volunteer samples are treated as Limited Purpose samples and therefore a presumption in favour of this (as suggested) would be of little consequence.

Further, it is currently not possible to take reference fingerprint material from a burglary for elimination purposes without a full forensic procedure. This causes a large amount of irrelevant data being placed on the national automated fingerprint system (NAFIS). If a clause in the *Crimes (Forensic Procedures) Act 2000* was added to allow forensic members to take limited purpose fingerprint material from a volunteer at the scene of a burglary, under the condition that fingerprint material would never be placed on the database, the clean up rate for fingerprints taken at scenes would greatly increase.

78. Should *Crimes (Forensic Procedures) Act 2000,* section 84 be expanded to encompass all offences as opposed to only serious offences?

Yes. The AFPA believes that there needs to be important reform in this area. The obtaining of DNA should be no different to the taking of a fingerprint for identifying

purposes. Any person charged with a criminal offence should be required to provide a DNA sample at the same time as a fingerprint sample is taken. Many prior offences are resolved though fingerprint matching of other crime scenes, once a person is charged and fingerprints obtained. DNA is an even more exciting tool in the fight against crime. The clear up rate of 'cold cases' would be significantly enhanced if DNA matching of other crime scenes was available through the compulsory taking of DNA sample from persons charged with an offence. The AFPA accepts that if the person is not convicted of the original offence, or indeed other offences identified as a result of the DNA sample, that it would be appropriate to destroy the sample and record, thereby remaining consistent with current legislation. This should allay any civil liberty concerns.

The AFPA strongly recommends that even if there is no expansion of section 84 to include all offences, that as a minimum the above reform be introduced for serious offences.

79. Should the court's powers to authorise retention of forensic materials following the withdrawal of a volunteer's consent be broadened in respect of all or specific categories of offence?

Yes.

80. Are the provisions relating to the destruction of forensic materials and the retention of identifying information satisfactory?

Yes. The amended provisions (2008) have improved the situation regarding destruction requirements.

81. Should the "same sex" requirements be amended to increase the circumstances in which a person carrying out or helping carry out a forensic procedure is subject to the "if practicable" proviso?

Yes. The current requirements are not always practicable as investigation and forensic teams can be solely made up of members of the opposite sex. In particular, Crime Scenes ACT Forensic Operations is predominantly staffed by females and therefore it is not always possible to have a member of the same sex on shift. It is suggested that "if practicable" is added to the act for non-intimate procedures.

82. Should police be permitted to use photo-board identification if they are unable to identify sufficient participants for an identification parade?

Yes. The current arrangements are difficult to organise and constitute a drain on police time and resources. The implementation of photo-board identification would reduce costs for the ACT Government and enable access to national electronic photo-board images.

Legal Aid ACT

Submissions on Review of Police Criminal Investigative Powers

Legal Aid ACT makes the following submissions in relation to questions in the Discussion paper.

Question 1

We agree that all the relevant provisions relating to police powers and responsibilities should be incorporated into one Act as has occurred in Queensland and New South Wales, and more recently in Western Australia.

A comprehensive collection in one piece of legislation should assist police officers to know and understand their powers and responsibilities in the exercise of their duties.

There could then be no excuse for the abuse of powers and the failure to comply with obligations by police officers in the performance of their duties.

It is to be noted that the consolidation of police powers and responsibilities into one Act was recommended by the Royal Commission into the New South Wales Police Service 'to help strike a proper balance between the need for effective law enforcement and the protection of individual rights.' ***Second reading speech New South Wales Legislative Assembly - Attorney-General Debus 17 September 2002.***

It is also significant that Section 7 of the Queensland ***Police Powers and Responsibilities Act 2000*** provides,

7 Compliance with Act by police officers

(1) It is Parliament's intention that police officers should comply with this Act in exercising powers and performing responsibilities under it.

(2) For ensuring compliance with Parliament's intention, a police officer who contravenes this Act may be dealt with as provided by law.

Examples--

1 A minor contravention, for example, forgetting to make an entry in a register, may amount to a breach of discipline under the Police Service Administration Act 1990 for which a police officer may be dealt with under that Act, including by correction by way of counselling.

2 A contravention, for example, a police officer maliciously strip-searching a suspect in a public place, may amount to misconduct under the Police Service Administration Act 1990.

3 A contravention, for example, a police officer improperly disclosing to a criminal information obtained through the use of a listening device, may amount to official misconduct under the Crime and Misconduct Act 2001.

4 A contravention, for example, a police officer deliberately holding a person in custody for questioning several hours after the end of a detention period with no intention of applying under this Act for an extension of the detention period, may amount to an offence of deprivation of liberty under the Criminal Code, section 355.

In our submission, concurrently with the enactment of such legislation there needs to be established an independent body to oversee the Australian Federal Police (ACT Policing) with Royal Commission powers similar to the Queensland Crime and Misconduct Commission and the New South Wales Police Integrity Commission to ensure that ACT Policing comply with their obligations under the legislation, to investigate serious abuses and breaches of obligations by police officers and make recommendations. Such a body could also have an educative role for police as to their powers and responsibilities. The pressing need for such a body is highlighted by the commentary in the discussion paper relating to the issue of search warrants (see pp 74 to 76)

Question 2

Part 1C does not adequately reflect the Territory's obligations under the ***Human Rights Act 2004*** **(ACT)** ('the HRA'). Specific mention must be made in the proposed legislation of the HRA itself, as well as the obligation it places on public authorities such as the AFP, to act in accordance with the HRA when performing their public functions.

The ACT Human Rights Commission should be requested to undertake an audit/study of the provisions of Part 1C of the ***Crimes Act 1914*** to determine which provisions currently comply and which do not comply with the ACT's obligations under the *HRA*. If provisions do not comply then the Human Rights Commission should be asked to recommend appropriate legislative changes.

Question 3

Subject to any review being conducted by the ACT Human Rights Commissioner as suggested above, it is important the proposed legislation in the ACT be properly drafted to suit the specific needs of our jurisdiction. As such, a blanket transfer of the Part 1C rights across to identical ACT legislation is not in the best interests of the ACT community. As such, in addition to the other comments contained in this paper, the following suggestions are made:

- Deletion of the term 'protected suspect' etc (see answer to Questions 9 and 10 below);
- Removal of all provisions that relate to terrorism offences. There is no reason why these provisions need to be repeated in the proposed ACT legislation and in any event, they are likely to fall foul of the HRA.

Question 4

Yes. The provisions of Part 1C need updating not only to ensure that they adequately reflect the ACT's obligations pursuant to the HRA, but also to improve the fluency of the legislation itself.

Question 5

It is integral that the protections afforded to indictable offences be extended to all summary offences for the following reasons:

- Summary offences are offences that have a maximum penalty of up to two years imprisonment. The distinction between summary and indictable offences is technical and geared towards the administration of the criminal justice system. It is not a distinction that justifies a two-tiered approach to police powers;
- Consistency of rights and responsibilities is important to ensure that both police and accused persons understand their obligations and options at each stage in the criminal justice process; and,
- The HRA does not distinguish between summary and indictable offences when expressing the rights of citizens in criminal proceedings in section 22 (or indeed, throughout the HRA generally). Further, the ACT Supreme Court has made it clear that consistency in application of the HRA in relation to section 22 is fundamental to the interests of defendants. In *William Kevin Stone v Les Brien & Itshak Yosef* [2009] ACTSC 6 , Penfold J stated

  "*in general, participants in the criminal justice system should not be placed at risk of being misled or confused by the processes and forms adopted by those who administer that system*".

Question 6

Section 187(2) (a) of the ***Crimes Act 1900*** should be removed.

The ***Road Transport (Alcohol and Drugs) Act 1977*** contains a range of offences including those which have maximum penalties of imprisonment and those which are to be penalized by way of fine only. It is common for persons to be charged with both such types of offences simultaneously and for conditions of bail to be imposed on such charges so as to ensure the protection of the community from further offending. As such, the consequences of offending under this Act can be severe including the loss of liberty and livelihood. As such, this offending cannot simply be classified as 'traffic matters' as though it is a lower tier of criminal offending not worthy of clearly defined police procedures and powers.

The comments above in relation to the breadth of section 22 of the HRA to all offences also apply to this question.

Question 7 and Question 8

No, the statement contained in section 23Q of Part 1C does not adequately reflect the Territory's human rights context. Unlike the Commonwealth and most other states and territories, the ACT has its own chart of human rights. Further, the HRA places an onus on 'public authorities' such as the AFP, to act in accordance with the HRA.

It is suggested that in addition to what is already contained in that section, specific mention must be made of the existence of the HRA in the body of the proposed legislation.

Question 9 and Question 10

The distinction between an 'arrested person' and a 'protected suspect' should not be retained in the proposed ACT legislation and the latter definition should be abolished altogether.

A 'protected suspect' as defined in section 23B (2) of the ***Crimes Act 1914***, is someone who has not been arrested but who is detained by investigating officials who believe they have sufficient evidence to establish that that person has committed the offence and would not allow them to leave if they wanted to do so.

If an investigating official believes that they have sufficient evidence to justify charging an individual, then they need only proceed to consider their options as to the means by which they are to bring that individual before the Court e.g. arrest, summons or a warrant.

The 'protected suspect' definition, however, has the effect of impliedly permitting persons to be detained by police without charge because of concerns they may flee. This is contrary to the fundamental principle that a person not be kept in custody when they are not under arrest or by virtue of the operation of other lawful bases of detention (such as pursuant to the ***Intoxicated People (Care and Protection) Act 1994*** etc). This principle is enshrined in section 18 of the HRA and adoption of the term 'protected suspect' in the proposed ACT legislation would be inconsistent with that provision.

It is critical to the efficient and human rights compliant operation of police powers and responsibilities that there are clearly defined rules that govern the deprivation of an individual's liberty. The 'protected suspect' classification will only serve to create blurry, middle-ground for officials and community members alike that is entirely unnecessary.

Question 11

In addition to comments contained elsewhere in response, we suggest that the ACT Government consult with members of the local indigenous community on the issue of ATSI rights and interests being properly protected in the proposed legislation. Particular issues that we suggest be examined as part of that consultation or generally, are:

- Regarding section 23J of Part 1C, consider specifying the frequency and process in which Aboriginal interview friend lists are compiled so as to ensure contemporary community participation.

Question 12

All agencies associated with the criminal justice system have an understanding of the prevalence of offenders with mental illness. It is suggested that specific mention be made of the processes to be put in place when dealing with a person who is mentally ill that ensures their health needs are properly addressed and their time in custody is safe. We propose regulation of the following processes in the proposed legislation:

- The process of arranging emergency treatment and/or assessment including the mandatory notification of CATT in emergency situations; and,

- The need for written approval from an appropriate medical practitioner to allow the continuation or instigation of questioning or usual investigation period extension options.

Questions relating to investigation periods

Questions 13 to 16

In our submission the periods prescribed by Section 23C of the ***Crimes Act 1914*** are appropriate and we oppose any extension of those periods. We would not seek to add to or remove any of the 'down (or dead) times' referred to in sub-section (7) to be disregarded in the calculation of the prescribed time under sub-section (4).

The discussion paper asserts that neither the New South Wales nor the Queensland legislation allow for down time. This is not the case, and in both jurisdictions there is provision for down time in terms similar to sub-section (7) of Section 23C. See ***Police Powers and Responsibilities Act 2000*** (Queensland) where in Section 403(4) the term 'time out' as defined in the Dictionary, is used; ***Law Enforcement (Powers and Responsibilities) Act 2002*** (New South Wales) Section 117.

It is noted that ACT Police assert that the 4 hours prescribed by Section 23C is often not long enough, resulting in inferior investigative work and paperwork. We would respectfully disagree. If one is to analyse the vast majority of crimes investigated by ACT Police there ought to be no excuse for not completing the task within the prescribed 4 hour period. Further the 4 hour period is not a limit on the time within which the police are to investigate a crime but a limit on the time they can detain a person for the purposes of investigation or questioning. Secondly, for the more complex matters, Section 23D of the ***Crimes Act 1914*** allows for an extension of the investigation period for a period not exceeding 8 hours. To avoid ongoing misunderstanding it may be better to rename investigation periods 'detention periods.'

There are some fundamental principles that need to be remembered when considering what powers police should be allowed, and particularly in the context of investigation periods,

1. there are no obligations on an accused person in a criminal prosecution to say or do anything (with certain limited statutory exceptions) or to participate in the investigation process and the prosecution bears the onus of proving the accused's guilt. In ***Woolmington v The DPP*** [1935] AC 462 the Lord Chancellor, Viscount Sankey stated the much quoted principle as follows,

   Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

2. a police officer may only arrest someone if he/she at the very least suspects the person of having committed an offence. There is no power either at common law or under any of the statutory schemes in Australia to arrest or detain a person simply for the purpose of questioning or for the purpose of investigating a crime. This principle was re-affirmed by the High Court in ***Williams v The Queen*** (1986) 161 CLR 278.

In our submission Section 23C or a similar ACT provision ought to clearly establish the prescribed investigation periods as a maximum and provide as the basic premise that the investigation period should conclude at a time that is reasonable in all the circumstances but which does not exceed the prescribed investigation period.

Section 115 of the New South Wales Law ***Enforcement (Powers and Responsibilities) Act 2002*** is in such terms and Section 116 provides a non-exhaustive list of circumstances relevant to determining what is a reasonable time as do Sections 403(1) and 404 of the Queensland ***Police Powers and Responsibilities Act 2000***. Such provisions ensure that investigation periods are brought to an end as soon as they can rather than potentially dragged out for the full prescribed 4 hour period.

Questions 17 to 20

In our submission the provisions of Sections 23D and 23E of the ***Crimes Act 1914*** make satisfactory provision for extending the investigation period. In practice they mean that police officers will in an appropriate case be allowed to detain a person for up to 12 hours for the purposes of investigation and questioning more than ample time one might suspect in even the most difficult or complex of cases.

In our submission an ACT provision similar to Sections 23D should require an application for an extension of the period to be made to a magistrate only. The provisions of Section 23D no doubt contemplate the situation arising in remote areas of the country where there was no resident magistrate, although it is noted that Section 23E allows for the application to be made electronically.

The availability of a provision such as Section 23E allowing for telephonic applications for extensions should enable every such application to be dealt with by a magistrate on any day and at any hour.

We would be opposed to a provision allowing for a police officer, even a senior police officer, to grant extensions of the investigation period. There needs to be both transparency and a semblance of due process in matters relating to the liberty of the subject and allowing a police officer to grant such an extension at the request of a fellow officer would clearly lack such transparency and similarly be open to the criticism that an impartial mind had not been brought to bear on the decision whether or not to grant the extension.

In our submission the grounds on which an investigation period may be extended under sub-section 23D(4) (which grounds it is noted have been adopted in Section 406 of the Queensland ***Police Powers and Responsibilities Act 2000***) are satisfactory but to which may be added the requirement that the judicial officer must satisfy him/herself as to the wellbeing of the person detained and that the investigating police are respecting the provisions of Section 18 and 19 of the HRA and Section 20 in the case of a child.

Questions relating to police cautions

Questions 21 to 31

21. The wording of the caution in Section 23F is adequate for the majority of situations.

It is a fairly common practice for police officers to ask the person being cautioned whether he or she understands the caution and to ask that person to tell the police officer in his or her own words what they understand the caution to mean.

In the case of children, people with an apparent intellectual disability, mental illness or disorder, people with no or a limited understanding of English and Aboriginal people it is especially important that the officer explains the caution in language the person is likely to understand and is satisfied that the person has understood the caution and understands his or her right to remain silent. The practice referred to in the previous paragraph was urged on investigating officers by Forster J in ***The Queen v Anunga*** (1976) 11 ALR 412 in relation to the interrogation of Aboriginal people, approved in this jurisdiction by Kelly J in the ***Queen v Clevens*** (1981) 37 ACTR 57.

In our submission this practice should be made mandatory by appropriate amendment to Section 23F or an ACT equivalent.

Questions 22 to 29

In our submission the current obligations to record confessions and admissions under Section 23 V of the ***Crimes Act 1914*** as applied in the ACT by operation of Section 187 of the ***Crimes Act 1900*** should continue to apply. Such provisions exist in most if not all Australian jurisdictions although not necessarily as universally as they do in the ACT.

There were powerful and compelling reasons for the introduction of provisions such as these and the importance of the need for corroboration of confessional evidence was explained by the High Court of Australia in ***Carr v The Queen*** (1988) 165 CLR 314 and ***McKinney v The Queen*** (1991) 171 CLR 468.

With current technologies it is easier now than it was when Part 1C was introduced for police officers to record admissions and confessions whether in the police station or in the field.

The definition of 'tape recording' in Section 23B of the ***Crimes Act 1914*** envisages such developments. Any re-enactment of such a provision might however choose a term which more readily lends itself to technological advances such as 'electronic recording.'

Because the technology is so advanced and readily and inexpensively available to police we can see no reason why these obligations should not continue to apply in relation to all offences.

It should be remembered that the existence of such provisions not only protects those being investigated from police 'verballing' but it also protects police from such allegations.

We believe that experience since the introduction of provisions such as Sections 23U and 23V in various jurisdictions would show that they have significantly reduced the number of challenges to

the admissibility of admissions and confessions and resulting no doubt in a greater number of pleas of guilty.

Questions 30 and 31

As already suggested, the circumstances in which it will not be practicable to electronically record confessions will be extremely limited in light of ongoing technological advances in recording equipment. It ought no longer to make a practical difference whether the questioning is taking place in a police station or in the field.

It would not be appropriate in our view to prescribe what is or may be 'not practicable' and this should be left to the discretion of the court in the circumstances of each case. There is no doubt a pool of authorities from other Australian jurisdictions dealing with specific instances of what is or is not practicable in these circumstances.

Questions relating to legal practitioners.

Question 32

There is only one Aboriginal Legal Service which operates in the ACT and that is the Aboriginal Legal Service (NSW/ACT) Limited.

As may be known, that legal service and its regional predecessors have for many years with the co-operation of the New South Wales police operated an after hours telephone service which enabled police to fulfil their obligations to notify the ALS of an Aboriginal person in custody, and give that Aboriginal person in custody the opportunity of speaking with a lawyer and receiving advice as to their rights.

The provision of such a service was recommended by the Royal Commission into Aboriginal Deaths in Custody, and no doubt was the motivation for Section 23H of the ***Crimes Act 1914***.

The Aboriginal Legal Service now provides the same after hours service in the ACT as it does in New South Wales. The service operates on a roster of its lawyers whether practising in New South Wales or the ACT and as we understand it the ALS (NSW/ACT) Limited has produced a manual to inform New South Wales lawyers about relevant ACT and Commonwealth legislation.

It should be added here that there is minimal difference between ACT law and New South Wales law so far as it affects the powers and responsibilities of police and the rights of the citizen in custody.

In our submission however there is no need to refer in legislation to a specific Aboriginal Legal Service in legislation.

Question 33, 34 and 35

If there is to be a provision similar to Section 23L of the ***Crimes Act 1914*** then the relevant rank should remain at superintendant or higher. It most definitely should be someone independent of the investigation.

The decision to refuse access to a legal practitioner and the reasons for the decision should not only be recorded but they should be provided in writing to the person in custody and the legal practitioner who has been denied access to the person. These may subsequently be relevant to a determination by a court as to whether any evidence or admissions obtained during the period the person was denied access to a legal practitioner, is admissible under various provisions of the ***Evidence Act 1995***.

It is difficult to envisage circumstances where the exceptions prescribed by Section 23L(1) could provide any justification for denying a person in custody access to a legal practitioner, unless it is believed the legal practitioner would engage in the conduct referred to, or have someone else do so.

Similarly the existence of circumstances falling within one or other of the exceptions ought not to operate to prevent police from fulfilling their obligations to ***notify*** an Aboriginal legal aid organisation that an Aboriginal person is in custody under Section 23H, even if it is decided that the person should be denied access to the legal practitioner under one or other of the exceptions under Section 23L(1).

Questions 36 and 37

In our submission there should be no prescribed time limit for a response from a specific legal practitioner. The allowance in Section 23G of a ***reasonable time*** is, in our submission, appropriate.

What is ***reasonable*** will depend on the circumstances of the case, including the nature of the offence and any urgency of the situation. In our submission however, if the nominated legal practitioner has not responded in a reasonable time, the person in custody should be afforded the opportunity to speak with another lawyer of his choice or a legal practitioner at Legal Aid ACT.

We have no difficulty with the time allowed for a telephone response being treated as down-time as is currently the case under Section 23C(7)(b) and (c), and its equivalents under the Queensland (Section 403(4) and Dictionary) and New South Wales (Section 117) legislation.

Questions relating to interview friends

Questions 38 to 40

We note that on page 49 of the discussion paper it is said

'Although it is noted that the investigation time with respect to Aboriginal people is 2 hours, it does not take less time to appropriately investigate an offence because the suspected offender is an Aboriginal person. Advice from ACT Policing is that 2 hours (and, in many cases, 4 hours) is simply insufficient to conduct appropriate investigative inquiries in cases other than straightforward cases."

As we have already observed elsewhere in these submissions, the 4 hour period is not a limit on the time within which the police are to investigate a crime but a limit on the time they can detain a person for the purposes of investigation or questioning. And we repeat again the fundamental principles (*Woolmington* and *Williams*) already referred to. The police have all the time they need to

investigate a crime (subject to any limitation period for instituting proceedings) and the statutory 'investigation period' does not limit that in any way.

Turning specifically to the questions, in our view, in light of the shameful history of contact between Australia's police and Aboriginal and Torres Strait Islander peoples (and recent cases in Queensland and Western Australia highlight the fact that contact continues to be unnaceptable) there should continue to be a specific ATSI 'investigation period. '

Both for these historical reasons, and cultural reasons ATSI people find time in custody more onerous, they find official questioning more intimidating, and by reason of cultural traits such as gratuitous concurrence, official questioning is unlikely to produce a reliable account of the person's version of what had occurred. ATSI people are more likely to tell a police officer what they want to hear just to end the questioning or in the hope of ending their time in custody. So dragging the process on for up to 4 hours merely prolongs the agony for the individual without any great likelihood of achieving any meaningful result for the police.

We agree with the suggestion in the discussion paper that special provisions relating to 'investigation periods' and official questioning should extend to people with an apparent intellectual disability, mental illness or acquired brain injury, or who are not proficient in spoken English.

In our submission such people should be permitted to have a friend, relative, carer as an interview friend during any period in custody and during any period of official questioning. A friend, relative, carer or support person should be advised by police of their role and their rights while assisting the person in custody. If such a person is not available, there should be a panel of 'official interview friends' available to assist vulnerable people as there are for ATSI people under the provisions of Section 23J.

Questions relating to the provision of information

Questions 41 to 43

Question 41 in our submission is already addressed by the obligations imposed by the provisions of Section 23G. A police officer should only contact or attempt to contact a friend or relative at the request of or with the consent of the person in custody.

In answer to Questions 42 and 43, in our submission the provisions of Section 23M adequately address the issue of providing information to friends relatives and legal practitioners who inquire as to a person's whereabouts.

In our submission the obligation should be extended to require police to notify somebody nominated by the person in custody that the person is in custody unless the person states that they do not consent to anyone being notified. An attempt to contact the nominated person should be made immediately the consent is given, and on a reasonable number of subsequent occasions if the first attempt proves unsuccessful.

Stories we hear suggest from time to time a disinterest by police in ensuring that friends and family are notified of the person's whereabouts or of assisting those in custody to deal with problems

arising from being in custody, such as making arrangements for children and pets or securing a house or collecting personal belongings.

Questions relating to interpreters and consular officials.

Question 44

In our submission Sections 23N and 23P of the ***Crimes Act 1914*** adequately deal with these matters.

Questions relating to children and young people.

Questions 45 to 47

We would answer Question 45 'no', Question 46 'not applicable', and Question 47 'no'.

Question 47

The protections should be stringent regardless of the seriousness of the offence (excluding minor driving offences).

The further safeguards provided by subdivision 10.7.2 of the ***Crimes Act 1900*** are necessary to ensure that the rights and interests of children and young people are protected, and to provide some assurance of the integrity of statements made by children and young people in the course of investigations.

The vulnerability of children and young people whilst "under restraint" is akin to that of children and young people who are lawfully detained. Many children and young people would not appreciate the difference in the respective situations.

With the exception of those offences excluded under subsection 252F(3), the safeguards should be applied to all other offences. The basis for the safeguards is to ensure the integrity of any statements made by children and young people in relation to an investigation, and the seriousness or otherwise of the offence(s) being investigated should not be a factor.

Questions relating to Forensic Procedures and Part 1C

We would answer Question 48 'yes' and Question 49 'no.'

Questions relating to Preventative Action

Questions 50 to 52

Police powers to prevent a breach of the peace are not limited to the move on powers set out in the ***Crime Prevention Powers Act 1998***. In addition police have a common law power to arrest and detain a person to prevent a breach of the peace.

It is difficult to understand the logic behind the exceptions provided for in sub-section 4(5). If police hold the belief mentioned in sub-section 4(1) that the person has or is likely to engage in violent conduct, police should be permitted to intervene whether or not the activity is prescribed by sub-section 4(5). In any event, sub-section 4(5) would not affect the power of police police to arrest such individuals in the event of an actual or threatened breach of the peace.

There have been few attempts over the centuries to define what constitutes a breach of the peace. As Watkins LJ said in ***Regina v Howell*** [1982] QB 416 at 426 (which decision is referred to in the discussion paper),

'A comprehensive definition of the term 'breach of the peace' has very rarely been formulated so far as, with considerable help from counsel, we have been able to discover from cases that go as far back as the 18th century. The older cases are of considerable interest but they are not a sure guide to what the term is understood to mean today, since keeping the peace in this country in the latter half of the 20th century presents formidable problems which bear upon the evolving process of the development of this branch of the common law.'

Their Lordships then went on to attempt a definition 'breach of the peace' in the following terms (at p.427)

'We are emboldened to say that there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance. It is for this breach of the peace when done in his presence or the reasonable apprehension of it taking place that a constable, or anyone else, may arrest an offender without warrant.'

This definition was accepted by the Full Court of the Supreme Court of Tasmania in ***Nilsson v McDonald*** [2009] TASSC 66 where Blow J at [41] said,

41 Subsequently, the definition of breach of the peace in R v Howell has been treated as correct, and as settled law, by the Ontario Court of Appeal, the European Commission of Human Rights, the European Court of Human Rights, and the House of Lords: ***Brown v Durham Regional Police Force*** *(1998) 131 CCC (3d) 1 at 27;* ***Steel v United Kingdom*** *[1998] ECHR 95; (1998) 28 EHRR 603;* ***R (Laporte) v Chief Constable of Gloucestershire Constabulary*** *[2006] UKHL 55; [2007] 2 AC 105 at 123 - 124.*

On the other hand in ***Nicholson v Avon*** [1991] 1 VR 212 at 221, Marks J said

"A number of cases have been cited by counsel in which a definition of ***breach of the peace*** *has been attempted.....I am not persuaded that I should regard the attempted definitions as exhaustive of the meaning to be given to the expression "breach of peace" or "threatened breach of peace". The facts in a particular case will or will not appeal to a court as justifying a conclusion by police officers that there was a* ***breach of the peace*** *or a threat of it."*

Referred to in the decision of the New South Wales Court of Appeal in ***State of New South Wales v Tyszyk*** [2008] NSWCA 107 (a civil case) where Giles JA comprehensively discusses the history and development of the law relating the King's Peace and breaches of it.

Having briefly reviewed the unsatisfactory state of the law relating to breaches of the peace, in our submission some attempt should be made to create some certainty by defining in legislation what amounts to a breach of the peace, for the benefit of both the citizen and the police.

For this purpose we would commend the definition propounded by Watkins LJ in ***Regina v Howell*** *supra* which has achieved acceptance in a number of jurisdictions. If one is to define the term, 'breach of the peace' in legislation, then it would also be appropriate to acknowledge the power of arrest for a breach of the peace in the same legislation.

Questions relating to the power of search and stop without warrant.

Question 53

The discussion paper highlights the current inconsistencies in the threshold tests under the ***Crimes Act 1900*** and the ***Drugs of Dependence Act 1989*** and the ***Major Events Security Act 2000*** where there is no threshold test. We acknowledge the need for an exception in the case of major events. However in our submission there is otherwise no need for different sets of provisions relating to police powers to stop and search and the inconsistency needs to be resolved.

Which is the appropriate threshold test needs to be assessed bearing in mind the provisions of the ***Human Rights Act 2004***. Section 12 of the ***Human Rights Act*** provides, inter alia, 'Everyone has the right – (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily....'

While it is conceded, as some of the European cases referred to in the discussion paper indicate, that the objective standard of reasonableness assists in guarding against arbitrary arrest, there is still the danger that the suspicion may be no more than an 'inarticulate hunch' (quoted in the discussion paper at p. 89 from ***Terry v Ohio*** 392 US 1 (1968)). In our submission the appropriate threshold test is 'reasonable belief' or 'belief on reasonable grounds.'

Experience shows that, certainly in the case of searches without warrant, police regularly will conduct a search of an individual in the street on the basis that he or she is a person who 'is known to them' or a 'high risk offender'. Such grounds alone cannot constitute a suspicion on reasonable grounds and in short amount to 'inarticulate hunches.'

Questions relating to the use of animals

Question 54 to 58

In our submission there should be legislative provisions defining the circumstances and manner in which drug detection dogs may be used by police, the limits to that use and the consequences of police (or the dogs) exceeding their authority. For example, Section 150 of the New South Wales ***Law Enforcement (Powers and Responsibilities) Act 2002*** imposes specific obligations on police to take all reasonable precautions to prevent the dog touching a person and to keep a dog under

control (neither of which the handler of the ACT Corrective Services drug detection dog makes any attempt to do).

Section 38 of the Queensland ***Police Powers and Responsibilities Act 2000*** prescribes circumstances in which the state will and will not be civilly liable for the actions of a drug detection dog.

Similarly if ACT Policing use or intend to use horses in the course of their duties, it would be appropriate to define in legislation the circumstances and manner of their use etc.

Question 59

In our submission the criminality involved in harming or killing a police dog or horse is adequately covered by the general law under the ***Animal Welfare Act 2002***. A police animal is part of the equipage used by police in the performance of their duties and just as there is no 'aggravated offence' of damaging or destroying police equipment such as a motor vehicle or a uniform, there should not be an aggravated offence in relation to police animals. That is not to say that in the circumstances of a particular offence, a court may not regard the fact that the offence involved a police animal as an aggravating feature.

Questions relating to search warrants

We agree with the suggestion in the discussion paper that there should be one scheme for the application for and issuing of search warrants rather than the current two sets of provisions, one in the ***Crimes Act 1900*** and one in the ***Drugs of Dependence Act 1989***.

Question 60

In the context of search warrants we would repeat what we have said in answer to Question 53 in relation to stopping and search without a warrant. Section 12 of the ***Human Rights Act 2004*** is particularly relevant to the circumstances in which police may enter upon private premises in the exercise of their duties.

It appears that in several jurisdictions, e.g. Victoria, the United Kingdom and New Zealand a distinction is drawn between searches of persons or vehicles without a warrant and searching or entering premises with or without a warrant, with the threshold test in the former cases being reasonable suspicion and in the latter, reasonable belief. In the case of search warrants see for example, Sections 459A and 465 of the ***Crimes Act 1958*** (Victoria), Section 81 of the ***Drugs, Poisons and Controlled Substances Act 1981*** (Victoria), Sections 8 and 17 ***Police and Criminal Evidence Act 1984*** (UK). It is significant that each of these jurisdictions has a Human Rights Act.

If it were to be determined that 'reasonable suspicion' were a sufficient threshold test for stopping and searching persons and vehicles, we would nevertheless submit that police entry onto private premises, being more invasive and disruptive of the rights of the citizen, should warrant the higher standard before entry is to be permitted.

Similarly the seizure of property either with or without warrant in our submission demands a threshold test of 'reasonable belief.'

Question 61

We agree that an oversight mechanism such as that in place under surveillance device legislation would provide law enforcement agencies, the government and the public with useful information concerning the issuing and execution of search warrants.

However in our submission, there also needs to be a body established, as we have already suggested in the context of the exercise of police powers generally, which can be charged with identifying individual and systemic failures in relation to the issuing and executing of search warrants, with the power to recommend procedural changes to remedy problems as they arise, and to take action against individual officers who fall short of the standards expected of them.

Question 62

Unlike the ***Commonwealth Surveillance Devices Act 2004***, the ACT ***Crimes (Surveillance Devices) Act 2010*** does not provide for the use of tracking devices without warrant.

The explanatory statement in our submission makes it clear that it was the legislature's intention that all use of surveillance device needed to be sanctioned by a judicial officer unless an emergency authorisation was required under Part 3 of the Act. The reason for the departure from the Federal model was the need in this jurisdiction to balance the human rights of the citizen with the broader interests of the community under Section 28 of the ***Human Rights Act 2004***.

For the reasons given in the Explanatory Statement we could not support a proposal that the ACT Chief Police officer be authorised to allow the use of tracking devices without warrant in any case.

Question 63

We are not in favour of the use of 'assistance orders' for the reason that they potentially can in effect require a person to incriminate themselves. Not only that, but a failure to comply with such an order (and potentially incriminate oneself) is a criminal offence punishable by a term of imprisonment. Modern law enforcement agencies must have access to experts with the necessary skills to access data on computers. It is noteworthy that Section 3LA of the ***Crimes Act 1914*** contains no safeguards against self incrimination.

Questions relating to the power of arrest

Question 64

We note the extensive review of case law from a number of jurisdictions in the discussion paper concerning what should be the threshold for the police power of arrest.

The current test is one of reasonable suspicion' which historically has been the threshold test for arrest in most if not all Australian jurisdictions and the United Kingdom both at common law and under statute.

The power of arrest must be qualified in this jurisdiction by the provisions of Section 18(1) of the ***Human Rights Act 2004*** which provides that no one may be arbitrarily arrested or detained.

While it is conceded, as some of the European cases referred to in the discussion paper indicate, that the objective standard of reasonableness assists in guarding against arbitrary arrest, there is still the danger that the suspicion may be no more than an 'inarticulate hunch' (quoted in the discussion paper at p. 89 from ***Terry v Ohio*** 392 US 1 (1968)).

It is also notable in our submission that in Victoria the test is one of 'belief on reasonable grounds.' (see Sections 458, 459 and 462 ***Crimes Act 1958*** **(Victoria)**). In our submission this should be the appropriate test in this jurisdiction.

Question 65

In our submission Section 212 of the Crimes Act 1900 should be strengthened to state as a matter of principle that arrest should be the exception rather than the rule. Paragraph 212(1)(b) as presently worded, does not, in our submission make this point sufficiently unequivocal.

For example, subsection 99(3) of the ***Law Enforcement (Powers and Responsibilities) Act 2002*** (NSW) provides,

(3) A police officer ***must not*** [emphasis added]*arrest a person for the purpose of taking proceedings for an offence against the person unless the police officer suspects on reasonable grounds that it is necessary to arrest the person to achieve one or more of the following purposes:*

(a) to ensure the appearance of the person before a court in respect of the offence,

(b) to prevent a repetition or continuation of the offence or the commission of another offence,

(c) to prevent the concealment, loss or destruction of evidence relating to the offence,

(d) to prevent harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence,

(e) to prevent the fabrication of evidence in respect of the offence,

(f) to preserve the safety or welfare of the person.

An express prohibition on arrest unless one or more of the criteria set out in paragraph 212(1)(b) is present would assist in guarding against arbitrary arrest.

We agree that the criteria prescribed by paragraph 212(1)(b) are appropriate considerations to be taken into account in determining whether someone should be arrested rather than summoned.

Questions relating to arrest for domestic violence offences

Question 66

We do not see any justification in legislating specifically for domestic violence offences in sub-section 212(2) and we agree that the absence of 'arrest criteria' can result in arrests that would be classed as arbitrary for the purposes of Section 18(1) of the ***Human Rights Act 2004***.

There are a multitude of domestic violence offences, committed in an infinite variety of circumstances some of which are much more serious than others. Some, in our experience, can be quite trivial.

In our submission, rather than promoting a 'pro-arrest policy' in relation to domestic violence offences, police should exercise a judgment in determining whether arrest is required by the established paragraph 212(1)(b) criteria.

Questions relating to police powers of seizure

Question 67

In our submission police powers of seizure are adequate. Where the power to seize is based on a reasonable suspicion as for example in Sections 195,207 and 209 of the ***Crimes Act 1900***, as previously stated we would submit that the appropriate test for seizing property should be reasonable belief, based on the human rights considerations previously discussed.

Questions 68

In our submission the provisions of Section 201 of the ***Crimes Act 1900*** should be extended to any property or any part of the premises where a warrant is executed which has been damaged or destroyed as a result of insufficient care.

Question 69

As we read Section 39C of the New South Wales ***Drug Misuse and Trafficking Act 1985,*** the power of a superintendant or officer of higher rank to order the destruction of drugs is limited to the situation where the drug could not reasonably be securely retained pending an order of a magistrate under Section 39D. Otherwise the requirement under Section 39D is that the order of a magistrate is required for the destruction of drugs.

We would not oppose a provision giving a magistrate jurisdiction to order the destruction of abandoned, illegal or hazardous goods provided, if someone had been charged in relation to the goods, or otherwise had an interest in them (e.g. as the occupier of premises from which they had been seized) that person was given notice of the application to the court to destroy the goods and had the opportunity to be heard in relation to the application before an order were made as is the case in relation to drugs under Section 194 of the ***Drugs of Dependence Act 1989*** (and for example Section 39E ***Drug Misuse and Trafficking Act 1985***(NSW)).

Questions relating to Crime Scenes.

Question 70

We would support clarification by legislation of police powers in relation to crime scenes similar to the provisions existing in Queensland and New South Wales with the following provisos,

- the test for determining whether a crime scene should be established should be a reasonable belief, not a reasonable suspicion as is the case in the two other jurisdictions
- a crime scene should only be established if it is reasonably necessary to do so for the purposes of preserving evidence ;
- there is a time limit within which a warrant must be applied for as is the case under Section 92 of the ***Law Enforcement (Powers and Responsibilities) Act 2002*** (NSW);
- a crime scene can only exist for as long as is reasonably necessary and in any event there should be a time limit for the existence of a crime scene.

Questions relating to forensic procedure legislation

Question 71

To avoid any uncertainty in our submission, Section 230 of the Crimes Act 1900 should be limited to procedures to establish the identity of a person in custody. Provisions in Section 230 relating to procedures to 'identify the person as the person who committed the offence' or to provide evidence of, or relating to, the offence' should be removed and such matters should be exclusively within the ***Crimes (Forensic Procedures) Act 2000***.

Question 72

We are inclined to think option 1 may be the preferred one in that it creates one legislative scheme.

Question 73

It is appropriate for the investigating officer to first seek the consent of the suspect but we accept that consent should not be a prerequisite for undertaking the forensic procedure. However in addition to the provisions relating to incapable persons, there should be a statutory requirement that before a forensic procedure is undertaken any suspect has the right to communicate with a friend relative or legal practitioner, and to have such person present when the procedure is undertaken.

Question 74

The purpose of undertaking forensic procedures on serious offenders following conviction is ordinarily not for the purposes of a current investigation but to record the persons DNA on a database for future reference. As such the undertaking of the procedure is not as urgent or significant as a procedure to be conducted on a suspect during the course of an investigation. We do not see the need to invest police with powers of arrest or entry in these circumstances. The purpose of undertaking forensic procedures on serious offenders following conviction is ordinarily not for the purposes of a current investigation but to record the persons DNA on a database for future reference. As such the undertaking of the procedure is not as urgent or significant as a procedure to be conducted on a suspect during the course of an investigation.

We do not see the need to invest police with powers of arrest or entry in these circumstances. Moreover, if a serious offender intentionally fails to permit a forensic procedure ordered by the court he/she will be guilty of an offence punishable by 100 penalty units, imprisonment for 1 year or

both. In our submission the threat of criminal prosecution provides sufficient incentive to serious offenders to comply with a court order. Arguably they would also be in contempt of court for failing to comply with the court order.

Question 75

We agree that the inconsistencies in the wording should be resolved. We agree that the concept of ordering someone to consent is anomalous and any orders should simply be that a forensic procedure be carried out or that someone submit to a forensic procedure.

Question 76

'Serious offence' is defined in Section 9 of the FP Act to be

(a) an offence against a territory law punishable by imprisonment for longer than 12 months; or

(b) an offence against the law of another participating jurisdiction punishable by imprisonment for life or by a maximum penalty of 2 or more years of imprisonment.

The equivalent provision in the ***Crimes Act 1914*** defines 'serious offence' to be one punishable by 2 years imprisonment or more (Section 3C).

An ACT offence punishable in the by up to two years imprisonment is a summary offence, and it may be that this definition ought to have been amended at the time the definition of summary offence was amended. When one analyses the classes of offences punishable by no more than two years imprisonment it is difficult in our submission to justify the taking of samples from these offenders for inclusion on the national database.

By contrast the equivalent provisions in the New South Wales ***Crimes (Forensic Procedures) Act 2000***, define 'serious offence' to be,

"serious indictable offence" means:

(a) an indictable offence under a law of the State or of a participating jurisdiction that is punishable by imprisonment for life or a maximum penalty of 5 or more years imprisonment, or

(b) an indictable offence under a law of the State that is punishable by a maximum penalty of less than 5 years imprisonment, being an offence the elements constituting which (disregarding territorial considerations) are the same as an offence under a law of a participating jurisdiction that is punishable by a maximum of 5 or more years imprisonment.

Further, the forensic procedures may only be carried out on a person who is serving (Section 61) or has served (Section 75A) a sentence of imprisonment for a serious indictable offence in a correctional centre or other place of detention or is a child sex offender (Section 75P).

The NSW provisions as to what constitutes a serious indictable offence appear to follow the provisions of the Model Forensic Procedures Bill 1999. In our submission the ACT provisions should be in similar terms to the NSW provisions.

Question 77 to 80

We do not have any views in relation to the FP Act so far as it relates to volunteers. We would however be opposed to an extension of the provisions of Section 84 to include material reasonably believed to be from the body of the volunteer without that volunteer's informed consent.

Question 81

No. We would find it difficult to accept that ACT Policing with a large staff at each of its police stations would experience operational difficulties in finding an officer or other person of the same sex to carry out or assist in the forensic procedure.

Question 82

While there may be merit in the advanced technology available in the United Kingdom, so far as we are aware, it is not available here. If this technology were to become available we would be happy to give it favourable consideration.

We do not see the need to amend Section 114 of the ***Evidence Act 1995*** in the manner suggested, as the exception provided for in paragraph 114(3)(c) is not limited to the two examples in the sub-paragraphs by reason of the inclusion of the words 'among other things' See for example ***Regina v Leroy*** [2000]NSWCCA 302; ***Ilioski v Regina*** [2006] NSWCCA 164 at [123] both referred to in Odgers Uniform Evidence Law (8th Ed) Thomson Reuters, paragraph [1.3.9560].

As with our response to Question 81 generally speaking in a city the size of Canberra, the logistical difficulties in organising an identification parade ought not to be so great as might be the case in say a remote country town.

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16 July 2010

Police Investigative Powers Review
Legislation and Policy Branch
Department of Justice and Community Safety
GPO Box 158
CANBERRA ACT 2601

Re: Review of Police Criminal Investigative Powers

Attached is the initial response by Civil Liberties Australia (CLA) to your review into police criminal investigative powers.

CLA commends the government for its willingness to undertake this most important review of police powers to ensure that any deficiencies in current legislation are addressed, while maintaining a balance between the community's expectations of law enforcement and the rights and safeguards that citizens should enjoy in going about their everyday life.

As evident by the Discussion paper, this review had been a significant task that has had to comprehensively evaluate a range of Territory legislation, the interaction with Commonwealth and other legislation, the issues arising from the Australian Federal Police providing community policing to the ACT and, of course, the impact of the *Human Rights Act 2004* on criminal investigative powers.

The Discussion Paper identifies a range of legislation that covers the conduct of police investigation powers and over time this legislative list has grown longer and somewhat more complex with the interactions and requirements of each new legislative instrument. A single piece of legislation has the advantage of bringing together, in one instrument, the principles under which investigative powers should operate and that should underpin any new legislative requirements in future matters. The rationale that underpinned the requirement to develop the *Children's and Young People Act 2008* is relevant in the consideration of police investigative powers.

Consolidation and review of criminal investigative powers also provides the community with clarity about its rights and responsibilities when being dealt with by police. Similarly, police have that same single source of authority uncomplicated by the current and future plethora of legislative requirements that have been/will be enacted to govern their operation.

The introduction of ACT legislation on police investigative powers can also ensure that compatibility exists with the *Human Rights Act 2004*, an Act that Commonwealth legislative requirements do not necessarily have to take into account.

Similarly, Commonwealth legislation has developed, not so much from a community policing perspective, but from those powers and functions that are the domain of the Commonwealth. In more recent times, Commonwealth legislation has focused on national security requirements and amendments have been made to the *Crimes Act 1914* (Cwlth) that are more relevant to its role in national security than community policing; the Commonwealth changes may not always be compatible with a human rights based legislative environment.

The single source of authority also has benefits in future training in that the source and underpinning principles of investigative powers should be more stable, understood and accessible. While there may be an initial implementation training load with the passing of the initial Bill, future training can better focus on the variations required and not be complicated by the interaction of one or more Acts on the legislative change being brought about.

CLA also notes the constraint on the Territory's limitation on being able to directly amend Commonwealth legislation. The requirement to engage the Commonwealth to provide the necessary priority and support to change its legislation to give effect to the Legislative Assembly requirements arising from this review is important, especially as consideration may span one or more parliamentary terms.

The dilemma facing CLA in its review of this subject is that it unfortunately does not have the luxury of full time staff to undertake its own in-depth review of the operation of police criminal investigative powers and, by necessity, has had to focus on the questions posed by the review Steering Committee; this is less than ideal for such an important matter.

Similarly, the limited time available for CLA to consider the issues raised has been a challenge. The attached paper is considered an initial response and, invariably as CLA further considers the issues raised in the Discussion Paper it may wish to provide a further paper to better reflect a more contemplated consideration of its initial response.

Yours faithfully

Dr Kristine Klugman OAM
President, Civil Liberties Australia

Attachment: Initial Response by Civil Liberties Australia On Review of Police Investigative Powers Discussion Paper of April 2010

CLA
Civil Liberties Australia

INITIAL RESPONSE BY

CIVIL LIBERTIES AUSTRALIA

ON

REVIEW OF POLICE INVESTIGATIVE POWERS

DISCUSSION PAPER OF APRIL 2010

List of Discussion Paper questions	CLA Response
Question relating to the adoption of police powers and responsibilities legislation	
1. Should all of the relevant provisions relating to police criminal investigation powers be situated in a single piece of legislation	The Discussion Paper identifies a range of legislation that covers the conduct of police investigation powers and over time this legislative list grows longer and somewhat more complex with the interactions and requirements of each legislative instrument. A single piece of legislation has the advantage of bringing together in one instrument the principles under which investigative powers should operate and that should underpin and new legislative requirements in other matters. The rationale that underpinned the requirement to develop the *Children's and Young People Act 2008* is relevant in the consideration of police investigative powers. The advantages of a single piece of legislation on this matter have significant benefits for both the community and police. The community has access to a single legislative source detailing how it will be dealt with by police, their rights and responsibilities. Similarly, police have that same single source of authority uncomplicated by the current and future plethora of legislative requirements that have/will be enacted to govern their operation.
Questions relating to the application and safeguards in the Crime Act 1914, Part 1C	
2. Are the safeguards, protections and police powers relating to suspects in police custody in the Commonwealth *Crimes Act 1914* (Cwlth) Part 1C, as currently expressed, consistent with the Territory's obligations under the *Human Rights Act 2004*	The introduction of ACT legislation on police investigative powers can also ensure that ongoing compatibility exists with the *Human Rights Act 2004*. The Commonwealth legislative requirements do not have to take into account the HR Act and there is no certainty that any future amendments to the *Crimes Act 1914* (Cwlth) will be compatible. The complexity of the issue does not enable a simple answer.
3. Should the ACT enact identical provisions to those in Part 1C or should the ACT develop its own laws for criminal investigation powers	The ACT should, in enacting any new legislation, critically review all the existing legislation to ensure compatibility with the HR Act and community needs. Initially, this may result in

	adopting significant sections of the existing Act that are known to be relevant and appropriate to the Territory.
4. Do the protections contained in Part 1C as currently drafted require updating	As exemplified by the range of issues explored in the Discussion paper, the protections contained in part 1C do require updating.
5. Should the safeguards and protection provisions apply to summary offences in the same way as they apply to indictable offences	There has been no rational argument presented in discussion to make a distinction between the application of safeguards and protections for each type of offence. Accordingly, Part 1C provisions should continue to apply to summary offences.
6. Should the *Crimes Act 1900* (ACT), section 187 (2) which exempts road transport offences from Part 1C protections continue as is, be extended or be removed	The rationale for the distinction appears to be appropriate and relevant regarding the *Road Traffic (Alcohol and Drugs) Act 1977.* For consistency, it is suggested that the provisions should be covered by any revision to the legislation that consolidates police powers. However, the implications regarding the recent amendments relating to roadside drug testing are unclear.
Questions relating to the treatment of detainees under Part 1C	
7. Does the *Crimes Act 1914* (Cwlth), section 23Q statement requiring that a person under arrest be treated with humanity and respect for human dignity adequately reflect the Territory's human rights context	
8. Should an ACT equivalent to section 23Q refer specifically to the *Human Rights Act 2004*	Yes
9. If the ACT were to adopt legislative safeguards and protections equivalent to those in Part 1C, should they apply to protected suspects in the same way that they apply to 'arrested persons'	Yes. Every person detained should have the same rights detailed. Their status of 'arrested' or been a 'protected person' is not particularly relevant.
10. How should protected suspect be defined in the ACT	
11. Are the rights and interests of Aboriginal and Torres Strait Islander people or people with a disability adequately protected in current Part 1C protections	Any person who is detained should have available to them adequate assistance to enable them to understand the detention, their rights and responsibilities. When necessary, additional assistance should be required to enable that understanding to be achieved.

12. Is there a category of people who are particularly vulnerable, for whom enhanced protections should apply	See response to question 11.
Questions relating to investigation periods	
13. What is the maximum period of time that should be allowed to elapse during which police officers conduct investigations (the investigation period) before the detainee must be released from custody, released on police bail or brought before a magistrate	4 hours deprivation of liberty without charge is sufficient. Essentially, if the detention by police is of a longer time frame it would suggest that the police action is somewhat premature. The use of 'down time' is fraught with complexity where the actual period of detention could be significant and invariably raises human rights issues. Legislation should place a cap on the total time an individual can be detained for an 'event' that leads to the detention.
14. What should be the limit on the investigation period for any detained Aboriginal or Torres Strait Island person	4 hours. All people should be treated equally before the law. If anyone requires special consideration, it should be available equally to all.
15. What should be the limit on the investigation period for any detained child or young person	See response to question 14. Consistent with the response at question 11, a parent, guardian or interview friend should also be present.
16. What periods of time should be excluded from the calculation of the investigation period	The current list detailed at Section 23C(7) appears adequate, subject to the response at question 13.
17. How should extensions to the investigation period be granted	By a judicial officer acting on a written submission by the informant detailing the reasons for the extension request. A copy of the submission is to be provided to the arrested person and their legal representative.
18. Who should be empowered to extend the investigation period	A judicial officer.
19. What should be the maximum period of extended time for an investigation period	A maximum of one period not to exceed 4 hours.
20. What mandatory criteria should be used in the assessment of applications for an extension of the investigation period	The assessment should be based on: • A limitation to the minimum extent necessary; • be rationally connected to the objective; • propionate; and • a 'fair balance' between community and the individual's interest.
Questions relating to police cautions	
21. Is the wording of the current caution provision in the *Crimes Act 1914* (Cwlth), section 23F adequate	Yes

22. Should the audio recording provisions apply to less serious offences	Yes
23. Should the audio recording provisions apply to all offences, including traffic offences	Traffic offences and those offences can be charged by way of an 'on the spot fine' should be exempt.
24. Does the legislation adequately take into account the advances in technology	No.
25. How should the legislation be drafted such that it captures future technology	The wording of any proposed Act should future proof it to changes in technology be referring to the required outcome and not on how that can be achieved.
26. Should provisions relating to requirements to record cautions, admissions and other processes apply equally regardless of location	Any recorded admission or other process is to include in the recording the caution, otherwise the recording is to be regarded as inadmissible.
27. When should it be mandatory for police officers to audio record a caution to a person and to audio record the person's response to the caution	Where practical to do so a recording should be made. Over time advances in technology may make such recordings far easier to undertake and the legislation should be draft to enable a judicial officer to make judgements about the circumstances of why a recording was not possible.
28. Should provisions be modified to provide for more onerous requirements if the conversation takes place in a police station	All cautions and a person's response should be recorded when practical to do so. There are a range of situations where this could occur including a police vehicle equipped with technology capable of making such recordings. See response to question 27.
29. What role do work safety issues play in the requirement to record cautions, admissions and other processes	Occupational health and safety issues form part of the 'practical' assessment.
30. Should "not practicable" be clarified by setting out in the legislation some of the factors that a Court should take into account in instances where recording requirements have not been satisfied	Yes
31. Should legislation or Ministerial guidelines set out the circumstances in which it is not practicable to record a caution	Legislation should be the appropriate mechanism to proscribe exemptions to the principle of recording a caution.
Questions relating to legal practitioners	

32. Should ACT legislation refer specifically to an ACT based Aboriginal legal service to ensure legal practitioners are familiar with ACT law	The legislation should provide for advice to an Aboriginal legal aid organisation or to a legal representative specifically nominated by the person.
33. At what rank should a police officer be able to refuse access to a legal practitioner	It is not appropriate for a police officer (of any rank) to refuse access to a legal practitioner for any detained person (arrested or otherwise).
34. Are the criteria that allow for a police superintendent to refuse access to a legal practitioner for a person in police custody appropriate	See response to question 33.
35. Where a decision-maker decides to refuse access to a legal practitioner, should legislation include a requirement for the reporting of the decision	Yes
36. Should the period of time allowed for a telephone response by a specific legal practitioner be limited in the legislation	If a practitioner cannot be contacted within a reasonable time, having regard for the detention period, details of the attempted contact and any response are to be recorded. The accused is to be given the opportunity to nominate an alternative representative.
37. How should the period of time allowed for a telephone response be treated by 'down-time' provisions	Given the immediacy of potential contact and the ability to nominate an alternative counsel, there should be no 'down time' provided for in the legislation.
Questions relating to interview friends	
38. Should there be provisions that are specific to Aboriginal and Torres Strait Islander people in terms of the 'investigation period'	The legislation should provide for equality for all before the law.
39. Are there other measures that should be included in legislation in order to safeguard the rights and interests of vulnerable groups of people	As noted in the Discussion Paper, the provision of an 'interview friend' should continue for Aboriginals and child/young people.
40. Are there groups of people whose rights to a lawyer or to other support during police questioning are not adequately protected	All persons detained should have the same rights.
Questions relating to the provision of information	
41. Should police be obligated to notify a person such as a next-of-kin when a person is arrested	Yes, except in instances when the person stipulates that a person(s) not be notified. Such a request should be recorded.

42. Should police be required to take proactive steps to seek consent from the arrested person to make contact with an appropriate person to tell them of the current whereabouts of the detained person	Yes – see response to question 41.
43. When should attempts to contact an appropriate person occur during the period of arrest	When initially detained or when requested by the detained person.
Question referring to interpreters and consular officials	
44. Are provisions relating to interpreters and consular officials adequate	Yes
Questions relating to children and young people	
45. Should the application of provisions relating to children and young people in the Territory be simplified	The recent *Children's and Young People Act 2008* sought to provide for matters relating to the detention of children/young people. Simplification implies a change to those provisions to suit persons other than child/young person. If change to the legislation was contemplated it should ensure all existing rights provided to children/young people are retained.
46. How should provisions relating to children and young people in the Territory be simplified	See response to question 45.
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47. Should the relevant laws, as they apply to young people, reflect the principle that the more serious the offence the more comprehensive the protections for suspects	Yes
Question relating to forensic procedures and Part 1C	
48. Should Part 1C apply to forensic procedures in the Territory	Yes
49. Is there any reason why 'down-time' should not include the period during which a forensic procedure is being conducted under the Territory forensic procedures regime	Conversely, is there any reason why it should? See earlier comments relating to periods of detention and down time.
Questions relating to Preventative Action	
50. Do powers in the *Crime Prevention Powers Act 1998* give police appropriate powers to prevent a breach of the peace	Yes. However, police move on powers are always contentious in nature and open to misuse, abuse and interpretation as to intent.

	There appears to be a trend emerging where legislators and police are more readily applying laws to limit freedom of movement and an individual's conduct in an arbitrary manner. Invariably, this trend will engage the Territory's human rights provision. In earlier times police did deal with various 'anti social' behaviours with the laws of that time. There seems a greater reliance on withdrawing an existing right, instead of better utilizing the provisions of existing laws to manage behaviour as was done in the past.
51. Do the limits in the *Crime Prevention Powers Act 1998*, section 4(5), adequately protect a person's right to freedom of peaceful assembly and association	See response to question 51. Any new legislation should closely consider the requirements for limiting an individual's freedom, e.g. move-on powers.
52. Should police powers to prevent a breach of the peace be included in ACT legislation	Yes
Questions relating to the power of search and stop without warrant	
53. Is 'reasonable suspicion' or 'reasonable belief' the appropriate threshold for the police power of stop and search without warrant	'Reasonable belief' is appropriate in all circumstances. Turning to the human rights aspects, while its is noted that there has not been any specific discussion by the European Court on the whether the standard required under Article 8 is one of reasonable suspicion or reasonable belief, it is worth noting that that European Court of Human Rights has held that searches impinging upon a person's privacy will usually need to be subject to prior judicial authorisation, and any regime for searches must impose "effective mechanisms against abuse": *Funke v France* (1993) 16 EHRR 297. Given that the very low threshold of 'reasonable suspicion' does not require any proof of wrongdoing, and may be found on rumour, gossip or 'inarticulate hunches', it is arguable that this threshold does not provide an effective safeguard of individual privacy, and unduly distorts the balance in favour of the state.

	In any event, the ICCPR, on which the ACT *Human Rights Act* is based, is a more modern instrument, and utilises the different and arguably more rigorous threshold of arbitrariness. This, in turn, means that the Canadian and United States jurisprudence is much more applicable. It is also particularly instructive to note that the common law requires that an issuing officer have a reasonable belief before a search warrant can be issued. We would argue that the jurisprudence on search warrants is highly apposite to any discussion on surveillance device approvals as they both deal with authorising an intrusion upon a person's privacy. As was noted by the Canadian Supreme Court in *Hunter v Southam Inc.* [1984] 2 SCR 145, English common law traditionally required "evidence on oath which gave 'strong reason to believe' that stolen goods were concealed in the place to be searched before a warrant would issue". It was this traditional common law standard which informed the Canadian and United States jurisprudence on unreasonable searches and seizures. Similarly, at common law, police can only enter and search a premises without a search warrant if, *inter alia,* they have reasonable grounds to **believe** that a serious offence has been committed, and reasonable grounds to believe that relevant articles will be found in the premises to be searched: *Ghani v Jones* [1970] 1 QB 693; *Reynolds v Commissioner of Police of the Metropolis* [1985] 2 WLR 93. The Canadian Courts, which operate in light of the same common law traditions as Australia, have also observed that "it should never be forgotten that a search warrant is an extraordinary remedy. It authorizes the invasion of a citizen's home, or his business, it countenances the infringement of his privacy." *Re Black and The Queen* (1973) 13

	CCC (2d) 446. The same could be said of a surveilance device authorisation. It is therefore clear that the threshold of reasonable suspicion is not only inconsistent with the *Human Rights Act,* it also falls short of the standard previously insisted upon by the common law. We would therefore maintain that the Bill should require a reasonable belief as the relevant threshold. The operation of the law in such jurisdictions has not curtailed enforcement officers in performing their functions and achieving a positive law enforcement outcome.
Questions relating to use of animals by police	
54. Should the ACT legislate for the use of animals by police	Yes
55. Should the legislation be crafted in general terms (i.e. assistance in lawful execution of duties) or should it apply only in specific circumstances	The legislation should be crafted for the general uses of animals in assisting police officers undertake their duties.
56. What specific circumstances, if any, should be legislated for	See response to question 55
57. Should the use of drug detection dogs be specifically legislated for	See response to question 55
58. Should the use of horses for crowd control be specifically legislated for	See response to question 55
59. Should harming or killing a police dog or horse be an aggravated offence that carries a period of imprisonment of greater than 2 years	Harming or killing a designated police animal should be an offence and dealt with in a manner consistent with the ACT *Animal Welfare Act 1992*
Questions relating to and search warrants	
60. Should the threshold for the issue of a search warrant be 'reasonable suspicion' or 'reasonable belief' that the search would facilitate a criminal investigation	See response to question 53
61. Should a mechanism for the oversight of the application and issue of search warrants, such as the mechanism in the *Surveillance Devices Act 2004* (Cwlth), be included in the legislation	Yes. However, as the Discussion Paper reveals, the scheme inherent in the *Surveillance Devices Act 2004* is more about reporting the facts on the numbers of warrants etc, rather than addressing the issues raised by Crispin J or Burchett J in the Discussion Paper; a compliance/audit regime is absent. The Ombudsman also noted the paucity

	of information to enable an opinion to be properly formed on the appropriateness of a warrant.
62. Should the ACT Chief Police Officer be authorised under the Crimes (Surveillance Devices) Bill 2010 to allow the use of tracking devices without warrant for serious offences	While ACT Policing may find it advantageous to have one of their own issue a warrant, as the New South Wales Law Reform Commission observed in its report on *Surveillance: An Interim Report,* such power to intrude into a person's privacy should be limited to judicial officers.
63. Should a magistrate be able to issue an 'assistance order' for search warrants involving computers or data storage devices	No. The proposal seeks to engage an individual to do what the justice agencies are charged with doing; proving guilt. Today it is the assistance in issues relating to computers, tomorrow it may follow the slippery path of some other 'necessary' extension to the point where the individual is engaged under 'strict liability' to do the work of law enforcement.
Questions relating to the power of arrest	
64. Is 'reasonable suspicion' or 'reasonable belief' the appropriate threshold for the police power of arrest	See response to question 53
65. Are the matters listed in *the Crimes Act 1900*, section 212 (1) (b) that guide whether a police officer should proceed by summons or arrest adequate	Yes
Questions relating to arrest for domestic violence offences	
66. Should the threshold for the arrest of a person alleged to have committed a domestic violence offence include additional criteria	No
Questions relating to police powers of seizure	
67. Are police powers of seizure adequate	
68. Should legislation provide for compensation for property damages caused in the course of police entry and search for evidence relating to an offence	Yes, in circumstances where no charges are laid with regard to the reason the property was damaged.
69. Are provisions for the destruction of abandoned, illegal goods or hazardous goods adequate	Provision should be made for the destruction of hazardous or dangerous goods where appropriate. Such destruction should be authorized by a judicial officer.
Questions relating to crime scenes	

70. Should the ACT adopt crime scene provisions similar to those in New South Wales and Queensland	Yes
Questions relating to forensic procedures legislation	
71. Should the provisions in the *Crimes Act 1900* and the *Crimes (Forensic Procedures) Act 2000* that apply to the same forensic procedures be amended	Yes
72. Which of the three options (discussed at 8.3) relating to reform of the statutory framework for forensic procedures is preferable	CLA does not have a preference.
73. Should it be necessary for police to obtain consent from a suspect, or the suspect's guardian or parent, to conduct forensic procedures	Informed consent is a pre-requisite.
74. Should the police be permitted to enter premises and arrest a serious offender in order to facilitate the carrying out of forensic procedures	Not without a court warrant which is justifiable in all the circumstances.
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75. How should the drafting inconsistencies identified in paragraph 8.2.4 be rectified	
76. In relation to the carrying out of forensic procedures by police on serious offenders, is the current test of 'justified in all the circumstances' appropriate	'In all the circumstances' is somewhat opened and without any practical guidance as to what constitutes such circumstances; the legislation should clarify the meaning intended.
77. Should the provisions relating to people volunteering for forensic procedure be reviewed	Yes. The practical application of the matter raised in the discussion paper is that by stealth the DNA database is being populated at the behest of policing services. Persons volunteering should be advised of the options and consequences of each option before they provide consent and such consent should be recorded in such a manner that it is clear the volunteer understood and acted in an informed manner. Forensic material proved by a volunteer should only be retained for a limited time relating to the purpose it was provided before destruction; a

	volunteer can impose a shorter retention period.
78. Should *Crimes (Forensic Procedures) Act 2000,* section 84 be expanded to encompass all offences as opposed to only serious offences	No
79. Should the court's powers to authorise retention of forensic materials following the withdrawal of a volunteer's consent be broadened in respect of all or specific categories of offence	No
80. Are the provisions relating to the destruction of forensic materials and the retention of identifying information satisfactory	Destruction of forensic material should relate to all the material and its recorded information, not just the means of matching the material to an individual.
81. Should the "same sex" requirements be amended to increase the circumstances in which a person carrying out or helping carry out a forensic procedure is subject to the "if practicable" proviso	No
82. Should police be permitted to use photo-board identification if they are unable to identify sufficient participants for an identification parade	Where agreed, the use of identification parades could be varied to include newer technologies on the proviso that, as with VIPER, solicitors are invited to attend the image selection process to ensure transparency and fairness.

HUMAN RIGHTS COMMISSION

Police Investigative Powers Review
Legislation and Policy Branch
Department of Justice and Community Safety
JACS.policepowers@act.gov.au

Dear Sir/Madam

Thank you for the opportunity to comment on the 'Review of Police Criminal Investigative Powers' Discussion Paper. Attached is our submission to the Review. We appreciate the opportunity for our officer Sean Costello to sit on the Review Steering Committee, and we look forward to the report of the Review.

As the Discussion Paper suggests, there are many issues relating to the work of the Commission raised in the Review, particularly in relation to human rights, discrimination, children and young people and people with disability. In the time available, the Commission has not had the opportunity to research and comment on every issue in detail.

Despite our involvement over many months on this Committee, researching and drafting our submission has required significant resources. The Commission is concerned that the complex and detailed issues dealt with in the Discussion Paper mean it was probably not accessible to all members of the community, particularly children and young people and those with a disability. As we suggested through the Committee, we consider that more targeted consultation is necessary to reach these vulnerable groups.

In drafting our response, the complexity of relevant police powers has become even more apparent, and it has not been possible, in the time available to provide a detailed human rights analysis of each question. With these issues in mind, our overall recommendation is that any implementation be staged so that a comprehensive analysis of these changes can be considered by all sections of the community. We make this recommendation despite our desire that police powers and human rights responsibilities be located solely in new Territory legislation, so they can be subjected to a full human rights analysis, including full reasons in the Attorney-General's Compatibility Statement. However, such an analysis may not be possible if all the issues dealt with in the Discussion Paper were to be enacted in to Territory law at once. At a minimum, any legislation enacted arising from this Review should be required to be reviewed after an appropriate period, for example two years. We also suggest that all submissions be made publicly available via the Department's website to allow the community to consider the range of perspectives and issues raised.

Yours sincerely

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ACT Human Rights Commission

Submission to Review of Police Criminal Investigative Powers

16 July 2010

1. The ACT Human Rights Commission

The ACT Human Rights Commission was established by the *Human Rights Commission Act 2005* in November 2006, amalgamating the former Human Rights Office and Community and Health Services Complaints Commission and incorporating substantive new functions relating to children and young people.[1] The Commission currently consists of the three Commissioners of equal status: the Human Rights and Discrimination Commissioner; Health Services and Disability and Community Services Commissioner; and the Children and Young People Commissioner. The issues raised in the Discussion Paper are relevant to the work and focus of all Commissioners, who are each informed by a human rights framework under the *Human Rights Act 2004* (ACT) (HR Act). In this submission we focus on the human rights implications of police criminal investigative powers, and also consider some of the particular implications of these powers for children and young people and people with a disability.

2. Police Powers and Human Rights

The police powers which are the subject of this Review directly engage a number of human rights protected under the HR Act. These include explicit rights in criminal proceedings relevant to police powers summarised below:

- s.18(3) and s.22(2)(a): Those arrested told promptly about charges against them, in a language they understand.
- s.18(4): Anyone arrested or detained must be brought promptly before a judicial officer.
- s.18(6) Anyone arrested or detained is entitled to apply to a court to determine lawfulness of detention.
- s.19(1) Anyone deprived of liberty must be treated with humanity and respect
- s.20 and s.22(3) – rights of children in the criminal process.
- s.22(2)(d) right to be told about the right to legal assistance.
- s.22(i) right against self-incrimination.

Police powers may also engage other human rights, for example, the right to equality (s.8), right to privacy (s.12) and the rights of children and families (s.11). As the Discussion Paper suggests, section 28(1) of the HR Act provides that human rights may be subject to '*reasonable limits sets by Territory laws that can be demonstrably justified in a free and democratic society*'. This section gives statutory effect to the concept of proportionality recognised in international human rights law.

Section 28(2) requires that in deciding whether a limit is reasonable under s.28(1), all relevant factors must be considered, including:

(a) the nature of the right affected;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relationship between the limitation and its purpose; and
(e) any less restrictive means reasonably available to achieve the purpose.

[1] Although the *Human Rights Commission Act 2005* created the role of the Disability and Community Services Commissioner, the disability services functions continued the functions of the Community and Health Services Complaints Commission. The complaints handling role of the Disability and Community Services with respect to community services has not yet been operationalised in legislation.

We note the guidance regarding methodology for the application of s.28 provided by Besanko J in *R v Fearnside*[2] as suggested in the Discussion Paper. That is:

> (1) consider whether the legislation "enlivens" a human right;
>
> (2) if, but only if, the answer to the first question is yes, it is necessary to consider whether the legislation contains a limitation which is reasonable within s.28;
>
> (3) if, but only if, the answer to the first question is yes and the answer to the second question is no, it is necessary to consider whether the legislation is able to be interpreted in a way that is compatible with human rights.[3]

However, please note that in this submission, the Commission has not had the time or resources to undertake a comprehensive analysis of proportionality in relation to each of the issues raised in the Discussion Paper. In general we have sought to identify human rights engaged and to consider, where possible, how other relevant human rights jurisdictions have dealt with such issues in a proportionate manner, most notably the United Kingdom, Canada and New Zealand. We would welcome the opportunity to provide more detailed comments on specific issues where amendments are proposed as a result of this Review.

Ultimately, where it is proposed to amend or re-enact a legislative power which will limit human rights under s.28, the onus is on those seeking to limit rights to establish that the limitation is proportionate.

3. Issues not directly raised in the Discussion Paper

The Commission would like to raise the following four issues not directly dealt with in the Discussion Paper.

(a) Use of Force

We understand that police use of force is generally dealt with at common law, although some matters have been codified under the *Crimes Act 1900*. Generally, this requires police to use such reasonable force and assistance as is necessary, in a range of situations including preventing suicide (s.18), preventing ill-treatment of a child (s.39), executing a warrant to enter premises to prevent injury (s.189), seize a firearm (s.191), executing a warrant (s.196), power to enter premises to arrest offender (s.220), executing a search warrant (s.256).

Section 221 for example states:

'A person shall not, in the course of arresting another person for an offence, use more force, or subject the other person to greater indignity, than is necessary and reasonable to make the arrest or to prevent the escape of the other person after the arrest.'

[2] [2009] ACTCA 3 (24 February 2009)
[3] *R v Fearnside*, para. 93.

Little detail is provided in these sections as to what 'reasonable force' will entail. The exception is s.210, which in permitting reasonable use of force in relation to stopping, searching and detaining conveyances, does provide more detail:

> '*In exercising a power under section 209 in relation to a conveyance, a police officer—*
> *(a) may use the assistance that is necessary; and*
> *(b) shall search the conveyance in a public place or in some other place where members of the public have ready access; and*
> *(c) shall not detain the conveyance for longer than is necessary and reasonable to search it and any container found in or on the conveyance; and*
> *(d) may use the force that is necessary and reasonable in the circumstances, but shall not damage the conveyance or any container found in or on the conveyance by forcing open a part of the conveyance or container unless—*
> *(i) any person apparently in charge of the conveyance has been given a reasonable opportunity to open that part or container; or*
> *(ii) it is not possible to give any such person that opportunity*.'

Use of force generally may be permitted by other laws. In a number of situations, the *Mental Health (Treatment and Care) 1994* allows police to use 'force and assistance that is necessary and reasonable'. Other Acts which give police such power to use 'reasonable force' or 'such reasonable force and assistance as is necessary' include the *Public Health Act 1997* and *Children and Young People Act 2008*.

Apart from these general statements, it does not appear that ACT legislation expressly deals with the use of particular weapons such as firearms, capsicum spray (OC Spray), TASERs or other new weapons by the AFP. These matters are generally dealt with in Federal AFP policies and guidelines.

While the guidelines governing the use of traditional weapons may be well understood, there has been controversy surrounding the use of new weapons by police. Issues have previously been raised in the ACT, particularly in relation to the use of Capsicum Spray in the City Watch House[4]. The NSW Ombudsman in 2008 recommended TASERs stop being rolled out for another 2 years. The use of TASERs was also linked to a death in Queensland. Recently, there has been concerns of WA police using TASERs on each other, and in Melbourne there was a report in the media of a dog being TASERed. The Commission is also aware of the allegation of a young man with a disability being subject to a TASER as his disability was misinterpreted as resisting arrest.

In 2005, the ACT Legislative Assembly Standing Committee on Legal Affairs completed a report on 'Police Powers of Crowd Control', which made a range of recommendations. The Committee noted:

'There is a dearth of written material in the public domain in Australia generally on the exercise of police powers in crowd control situations. It is also difficult to precisely

[4] *R v Fearnside* [2009] ACTCA 3.

state the full extent of police powers, given the disparate origins and legal authority from which powers are derived.'

Similarly, Bronitt and Williams have suggested:

'The list of measures available to prevent a breach of the peace is not closed…within this broad and open-ended framework, the only limit upon the further development of preventive measures is the ingenuity and imagination of the police and the judicial acceptance that the steps taken are "reasonable" in the circumstances.'[5]

The LA Assembly Committee Report suggested that in the ACT, use of force is governed by Commissioners Order 3, AFP Commissioners Order on the Use of Force (CO3). Commissioners Order 3 apparently provides guidelines for the use of force by AFP officers in the execution of their duty. The Report made several key recommendations, including that:

- *The AFP prepares a version of Commissioner's Order 3 for release to the public.*
- *The AFP reports in detail on use of force in its annual report, including action taken on inappropriate instances of use of force.*
- *TASERs are deployed by tactical response group members only and should not be generally deployed by ACT policing as standard issue gear.*

The Commission is unaware of the status of these recommendations, but would suggest in light of recent concerns regarding TASERs that they remain valid.

In addition to CO3, the Report suggests that the AFP produces a specific guide for officers on the use of OC spray. Use of OC Spray has been controversial internationally, primarily because of the potential impact of OC spray on health, particularly for certain vulnerable populations.

It is unclear if greater detail on what constitutes reasonable use of force in legislation would assist public confidence in the use of new weapons, but certainly there is room for greater transparency to allow the proportionality of limits on human rights resulting from such force to be assessed. We question whether the AFP could make some of their policies publicly available so that greater scrutiny could be applied to when and how certain uses of force are made.

(b) Road Traffic Offences

The Commission has concerns with the recently passed amendments to the *Road Traffic (Alcohol and Drugs) Act 1977* concerning roadside random drug testing. A copy of our advice to the Chief Minister on that Bill is attached.

In addition, we note that currently the Part 1C protections do not apply to road traffic offences. With the increased detention of motorists under the drug testing amendments, under which drivers may now be detained for up to 2 hours for both alcohol and drug related blood testing, we submit that consideration be given about how Part 1C protections

[5] Simon Bronitt and George Williams, 'Political Freedom as an Outlaw: Republican Theory And Political Protest' (1996) 18(2) Adelaide Law Review 289-33

should apply during this detention. We understand that the police have concerns about any delays between a positive breath/fluid test and subsequent blood test while a legal practitioner or other person is contacted. In this context (and as discussed below in relation to forensic procedures) consideration may need to be given to the adequacy and availability of free legal advice services, including telephone advice. In particular, a person under 18 years of age having access to legal advice and the support of a parent or guardian before consenting to a blood test is particularly important.

The Commission is also concerned at the existing construction of s.5 of the *Road Transport (Safety and Traffic Management) Act 1999*, which allows for police to seize, impound and forfeit vehicles for certain offences. It appears s.5 was part of the original Act and has not been amended since 2002, thus it has not been subject to a compatibility analysis under the HR Act.

The offences concerned are street racing, speed trials, burnouts and menacing driving. The Act empowers the Police to seize a vehicle within 10 days of a relevant offence. The vehicle must be stored in a holding yard while the informant has 28 days to swear a summons. The vehicle is retained by the police whilst the matter goes through the courts.

A similar power was suggested in a previous Government Discussion Paper on the *Road Transport (Alcohol and Drugs Act) 1977*. The Commission opposed the increase of police powers to immediately impound vehicles in drug driving matters. We identified that such provisions would effectively remove the presumption of innocence and breach the individual's right to a fair trial.

'The Commissions' concern with respect to the right of any officer to impound a vehicle is the potential for this to negatively and unintentionally impact on the offenders' family and other persons who could drive the vehicle for the family's benefit. The Commission recognises that a car is often one of the most valuable assets owned by an individual, is relied upon as a means of transport to and from work and may be subject to credit or loan agreements. The negative financial impact on the individual and their family may be far reaching and disproportionately debilitating. The Commission also recognises that access to a vehicle, as a means of transport is generally important for vulnerable persons such as children, people with a disability and the elderly.

The Commission understands that the Courts and police still have powers to make orders, on conviction or by way of bails conditions, that restrict the individual's ability to drive to not endanger the public. The Commission considers this to be an appropriate way to tailor restrictions.

This power may also raise issues of the rights to equality before the law (s.8), and the rights of children (s.11) given that list of offences seems to target young offenders.

(c) Watchhouse Review

The ACT Ombudsman released its review of the police Watchhouse in June 2007 which found particular issues for those with disabilities and children and young people. The report found that:

'*The Watchhouse capacity to cater for detainees with physical disabilities is limited. Detainees with mobility problems can enter the Watchhouse by either the lift from the City Station to the lower ground floor or by police vehicle through the sally port…cells are not fitted with handrails to assist disabled persons accessing toilets, hand basis or bubblers…it is not clear how a detainee with every limited mobility who had to be accommodated in one of the other [non-padded cells] would be able to summon assistance….There appears to be equally limited provision for detainees with physical disabilities such as hearing or sight impairment.*

The Report also found issues with the treatment of children and young people:

'*The Watchhouse has not been designed as a juvenile custodial facility although detainees under the age of 18 are often taken there in the first instance, pending charging and transfer to Quamby Youth Detention Centre.'*

We question whether these issues have yet been adequately addressed.

(d) Intoxicated Persons Powers

The Commonwealth Ombudsman's report 'Australian Federal Police: Use of Powers under the Intoxicated People (Care and Protection) Act 1994' raised a number of issues relating to police powers to detain intoxicated people. We note under s.4 of the *Intoxicated Persons (Care and Protection) Act 1994* (IPCPA) an officer may detain a person who is intoxicated in certain circumstances. A key recommendation of the Ombudsman's report was that '*AFP training material on the IPCP Act should be revised to emphasise the care and protection aim of the Act and distinguish powers under those provisions clearly from street offences*.' The Ombudsman was concerned that these powers were used to curb anti-social behaviour rather than for care and protection.

Section 4(3) provides that after a person is no longer intoxicated or has been in detention for 8 hours, that person should be released. The Ombudsman also raised concerns of rolling detention in the Watch House Manual, recommending:

'The AFP should amend the Watchhouse Manual to remove any reference to consideration by police of rolling detentions of periods of eight hours.'

This referred to the use of s.4 to hold a person for 8 hours, release them, and then re-arrest and detain again. These concerns raise issues under the right to liberty (s.18). Whilst not covered in the Discussion Paper, we continue to have concerns about these issues.

The Ombudsman also made recommendations about better information being available to officers on referring intoxicated people to the sobering-up shelter run by Centacare, as an alternative to police detention.

4. Response to Discussion Paper Questions

Questions relating to the adoption of police powers and responsibilities legislation
1. Should all of the relevant provisions relating to police criminal investigation powers be situated in a single piece of legislation?

The Commission agrees in principle, that for the sake of simplicity, and to ensure all police powers of criminal investigation are assessed for human rights compliance, police powers of this sort should be situated in a single piece of legislation, as far as possible.

Questions relating to the application and safeguards in the Crime Act 1914, Part 1C
2. Are the safeguards, protections and police powers relating to suspects in police custody in the Commonwealth Crimes Act 1914 (Cwlth) Part 1C, as currently expressed, consistent with the Territory's obligations under the Human Rights Act 2004?

This question is complex and underpins the comments in the remainder of our submission on the specific issues raised. Whether Part 1C and police powers elsewhere satisfy these requirements is a question that can essentially only be answered through an analysis of each issue, and in the case of police powers, will raise questions of the proportionality of any limitation. As noted above, human rights jurisprudence clearly establishes the onus is on those seeking to limit rights to demonstrate that the limitation is proportionate.

3. Should the ACT enact identical provisions to those in Part 1C or should the ACT develop its own laws for criminal investigation powers?

Further to our point above, we submit that the ACT should develop its own laws for criminal investigation powers. To fail to do so would undermine the intention and effectiveness of the ACT having a HR Act.

4. Do the protections contained in Part 1C as currently drafted require updating?

We consider that these protections do require updating, and examine these issues in our responses to the specific questions below. As already noted, we believe there are other areas such as use of force, road traffic provisions, the Watchhouse and powers relating to intoxicated persons that also require consideration and amendment.

5. Should the safeguards and protection provisions apply to summary offences in the same way as they apply to indictable offences?

We note that s.182 of the *Crimes Act 1900* states that Part 1C is to apply to summary offences in the same way as it applies to indictable offences in the Territory. The Discussion Paper questions if this should continue, but offers no rationale for why such a change should take place, and what protections would replace Part 1C for summary offences. Some of the

protections contained in Part 1C are consistent with rights under the HR Act. For example, s.18 of the HR Act includes a range of rights in criminal proceedings (as set out above), including that a person who is arrested must be told promptly of the reason for their arrest, and be brought promptly before a judge or magistrate when detained. Similarly, s.22 provides further relevant rights that police powers engage such as the right to privacy (s.12), freedom of association (s.15) and right to liberty and security of the person (s.18). Sections 11 and 20 also give special protection to children.

These rights apply to both summary and indictable offences. In relation to rights under the International Covenant on Civil and Political Rights (ICCPR), generally questions of the application of such rights turn on whether the legislation concerned is criminal in nature, rather than whether or not the offence is indictable. For example, The European Court of Human Rights in *Engel v Netherlands*[6] suggested a proceeding would be criminal if it satisfied three tests, which have been further elaborated on in later judgements:

(a) It was classified as criminal by the domestic law;
(b) The nature of the offence, taking into account that the proceedings are instituted by a public body with statutory powers of enforcement and whether there is a punitive or deterrent element to the process; and
(c) The severity of the potential penalty including deprivation of liberty or significant financial penalties.

Similarly, in *Ozturk v Germany*[7] the European Court found a decriminalised road offence, in which the power to impose a fine had been transferred to the administrative authorities, was still criminal in nature. In subsequent cases involving road traffic offences, similar decisions have been made, including a case in which the Court found that the mere threat of the loss of a drivers licence was sufficient to render an offence criminal in nature.[8]

In contrast, the European Court did find in a more recent case *Escoubet v Belgium*[9] that a procedure which allowed for an automatic 15 day suspension of a driving licence following a car accident in which the respondent was suspected of being drunk, was not criminal in nature and therefore not within the ambit of Article 6 of the European Convention (equivalent to sections 21 and 22 of the HR Act). This was because the measure was preventative, there was no investigation, no finding of guilt and the impact of the penalty was limited in scope and time and not substantial.

These cases make clear that the extent of punishment or sanction is only one factor in determining whether a matter is criminal for the purposes of international human rights protection. Certainly, any offence carrying a punishment of imprisonment would on its face satisfy the test of *Engel v Netherlands.* On this basis, and mindful that the onus sits with those seeking to limit rights, we are not aware of any clear argument as to why Part 1C should not continue to apply to summary offences.

[6] (1976) 1 EHRR 647.
[7] (1984) 6 EHRR 409.
[8] *Malige v France* (1999) 28 EHRR 578.
[9] (2001) 31 EHRR 46.

6. Should the Crimes Act 1900 (ACT), section 187(2) which exempts road transport offences from Part 1C protections continue as is, be extended or be removed?

As detailed above, the protections for those in the criminal justice system contained in the ICCPR generally turn on whether the legislation in question is criminal in nature, not the particular nature of the offence.

The Discussion Paper does suggest that by virtue of s.187(2) Part 1C will not apply to road traffic offences under the *Road Traffic (Alcohol and Drugs) Act 1977* or the *Road Transport (General) Act 1999* where a police officer intends to take no further action or intends to serve an infringement notice for the offence. The Commission has no issue with Part 1C not applying where a police officer intends to take no further action, most particularly as it is unclear to what extend Part 1C would apply. However, the Commission is concerned about Part 1C not applying to other offences under these laws, particularly in relation to offences under the *Road Traffic (Alcohol and Drugs) Act 1977.* The Commission is aware that this Act does include some overlap with Part 1C. For example, in relation to police detention powers, under s.15(4) a person can only be taken into custody to give blood for a period of up to two hours.

Nonetheless, we are concerned about whether there are gaps in protection or confusion caused by offences under the *Road Traffic (Alcohol and Drugs) Act 1977* not being subject to Part 1C. Consistent with our submission that all police powers be centralised in one Act, we would suggest that Part 1C or its ACT equivalent apply to these offences, even if that application is modified to take into account the particular offences under the Act. For example, limiting the amount of time a person can be detained to take a blood sample.

As discussed above, the Commission is mindful of the recent amendments to this Act concerning random roadside drug testing and the new powers of the police in this regard.

Questions relating to the treatment of detainees under Part 1C

7. Does the Crimes Act 1914 (Cwlth), section 23Q statement requiring that a person under arrest be treated with humanity and respect for human dignity adequately reflect the Territory's human rights context?

8. Should an ACT equivalent to section 23Q refer specifically to the Human Rights Act 2004?

The s.23Q statement is welcome, but the Commission prefers that a provision should capture specifically the protections contained in the HR Act. We further submit that this statement should be expanded with reference to the particular obligations of the Australian Federal Police (AFP) under the HR Act. Section 40B of the HR Act requires that public authorities act compatibly with human rights and give proper consideration to human rights. Section 40(e) states that a police officer is a public authority when exercising a function under a Territory law. The Commission submits that a statement summarising this obligation is necessary.

9. If the ACT were to adopt legislative safeguards and protections equivalent to those in Part 1C, should they apply to protected suspects in the same way that they apply to 'arrested persons'?

10. How should 'protected suspect' be defined in the ACT?

On its face, the assertion in the Discussion Paper that '*it is not always clear whether a person is 'under arrest' or a 'protected suspect'* appears to be a compelling reason for the same rights applying to both protected suspects and those under arrest. We further note that s.23B(2), in defining '*protected suspect*', seeks to capture the broader common law definition of arrest.

The HR Act generally does not differentiate between those arrested and any other detention status in protecting rights in criminal proceedings, and applies to those arrested or detained. The exception is s.18(3) which states that anyone arrested must be told promptly of the reasons for the arrest and the charges against him or her. Aside from the remaining rights in s.18, which protects the liberty and security of the person, and others such as freedom of movement (s.13), rights to privacy (s.12) and humane treatment when deprived of liberty (s.19) apply to anyone who is detained. Section 22, which protects rights in the criminal process, only applies once someone is charged, but this is because these rights focus on court proceedings. On this basis, there seems little rationale for having a class of persons detained by police for the purpose of questioning and charging, who would not be considered '*under arrest*', no matter how described.

The intention of the '*protected suspect*' provisions are clearly to ensure that rights protected in Part 1C apply to those detained (or who believe they are detained) but are not under arrest. Section 23(2) and (3) are consistent with this intent.

> *'(2) To avoid doubt, this Part does not confer any power to arrest a person.*
> *(3) To avoid doubt, only a person arrested for a Commonwealth offence may be detained under this Part.'*

Such a view is reflected in the Supplementary Explanatory Statement to the amendments:[10]

"The proposed amendments respond to the Committee's criticism of the use of the word 'arrest' to mean two different things by replacing the 'deemed arrest' label with the phrase 'protected suspect'. In other words, persons who are currently deemed to be 'under arrest' would instead be termed 'protected suspects'. This will make it clear that in the absence of 'lawful arrest', there is no other power of arrest or detention created by the fact that a person is in the company of an investigating official. Rather, the extended operation of many of the provisions of Part 1C (previously referred to as 'deemed arrest') is purely directed to conferring safeguards and protections, a fact that will be reflected in the new term 'protected suspect'. The amendments employ a clearer label only, and have no substantive

[10] Supplementary Explanatory Statement to the Measures to Combat Serious and Organised Crime Bill 2001.

impact on the powers or rights conferred by Part 1C of the Crimes Act. The definition of 'protected suspect' is contained in item 36 of the government amendments."

The intention of the provisions is laudable, but its current construction has the potential to cause confusion. Even if the protections for multiple types of detention are consistent, having two types of detained persons in Part 1C only increases the likelihood that their rights will be protected in different ways, either deliberately or inadvertently through later amendments. Further, the definition of *'protected suspect'* under s.23B(2) seems to imply that a person can be detained lawfully other than by arrest:

(*2*) *A person is a protected suspect if:*
- *(a) the person is in the company of an investigating official for the purpose of being questioned about a Commonwealth offence; and*
- *(b) the person has not been arrested for the offence; and*
- *(c) one or more of the following applies in relation to the person:*
  - *(i) the official believes that there is sufficient evidence to establish that the person has committed the offence;*
  - *(ii)* ***the official would not allow the person to leave if the person wished to do so****;*
  - *(iii)* ***the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so****;*

The powers of prolonged detention stated elsewhere in the Act are linked to arrest. It is therefore unclear under what power a '*protected suspect'* is detained if they are not under arrest, and so under what lawful power an official 'would not allow the person to leave if the person wished to do so'. There are other police powers of detention other than arrest, for example to stop and search someone under s.207. However, such detention can be no longer that is necessary and reasonable to undertake such action. This suggests any detention of 'protected suspects' without arrest would be arbitrary and a breach of the HR Act, particularly as it appears not to be authorised under a Territory law.

This interpretation appears contrary to the intent of the section, and could largely be a drafting issue. It is likely when read in conjunction with the Explanatory Statement, no new power of lawful detention would be found. However, it would preferable if any such implied power could be removed. In 2003, the Tasmanian Law Reform Institute in its Report on 'Custody, Arrest and Police Bail'[11] recommended that:

'Recommendation 1: That the term 'in custody' in the Criminal Law (Detention and Interrogation) Act 1995 be extended to include suspects in the company or control of the police who are being or are to be questioned or are otherwise being investigated and:
(a) who would be arrested if they attempted to leave; or
(b) in respect of whom there is sufficient evidence to justify a lawful arrest.

[11] See http://www.law.utas.edu.au/reform/docs/CustodyFinalReportEasyPrint.pdf

Recommendation 2: That a person being questioned as a suspect about their involvement in the commission of an indictable offence be afforded the following protections regardless of whether they are in custody or not:
- being cautioned;
- being informed of the right to communicate with a friend, relative or lawyer and
- have questioning delayed for such a person to be present during questioning; and
- being provided with an interpreter when required.'

The Commission suggests that the construction of provisions on this basis would be preferable, although simply defining '*in custody'* to include those who under arrest or who would be arrested if they attempted to leave would be even simpler. Such a definition would clarify that a person is not in lawful police detention until they are arrested.

The final recommendation of the Law Reform Institute was:

Recommendation 3:
That s 301 of the Criminal Code be amended to make it clear that failure to give reasons for arrest makes that arrest unlawful.

This raises the issue of what consequences flow if the protections in Part 1C are not complied with. Part 1C currently appears not to deal with this issue, and the consequences of not complying is unclear. While the ability to admit evidence obtained in contravention of Part 1C may be questioned, the status of other actions taken in contravention of the rights in Part 1C are unclear.

In considering the application of safeguards for those in custody, we are also conscious of the vulnerabilities of women and those with a mental illness. The Women's Centre for Health Matters (WCHM) report '*Out of Reach: Women Living with Mental Health Issues in the ACT: What Hinders their access to Legal Support?"* interviewed some women with mental illness for their experience of the criminal justice system. They found that:

'All of the women felt their treatment by the police was far from humane: that they were discriminated against and treated like criminals because of their mental illness.' [12]

While these may just be perceptions, we question if special protection is necessary in Part 1C (or elsewhere) to govern the interaction between police and those with mental illness. It may be that this is more an issue of education or better liaison between police and mental health services, but we are nonetheless conscious of these issues. Such protections in Part 1C or elsewhere, might be about ensuring women's treatment is appropriate for their behaviour. For example, the WCHM report notes:

'One service provider noted that women's shelters could be an appropriate alternative to leaving women in lock up for extended periods.'

[12] Judd K and Hale, L, *Out of Reach: Women Living with Mental Health Issues in the ACT: What Hinders their access to Legal Support,* Women's Centre for Health Matters, June 2010.

Such issues obviously go beyond the procedural safeguards contained in Part 1C. We discuss below the concept of improved supports for those people who do not have the capacity to participate or understand their interaction with police in relation to people with a disability, and it might be that this model could equally apply to those with mental illness.

11. Are the rights and interests of Aboriginal and Torres Strait Islander people or people with a disability adequately protected in current Part 1C protections?

The Commission is conscious of the right to equality in s.8 of the HR Act and the special measure provision in s.27 of the ACT *Discrimination Act 1991,* which allows positive measures to prevent inequality, and would support any measures that assist Aboriginal and Torres Strait Islander people in the criminal justice system and which may reduce the incidence of Aboriginal and Torres Strait Islander people interacting with the criminal justice system.

In relation to people with disability, we submit that the appropriate test for when additional supports should be provided is when that disability impacts on their ability to understand or engage in a process with police. The labelling of 'disability' or 'vulnerable' is potentially misleading, as the two relevant factors that need to be considered are whether the person in question has the capacity to understand and/or engage with the process at that point in time, noting that at certain times, for example, a person with a mental illness may be able to understand and/or engage, whilst at other times they may not. Therefore, capacity can vary as 'disability' status can be dynamic, being relevant at some times, but not others.

The Disability Services Commissioner, Mary Durkin, recently chaired a roundtable discussion with people with a disability and relevant peak organisations, convened by Disability ACT, to discuss the interaction of people with a disability and the criminal justice system. Participants recommended that there be a support program developed for people with an intellectual disability, similar to an 'interview friend'. A NSW scheme was recommended which trains volunteers to provide such support, and which is triggered when people with disability come to the attention of the police.

Such a model would be consistent with the right to equality and right to humane treatment when deprived of liberty under the HR Act. Section 31 of the HR Act allows international instruments to be used to interpret rights. Australia is a signatory to the International Convention on the Rights of Persons with Disability. The interaction between police and people with disability engages a number of these rights including:

- Article 5: equal and effective legal protection from discrimination including reasonable accommodation;
- Article 8: combating stereotypes, prejudices and harmful practices in all areas of life;
- Article 12: providing access to the support such persons may require when exercising their legal capacity;
- Article 13: ensuring effective access to justice through the provision of procedural accommodations at investigative and other preliminary stages;

- Article 15: taking effective legislative, administrative, judicial or other measures to prevent people with disability being subjected to inhuman or degrading treatment or punishment; and
- Article 21: access to information.

When someone with a disability who requires support is identified, they should be given additional support and protection from *the earliest possible point*. In practice, this is likely to be when a person with a disability is assisting police in some capacity, whether as a suspect or witness. In cases where a person with a disability has limited ability to understand or engage with police, whether through an intellectual or physical disability, we submit that the presumption should be that questioning not proceed without adequate supports.

In contrast, those whose disability does not impact on their ability to understand or engage in the process may not require additional supports, consistent with their right to self-determination. This does not mean that the other needs of persons with a disability should be ignored. Under anti-discrimination law these needs should be accommodated, for example a person with vision impairment may need assistance moving in unfamiliar surroundings.

The existing section s.23H(2) provides a useful precedent for vulnerable people. It provides that if the investigating officer believes that a person who is under arrest or a protected suspect is an Aboriginal or Torres Strait Islander person, then the investigating person must not question the person without an interview friend being present, unless the person has waived that right. The investigating official must also make arrangements to allow the person to communicate with the interview friend in circumstances where the communication will not be overheard. We suggest that a similar model be considered for people with disability who meet the above incapacity test. However, we would suggest that the obligation not be waived, where the capacity of the person to engage in the process is in question.

Such a model would require extensive training for officers to understand and be equipped to identify who may or may not have a disability. In many cases, the types of disabilities that may impact on a person's '*capacity to understand and/or engage'* in the process will not be visible or obvious. For example, the Commission is aware of one alleged situation in which a young deaf man was unable to respond to questions by police and so was deemed to not be cooperating.

Similar recommendations were also made at the Disability ACT roundtable referred to above chaired by the Disability Services Commissioner. Participants suggested that disability awareness training be provided for all key participants in the criminal justice system on how intellectual disability differs from mental health disability. Enhanced awareness of police in appropriate questioning of people with disability was specifically recognised as a key priority. Finally, to support such changes, participants suggested establishing a Disability Liaison Officer in the AFP whose role would include building the capacity of the AFP to identify people with disability at the earliest stages and to make linkages with appropriate support agencies.

There is also currently no specific interview support for people with a disability in the ACT who do not have the capacity to understand and/or engage in the process. The one exception is interpreters (for example Auslan), who may be an appropriate support in some, but not all, situations. The introduction of such a scheme should be adequately resourced, such as the interview friend programme already identified, for it to be effective and appropriate. Disability advocacy agencies should be consulted in developing such a model as they will be familiar with situations where people with a disability have been disadvantaged in the criminal justice system.

It should be acknowledged, particularly considering the disproportionate representation of people with a disability in the criminal justice system, particularly mental illness, that investing additional resources and energy into such a supportive model could significantly reduce the numbers of people with a disability entering the criminal justice system and improve the quality of the information they supply the police. There is also the incalculable emotional toll on people with a disability needlessly passing through the criminal justice system, which also diverts valuable resources.

Consistent with such a model, we would also suggest that if a person declares that they have a disability and they require an interview friend/additional support then that should required to be accommodated. If such support cannot be sourced, than questioning should not proceed.

Such supports and protections should be seen as additional to other existing protection, as some people with disability may require both an advocate and an interview friend/support person.

12. Is there a category of people who are particularly vulnerable, for whom enhanced protections should apply?

We support positive measures taken to assist vulnerable people when interacting with police. We are particularly mindful of the special needs of children and young people and people with disabilities. The above test of whether a person has the capacity to understand and/or to engage in a process with police would appear to be a useful model to determine who and in what situations people may require additional support. This could include a reference to the evolving capacity test in Article 12 of the Convention on the Rights of the Child.

'States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.'

Questions relating to investigation periods

13. What is the maximum period of time that should be allowed to elapse during which police officers conduct investigations (the investigation period) before the detainee must be released from custody, released on police bail or brought before a magistrate?

We welcome the detailed human rights analysis of this issue in the Discussion Paper. Our research indicates that the case law of United Kingdom, New Zealand, Canada and the United States referred to in the Discussion Paper remain the current precedents for the laws of those countries.

We recognise the balancing of interests required in such legislation, between the individual rights of an accused versus the state's interest in detaining those persons reasonably suspected of engaging in criminal activity.

In relation to this issue, the Discussion Paper essentially raises two issues: what is the global time a person should be detained before being released or brought before a Magistrate; and, is police questioning a legitimate delay?

Police Questioning Limits

We do not necessarily agree with all the arguments advanced in the Discussion Paper around police needing to undertake several lines of inquiry prior to releasing a person. Although this may be valid, we question the suggestion that having a limit of four hours detention '*can have a negative impact on the accused's ability to respond to the case put against them*'. The rationale of such a statement is unclear. If it suggests that the person being held is innocent and will ultimately be released, this would support the argument that their prolonged detention is arbitrary. If the suggestion is that there is sufficient evidence already collected in relation to the charges against them, then arguably the investigation period is over and the person should be brought before a Magistrate.

Further the list of 'down time' (or 'stopping the clock') matters in s.23C(7) are extensive and could presumably extend this four hour period greatly. We note there is no cap on how long 'down time' can run, so recommend that one be inserted of 4 hours, which could be extended to 8 hours with judicial authorisation (and any case subject to a global limit on detention time as discussed below).

Therefore, as the Discussion Paper notes, the current limits set forward in Part 1C raise human rights issues, particularly in relation to s.18(4) of the HR Act. Whilst only a small amount of evidence is advanced in the Paper to satisfy the conclusion that a delay caused by police questioning is a reasonable limitation, we are willing to accept that the NZ case of *R v Te Kira* is authority for the proposition that a person's detention can be prolonged for police questioning. We note however that the Discussion Paper refers to the Canadian case of *R v Oakes* is used to test the proportionality of this limitation, rather than the specific rationale stated in s.28(2) of the HR Act. Nonetheless, to be proportionate, such an extension of detention would clearly rely on the voluntariness of the accused's participation in the questioning.

Further, in *R v Te Kira*, Richardson J noted that detention '*is of its nature, coercive'*.[13] That is why much of the human rights jurisprudence and the common law has emphasised that any participation in police questioning must be voluntary. This is consistent with s.22(2)(i) of the HR Act which enshrines the right against self-incrimination. This section is based on Article

[13] (1997) 23 EHRR 313

13(3)(g) of the International Covenant on Civil and Political Rights (ICCPR), which also expresses the protection in terms of the person 'testifying against himself or herself'.

The United Nations Human Rights Committee, which monitors implementation of the ICCPR, has clearly stated that this Article applies to all stages of criminal proceedings. In General Comment 13 the Committee stated:

'In order to safeguard the rights of the accused under paragraphs 1 and 3 of article 14, judges should have authority to consider any allegations made of violations of the rights of the accused during any stage of the prosecution.'

Similarly, section 170 of the ACT *Legislation Act 2001* further recognises this protection by noting that an Act or statutory instrument must be interpreted to preserve the common law privileges against self-incrimination.

In interpreting the right to fair trial under the European Convention on Human Rights, the pre-trial right to silence has been recognised. In *Saunders v United Kingdom* the European Court of Human Rights found that the right to fair trial under Article 6 of the European Convention included the right to silence and the right not to incriminate oneself, on the basis that the prosecution must prove its case without coercing a confession from the accused.

> *'The Court recalls that, although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6... The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.'* [14]

On this basis, we would suggest that any change to the current protections in Part 1C be predicated on the basis that a suspect's participation in questioning must be on a voluntary basis. We would further suggest that implicit in the authorities and current Part 1C, is that the duration of questioning should be no longer than 4 hours, subject to the 'down time' factors listed in s.23C. Such a view is supported by the bulk of 'down time' factors in s.23C (7) beginning with the words 'any time during which the questioning of the person is suspended or delayed...'. Consistent with the authorities, we would also submit that there should be a clearly stated limit on the period of down time also of 4 to 8 hours.

In summary, our position is that subject to a clear global limit of detention, discussed below, the maximum period of police questioning, should be 4 hours, up to a maximum of 8 hours in some limited circumstances and with judicial authorisation, and the maximum down time should also be 4 hours, extendable to 8 hours. After this time, the police must release a person or bring them before a judicial officer as soon as practicable, and in any case not detain them for a period in excess of the global limits below.

[14] Similar to sections 21 and 22 of the HR Act.

Global Limit

The New Zealand case of *R v Greenway*[15] and United States case of *County of Riverside v McLaughlin*[16] are precedents that human rights proportionality of prolonged detention will be determined by the practical options available to police in bringing a person before an judicial officer. In the case of *Greenway*, the accused was arrested on a Saturday morning and the relevant court did not sit until Monday morning. As there was an alternative option of seeking a special hearing before a justice of the peace, the Court found the continued detention of the person over the weekend was not justified.

In the ACT context, we have a similar dilemma, as the Magistrates Court does not sit on a Sunday and so an accused arrested after the conclusion of Saturday sittings does not have the opportunity to face court until the following Monday morning. The Commission advocates that the Government investigate alternative options to prevent people being held needlessly in custody for up to 48 hours. The New Zealand model of a Justice of Peace seems a potential option.

In the meantime, taking into account the current limitations of Magistrate Court sittings, the obvious answer based on the authorities is that the total time of detention be capped at 46 hours on the basis that this the maximum time a person would wait to appear before a judicial officer from a Saturday afternoon to a Monday morning.

However, we would submit that the legislation could be further nuanced to recognise that what is practicable on a weekday will not be practicable on a weekend. A more human rights consistent approach would be for the legislation to place a maximum time limit of 18 hours detention for those arrested on a day when the Magistrate Court is sitting (within the next 18 hours). This would reflect the maximum time period from arrest to the time of the next sitting of the Magistrates Court on all days but Sundays. From Saturday afternoons onwards, the upper limit of 46 hours could apply.

This would be consistent with the international authorities, particularly the US case of *McLaughlin,* which recognised explicitly that 48 hours could be too long a period of detention. Twenty-four hours was also the preferred upper limit of the dissenting judgment of Scalia J in that case. The Discussion Paper recognises that many of the municipalities responsible for complying with these requirements in the US are smaller than the ACT. Further, also consistent with these authorities and the Australian case of *Williams v The Queen*[17], whatever upper limit is chosen, the legislation should ensure that the police retain an obligation to bring a person to court sooner if that is practical, to ensure an accused's detention is not delayed unreasonably.

We further note that a clear line of reasoning across all the precedents cited is that the relevant assessment of promptness begins when a person loses their liberty (initial arrest), not the point at which charges are laid.

[15] [1995] 1 NZLR 204
[16] 500 US 44 (1991)
[17] (1986) 161 CLR 278

14. What should be the limit on the investigation period for any detained Aboriginal or Torres Strait Island person?
15. What should be the limit on the investigation period for any detained child or young person?

We continue to advocate that to give proper regard to the vulnerability of these groups the 'investigation period' for children and young people and Aboriginal or Torres Strait Island people continue to be half of the period allowed for other suspects. According to our proposals, this would be a limit of questioning of 2 hours extendable to 4 hours, and subject to capped 'down time'.

Both groups would then be subject to the same global limits outlined above.

We do not support children and young people being questioned without parents or guardians and believe the interview friend requirements in s.23K are appropriate.

16. What periods of time should be excluded from the calculation of the investigation period?

The Commission supports the list in s.23C(7) subject to our proposal that the total down time be capped at 4 hours (or 8 with judicial approval).

17. How should extensions to the investigation period be granted?
18. Who should be empowered to extend the investigation period?

We are comfortable with the current process in Part 1C, that a judicial officer be contacted to extend an investigation period. In the context of our suggestions above, we submit that while the investigation period (including police questioning) may be extended, the obligation to bring a person before a Court within 18-46 hours (depending on whether they are arrested over the weekend) could not be extended by any means.

19. What should be the maximum period of extended time for an investigation period?
20. What mandatory criteria should be used in the assessment of applications for an extension of the investigation period?

We submit that the maximum extension should be a further 2 or 4 hours (depending on the age, race or vulnerability of the accused), and that downtime should not apply to this extension, given the police have already had a period of 4 hours and many of the factors in s.23C(7) would no longer apply. Such an extension should also not impact upon the global limit of the person's detention. That is, they must still be released or bought before a court within 18 or 48 hours. Such an extension would be predicated upon police demonstrating that any further questioning of the person is voluntary.

Terrorism
We note the Discussion Paper does not discuss the terrorism provisions relevant to investigation periods and assume this is because these provisions are subject to separate

review. Nonetheless, given that the additional powers given to police in relation to terrorism offences appear not to have been used in the ACT, we advocate that the distinction between terrorism and non-terrorism offences may be removed. Prima face, they are disproportionate limitation on rights given there are lesser limitations in relation to all other offences.

Questions relating to police cautions

21. Is the wording of the current caution provision in the Crimes Act 1914 (Cwlth), section 23F adequate?

As noted above in relation to question 2, s.18(3) and s.22(2)(a) of the HR Act require that those arrested told promptly about charges against them, in a language they understand. Whilst this might be provided for elsewhere, we submit the caution under s.23F should include details of the charge against the accused and details of their right to an interpreter.

22. Should the audio recording provisions apply to less serious offences?
23. Should the audio recording provisions apply to all offences, including traffic offences?
24. Does the legislation adequately take into account the advances in technology?
25. How should the legislation be drafted such that it captures future technology?
26. Should provisions relating to requirements to record cautions, admissions and other processes apply equally regardless of location?
27. When should it be mandatory for police officers to audio record a caution to a person and to audio record the person's response to the caution?
28. Should provisions be modified to provide for more onerous requirements if the conversation takes place in a police station?
29. What role do work safety issues play in the requirement to record cautions, admissions and other processes?
30. Should "not practicable" be clarified by setting out in the legislation some of the factors that a Court should take into account in instances where recording requirements have not been satisfied?
31. Should legislation or Ministerial guidelines set out the circumstances in which it is not practicable to record a caution?

Whilst the purpose of requiring audio recording is largely about protecting the accused, it is worth nothing that the audio or video recording of a person without their consent will engage the right to privacy (s.12). The proportionality of this limitation will likely turn on the particular requirements for recording in the legislation. On its face, the current limitation to this right in Part 1C, being that a person under arrest or a protected suspect should have their caution and response recorded whenever practicable seems a reasonable limitation on this right, given it is for the protection of the person detained.

We note the issues associated with taking a person to a police station for the recording of cautions for minor offences. However, given the increased technology available to police for audio recordings, can see no rationale for why audio, and even video recording obligations, should not apply to road traffic offences.

We also note the case studies put forward by the police in relation to work safety and other considerations when 'in the field' and the complexity of determining if a recording is necessary in some situations. However, a sensible solution to this issue may be to retain the requirement for recording of cautions and admissions in all situations where such recording is practicable. This would not be inconsistent with the current provisions of Part 1C.

The legislation could then outline a list of non-exhaustive factors which are relevant in determining what is practicable, many of which are alluded to in the Discussion Paper. This would include the location of the admission or caution (eg within a police station or elsewhere), whether the admission was foreseeable, safety issues faced by police in using audio equipment in the situation, particularly audio/video technology available to police, etc.

Questions relating to legal practitioners

32. Should ACT legislation refer specifically to an ACT based Aboriginal legal services to ensure legal practitioners are familiar with ACT law?

The Commission is familiar with members of the community advocating for an ACT Government funded ACT Aboriginal Legal Service to deal with some issues caused by the service being shared across South Eastern NSW. We support such a proposal, and are concerned about a lack of community legal services generally in the ACT. We support calls for a comprehensive, ACT Government-funded suite of community legal services. In the absence of such a programme, legislation requiring that legal practitioners are familiar with ACT law is laudable, but its implementation may be practically difficult, given our experience with the ACT legal profession's lack of expertise in human rights and discrimination law generally.

33. At what rank should a police officer be able to refuse access to a legal practitioner?
34. Are the criteria that allow for a police superintendent to refuse access to a legal practitioner for a person in police custody appropriate?

Section 22(2)(b) of the HR Act states that anyone charged with a criminal office is entitled to communicate with lawyers or advisors chosen by him or her. The Commission is concerned about any person detained being refused the right to see a legal practitioner by the police, which is contrary to the intention of s.22.

There is precedent elsewhere in Part 1C for police to contact a range of judicial officers over the phone to extend investigation periods under s.23E. It is unclear why a similar regime could not apply in relation to the refusal to see a legal practitioner. That is, the same process under s.23E for extending an investigation period should apply if the police wish to refuse a person's right to see a legal practitioner. We do not believe it is appropriate for any police officer to decide that a person cannot see their legal representative. If a judicial officer cannot reasonably be located to authorise the refusal, then perhaps in very limited situations a Superintendant may abrogate this right, but we would submit only in situations where the safety of others is at risk. This should largely be the same criteria considered by a judicial officer in hearing such an application.

We do not support the current criteria in relation to refusing such a request that providing access would likely result in:
'(*a) an accomplice of the person taking steps to avoid apprehension; or*
(b) the concealment, fabrication or the destruction of evidence or the intimidation of a witness.'

To the extent that this test suggests that the legal practitioner would knowingly collude in the notification of an accomplice or the concealment, fabrication or destruction of evidence or intimidation of witnesses, this would clearly be a serious breach of professional ethics and a criminal act on the part of the legal practitioner, and it is difficult to see how police could determine that such conduct is 'likely,' barring the most exceptional circumstances. Where it is feared that the legal representative may unwittingly be used by the person to tip off accomplices this could presumably be dealt with by obtaining undertakings from the legal practitioner not to contact another person regarding the matter. In any such case, the person should be entitled to contact another legal representative rather than being denied legal representation altogether.

35. Where a decision-maker decides to refuse access to a legal practitioner, should legislation include a requirement for the reporting of the decision?

Such decisions should be recorded in writing for later scrutiny, as is the case now under Part 1C.

36. Should the period of time allowed for a telephone response by a specific legal practitioner be limited in the legislation?

The Discussion Paper does not go into sufficient detail to support this proposition. Paragraphs 23C(7)(b) and (c) already allow 'down time' to stop the clock so that a legal practitioner can be contacted and arrive. If the Commission's suggestion above was followed, such a delay would be capped at 4 hours or extended to 8 hours with the approval of a judicial officer. As detailed above, jurisprudence in other jurisdictions suggests that detention for police questioning is only permissible where a person is voluntarily cooperating. As such, if at the end of the 4 hour (or 8 hour) down-time cap a legal practitioner cannot be contacted, and the person does not wish to answer questions without their legal representative, they should be released or brought before a judicial officer.

37. How should the period of time allowed for a telephone response be treated by 'down-time' provisions?

We would submit this should be treated in the same way as the other 'down time' rationale and refer to our earlier answer on that issue.

Questions relating to interview friends
38. Should there be provisions that are specific to Aboriginal and Torres Strait Islander people in terms of the 'investigation period'?

39. Are there other measures that should be included in legislation in order to safeguard the rights and interests of vulnerable groups of people?
40. Are there groups of people whose rights to a lawyer or to other support during police questioning are not adequately protected?

Despite the examination of this issue in this section of Discussion Paper, we can see no valid reason for removing the current special protections for children and young people and Aboriginal and Torres Strait Islanders. The Paper itself cites the Australian Human Rights Commission and Royal Commission into Aboriginal Deaths in Custody as supporting such special measures. There may be more appropriate options, but none are canvassed in the Discussion Paper. In the absence of clear alternatives, we continue to advocate for these special measures, including a half time limit on detention for an investigation period.

Further, as alluded to in the Discussion Paper, we would suggest that the right to equality (s.8 of the HR Act) coupled with the reasonable accommodation requirements of the Convention on the Rights of Persons with Disabilities, that people with disabilities might also be granted similar rights.[18] We note the Convention includes the requirement under Article 13(2) that:

In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

We would support a scheme similar to the Victorian Office of the Public Advocate's Interview Friends, which is discussed in this section of the Discussion Paper, being introduced in the ACT and referred to in legislation.

Questions relating to the provision of information
41. Should police be obligated to notify a person such as a next-of-kin when a person is arrested?
42. Should police be required to take proactive steps to seek consent from the arrested person to make contact with an appropriate person to tell them of the current whereabouts of the detained person?

We believe the existing obligations in s.23M for police to pass on details of friends or relatives seeking to contact a person in detention should be retained. In addition, we submit that consistent with the right to humane treatment when deprived of liberty, and conscious of the vulnerable position persons in detention finds themselves, there should be a positive duty on the police to contact an arrested person's next of kin where practicable. We submit that this could be negated in a similar way to the current exemption to s.23M, most particularly where a person requests that no one be contacted.

[18] See for example Article 14(2) which says 'States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.'

In relation to people with disability, we again note the recommendations of people with disability in the criminal justice roundtable recently chaired by the Disability Services Commissioner. A key recommendation from that forum was that there be a review of the AFP system for notifying parents and guardians in relation to crimes alleged to have been committed by people with a disability. Consistent with our earlier recommendations in relation to people with a disability, we submit that where a person's ability to understand or participate in questioning by police is at question, the obligation should be on police to proceed no further without contacting a parent or guardian. We suggest this would be the likely first step before determining if an interview friend and/or legal practitioner is also needed, depending on the wishes of the person.

In relation to children and young people (under 18 years of age), as discussed below, we consider that at any time they are being questioned by police regarding a possible offence (even where not detained or a suspect in relation to that offence), a parent or guardian should generally be contacted.

43. When should attempts to contact an appropriate person occur during the period of arrest?

We suggest that contact be attempted as soon as is practicable.

Question referring to interpreters and consular officials
44. Are provisions relating to interpreters and consular officials adequate?

The intent of the current protections for people of culturally and linguistically diverse backgrounds and those with a physical disability unable to communicate in English with reasonable fluency appear consistent with the HR Act, most particularly, the right to equality (s.8), the right to be informed about charges against them in their own language (s.22(2)) and the right against self-incrimination (s.22(2)(i)).

However, we have some concerns with the manner in which the provisions are drafted. It is unclear in particular how s.23N would operate in practice. It is unclear what type of interpreter police are obliged to locate, particularly if the person cannot communicate effectively.

Consistent with our comments above in relation to interview friends, we submit that people who have a disability that impacts on their ability to understand or engage in the process with police should be given additional support and protection from *the earliest possible point*. This might be an interpreter, interview friend as suggested above, relative, friend or other support. Where such a support is not available, questioning should not proceed.

We support the current obligations in relation to consular officials.

Questions relating to children and young people
45. Should the application of provisions relating to children and young people in the Territory be simplified?

46. How should provisions relating to children and young people in the Territory be simplified?
47. Should the relevant laws, as they apply to young people, reflect the principle that the more serious the offence the more comprehensive the protections for suspects?

As detailed above, it is important to recognise the particular vulnerability of children in interactions with police. Section 11 of the HR Act confirms that children under 18 years of age must be afforded the protections they need because of this vulnerability. While there is currently protection for children who are formally detained and questioned as suspects by police, we are concerned that informal questioning and interactions by police may elicit information which may later be used against child (directly or indirectly) in a criminal investigation. While we do not wish to limit in any way the potential for positive community engagement between police and children and young people, serious consideration should be given to providing further protection for children and young people when they are informally questioned by police in relation to a possible offence, even if they are not a suspect at that time. These protections may include informing a parent, guardian or other adult of their choice as soon as is reasonable practicable. This would be consistent with s.11 of the HR Act.

Question relating to forensic procedures and Part 1C
48. Should Part 1C apply to forensic procedures in the Territory?
49. Is there any reason why 'down-time' should not include the period during which a forensic procedure is being conducted under the Territory forensic procedures regime?

Questions relating to Preventative Action
50. Do powers in the Crime Prevention Powers Act 1998 give police appropriate powers to prevent a breach of the peace?
51. Do the limits in the Crime Prevention Powers Act 1998, section 4(5), adequately protect a person's right to freedom of peaceful assembly and association?

The Commission is concerned about the existing powers of police to direct people to 'move on' under the *Crime Prevention Powers Act 1998.* As detailed above, s.28 of the HR Act requires that rights can only be limited where there is a relationship between the limitation and its purpose. As James Farrell has suggested in his article quoted in the Discussion Paper, there is a real question as to whether move on powers actually reduce the incidence of crime. The Discussion Paper notes that such powers disproportionately impact on children and young people, and Aboriginal and Torres Strait Islanders. This suggests the right to equality (s.8) is also limited by such powers, along with freedom of movement (s.13) and freedom of association (s.15). As we noted above, the onus is on those that seek to limit rights to show that the limitation is proportionate. If it cannot be shown that move on powers reduce the incidence of crime, than such powers are disproportionate. Such a view is supported by the Victorian Government's recent 'statement of partial incompatibility' in relation to their Summary Offences and Control of Weapons Acts Amendment Bill 2009. Whilst the Discussion Paper refers to the powers of police to randomly stop and search in that Victorian Bill, it also included new police powers to move people on. It is unclear if the statement of partial incompatibility also applied to these powers.

An open letter from the leading Victorian social service and social justice organisations summarised their concerns with the concept of move on powers generally on 21 December 2009 in response to their introduction:

'It [the Bill] *provides move on powers to police, which may be applied in a discriminatory way, as the powers provide a very broad and subjective discretionary power that have been used in discriminatory and disproportionate ways in other jurisdictions against some of our most vulnerable community members, including people who are homeless, young people, Aboriginal people and people experiencing mental health issues'*

Further, Chief Justice Higgins recently noted in *Tahi Temoannui v Brett Jason Eric Ford* the potential uncertainty around the offence of breaching a move on direction, and the potential for a subsequent arrest to be unlawful. In that case, the defendant had been asked to move on from Green Square in Kingston. His Honour discussed the potential confusion such a direction could create:

> *'To illustrate that point, let it be supposed that the directing police officer considered Green Square to include all surrounding public streets and/or any public place within sight of Green Square but failed to communicate that understanding. Could it seriously be suggested that a person was liable to be arrested under the CPP Act for being, remaining in or entering such a place dependent only on the internal thought processes of the directing officer? Similarly, it is abhorrent to our system of criminal justice that a person may be liable for punishment because that person has engaged in conduct which, though not actually proscribed, could have been proscribed.'* [19]

These powers were also recently considered by Justice Refshauge in *Vince Spatosilano v Geoffrey David Hyde*. [20] His Honour noted that the move on direction '*may not leave the person to whom it is given with any clarity about the limits of that right and how they may avoid committing a criminal offence*'.

The Commission also notes that a new offence of affray was recently added to the ACT Crimes Act by the *Crimes (Serious Organised Crime) Amendment Act 2010*. It is our understanding that one of the justifications for this new offence was to provide police with greater powers to deal with breaches of the peace.

In light of the above, we submit serious consideration be given to removing 'move on' powers from the ACT law, given the new affray offence.

52. Should police powers to prevent a breach of the peace be included in ACT legislation?

The Commission is generally supportive of common law powers being codified in legislation so that their human rights impact can be properly assessed. A number of the measures outlined in the common law powers to prevent breaches of the peace indeed raise such issues. For example, the powers of temporary detention without arrest cited in the Discussion Paper based on the case of *The Commissioner of Police for the State of Tasmania;*

[19] [2009] ACTSC 69.
[20] [2009] ACTSC 161.

Ex parte North Broken Hill Ltd.[21] We would therefore support further consideration of enacting such powers into legislation. Nonetheless, as outlined above, as a public authority, ACT Police would already need to give proper consideration to human rights and act consistently with human rights, before exercising such common law powers.

Finally, we note the discussion on page 60 of the Discussion Paper in relation to the power of police to enter premises without a warrant in emergencies. Whilst this engages a number of rights, the tests in s.190 of the *Crimes Act 1900* on their face suggest that this limit is proportionate. However, we suggest that a cap be placed on the time police spend in such premises based on the NSW and Queensland test of 'only as long as is reasonably necessary in the circumstances'.

Questions relating to the power of search and stop without warrant

53. Is 'reasonable suspicion' or 'reasonable belief' the appropriate threshold for the police power of stop and search without warrant?

[questions 54-59 are dealt with below]

60. Should the threshold for the issue of a search warrant be 'reasonable suspicion' or 'reasonable belief' that the search would facilitate a criminal investigation?

These questions are intrinsically linked, and the authorities largely overlap, essentially turning on the same human rights question: when is it reasonable to infringe on an individual's rights to privacy and to be free from arbitrary detention in order to search them, either with or without a warrant?

As the Discussion Paper notes, ACT legislation in relation to police powers to stop and search, with and without a warrant use both the concepts of 'reasonable suspicion' and 'reasonable belief'. The discussion at Part 6.5 of the Paper provides a comprehensive analysis of the local and international jurisprudence on the question of the appropriate thresholds for a range of police powers including searching. Our research indicates that the authorities cited remain valid on this question.

In relation to powers of granting a search warrant, we submit that reasonable belief is the appropriate test. This is clearly borne out in the authorities and legislation referred to in the Discussion Paper.

In relation to the Canadian authorities cited in the Discussion Paper on issuing a search warrant, we submit that they clearly refer to a test of 'reasonable belief' drawn from the case of *Hunter v Southam.*[22] We note the recent report of the ACT Legislative Assembly's Scrutiny of Bills Committee,[23] which seemed to suggest this authority was no longer valid based on the cases of *R v Kang-Brown and R v M(A).* [24] We submit that in those cases there was considerable disagreement amongst the Justices on the appropriate evidentiary threshold that should apply. Both cases related to the use of sniffer dogs, and at least one

[21] (1992) 61 ACrimR 390.
[22] [1984] 2 SCR 145
[23] Standing Committee on Justice and Community Safety (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee), Scrutiny Report 15, 15 March 2010.
[24] *R v Kang-Brown* [2008] 1 SCR 456 and *R v M (A)* [2008] 1 SCR 569

Canadian commentator has distinguished these cases from those identified in the Discussion Paper, most notably *Hunter v Southam*. Stribopoulos has said of the majority:

'*This bloc emphasized that relative to other kinds of searches, a dog sniff is comparatively less intrusive and, therefore should be permitted on a less exacting standard than that normally required by section...i.e. reasonable and probable grounds.'*[25]

Of the five remaining Justices, Stribopoulos suggests 'four concluded that the more exacting reasonable and probable grounds standard is indeed what section 8 requires, refusing to countenance a lessening of the standard in this context'. Only Justice Bastarache found that reasonable suspicion is the appropriate standard in relation to broader searches than those involving sniffer dogs'. As Stribopoulos noted, in relation to one of the cases referred to:

'*...where the state's purpose is criminal law enforcement, the Supreme Court has usually insisted on strict adherence to Hunter v Southam's requirements, including the need for reasonable and probable grounds as a precondition for a constitutional search or seizure.'*

Searches without a Warrant
In *Hunter v Southam*, Dixon J stated that police should only search with a judicially issued warrant, unless it is not feasible to obtain one. He suggested the purpose of the right to privacy was:

'...to protect individuals from unjustified state intrusions upon their privacy. That purpose requires a means of preventing unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place. This, in my view, can only be accomplished by a system of prior authorization, not one of subsequent validation. A requirement of prior authorization, usually in the form of a valid warrant, has been a consistent pre-requisite for a valid search and seizure both at common law and under most statutes. Such a requirement puts the onus on the state to demonstrate the superiority of its interest to that of the individual. As such it accords with the apparent intention of the Charter to prefer, where feasible, the right of the individual to be free from state interference to the interests of the state in advancing its purposes through such interference.

I recognize that it may not be reasonable in every instance to insist on prior authorization in order to validate governmental intrusions upon individuals' expectations of privacy. Nevertheless, where it is feasible to obtain prior authorization, I would hold that such authorization is a precondition for a valid search and seizure.'

In *R. v. Collins,*[26] the Canadian Supreme Court suggested that in order to rebut the presumption of unreasonableness of a warrantless search, the Crown must establish that:

(1) that the search was authorized by law,
(2) that the law authorizing the search was reasonable, and

[25] James Stribopoulos, Sniffing Out the Ancillary Powers, Implications of the Dog Sniff Cases' (2009) 47 S.C.L.R. (2d) 35-52.
[26] [1987] 1 S.C.R. 265.

(3) that the manner in which the search was carried out was reasonable.

As the Discussion Paper notes, the Canadian case of *R v Plant*[27] is authority for the proposition that whether a search is reasonable will partly also turn on whether the individual had a reasonable expectation to privacy. In *R v Silveira,* the Court further considered the question in relation to searches of a person's dwelling. In assessing whether such a search was reasonable, Cory J suggested '*there is no place on earth where persons can have a greater expectation of privacy than within their "dwelling-house."*'[28]

In citing a line of authority developed from the English common law, the Canadian Supreme Court in *R v Mann*[29] suggested a 'pat down' search of a suspect without warrant would not infringe the right to privacy, or to be free from arbitrary detention, on the basis that the search is brief and does not impact significantly on the suspect. Iacobucci J stated:

'*...police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary. In addition, where a police officer has reasonable grounds to believe that his or her safety or that of others is at risk, the officer may engage in a protective pat-down search of the detained individual. Both the detention and the pat-down search must be conducted in a reasonable manner. In this connection, I note that the investigative detention should be brief in duration and does not impose an obligation on the detained individual to answer questions posed by the police.'*

Stribopoulos has noted of the Canadian authority's development of exceptions to the general rule that a search warrant should be obtained,

'The rationale behind these exceptions has been twofold: first, the privacy expectation involved and, second, the intrusiveness of the search power being considered. In cases where privacy expectations are high and the search power is quite intrusive, such as where state action would interfere with an individual's bodily integrity, the Supreme Court has indicated that even greater protections than those demanded by Hunter v. Southam are required. In contrast, where privacy expectations are diminished and the search power is not very intrusive, the Supreme Court has accepted as constitutional slight deviations from the reasonable and probable grounds standard.'

Similarly, in *Arizona v Grant*[30] the US Supreme Court confirmed the basic rule in *Katz v United States*[31] that '*searches conducted outside the judicial process, without prior approval by a judge or magistrates, as per se unreasonable under the Fourth Amendment — subject only to a few limited exceptions*.'. Similarly, the European Court of Human Rights in *Camezind v Switzerland*suggested the Court would be:

[27] [1993] 3 SCR 281
[28] [1995] 2 S.C.R. 297
[29] [2004] SCJ. No. 49
[30] 556 US 542 (2009)
[31] 389 U. S. 347, 357 (1967

'...particularly vigilant where, as in the present case, the authorities are empowered under national law to order and effect searches without a judicial warrant.'[32]

In that case, a search of a house without warrant was reasonable, as the search was very narrow and was restricted to seeing whether TV and telephone sets complied with regulatory requirements. Consistent with this reasoning, in *Funke v France*[33], the Court found Article 8 of the European Convention had been breached when a full search by a senior customs official of a person's home took place without a judicially approved warrant.

We suggest that these authorities state a clear presumption that all police searches of the person, vehicle or dwelling must be by pre-approved judicial warrant. However, where obtaining such a warrant is not feasible, the search may proceed, but only on the basis of a reasonable belief. We submit that the legislation should explicitly include the requirement that the obtaining of a warrant was not feasible. This is already alluded to in some of the sections identified in the Discussion Paper, for example s.188 of the *Drugs of Dependence Act 1989*. The reasonableness of proceeding without a warrant will also be determined by the person's reasonable expectations of privacy. It is therefore likely that a pat-down search of a person in a public place (on the basis of a reasonable belief) without a warrant will be reasonable, as opposed to a search of a person's private dwelling without a warrant. Searches involving the most minimal of invasion may justify an officer seeking to pat down a person without a warrant, based only on 'reasonable suspicion,' but we would submit this would be a very limited exception.

Concealment of Knives

We also note the discussion on page 60 of the Discussion Paper in relation to the s.193 of the *Crimes Act 1900* which refers to a specific power of police to search a person if they have reasonable suspicion that the person is carrying a knife. We suggest that this should also be changed to 'reasonable belief,'[34] and that the same rationale above for searches without warrants are applicable to this section. We accept that where an officer has a reasonable belief that a person is carrying a knife, obtaining a search warrant will not be feasible. The Canadian authorities also make clear pat down searches in such circumstances are likely to be reasonable.

We also note that this provision uniquely refers to the person being in a public place or '*on school grounds'.* As it appears that children and young people are targeted by this provision, consistent with general response to searching, we would suggest an added requirement be added to this section, whereby a person under 18 years of age can only be searched in the presence of an adult who is not a police officer.

Major Events Security Act

Additionally, the Discussion Paper notes that the *Major Events Security Act 2000* provides police the power to search people in the absence of any reasonable suspicion that an offence has been or will be committed if an event is declared a 'major event'. This is a similar power to that granted by the Victorian *Summary Offences and Control of Weapons*

[32] (1999) 28 EHRR 458
[33] (1993) 16 EHRR 297
[34] In *R v Mann* the Canadian Supreme Court did refer to a 'reasonable suspicion' test.

Acts Amendment Act 2009, which provides police the power to randomly search people within 'designated areas'. As such, we would submit that sections 9 and 10 of the Major Events Act raises all the same human rights issues and may similarly be a disproportionate limitation on rights. The Victorian Scrutiny of Acts and Regulations Committee felt that the Victorian Bill was incompatible with the rights to privacy (s.12 of the ACT HR Act) and protection of the child (s.11). It may also constitute arbitrary detention under s.18 of the HR Act on the basis of the above international authorities. A key difference may be that the ACT Act applies only to major events, which are held within pre-defined restricted areas requiring ticketed entry. The large numbers of people mixing in one area may make it impractical for police to search individuals in their usual manner.

Nonetheless, whilst the Discussion Paper suggests that the Government is not minded to amend this Act, we submit that the later passage of the HR Act means that the proportionality of the provisions of the Major Events Act in relation to searching should at least be considered further.

Questions relating to use of animals by police
54. Should the ACT legislate for the use of animals by police?
55. Should the legislation be crafted in general terms (i.e. assistance in lawful execution of duties) or should it apply only in specific circumstances?
56. What specific circumstances, if any, should be legislated for?
57. Should the use of drug detection dogs be specifically legislated for?
58. Should the use of horses for crowd control be specifically legislated for?
59. Should harming or killing a police dog or horse be an aggravated offence that carries a period of imprisonment of greater than 2 years?

The Commission would welcome draft legislation clearly outlining the use of animals by police so that their use can be further examined. As part of this, we do not foresee difficulties with specific offences to protect animals from being hurt in assisting police, provided that these measures are proportionate.

We have not had time to consider the human rights issues of the use of animals in detail, but are aware of the use of drug detection dogs at the AMC and would suggest that legislation regulating their use by police would raise the questions of 'reasonable belief' and 'reasonable suspicion', and the use that may be made of information resulting from the use of the dogs. For example, whether is it reasonable for a person's car to be searched if drug detection dogs have detected drugs on their person when they are attempting to visit someone at the AMC? A further question would be who would perform this function – presumably police rather than corrections officials?

As outlined above, the Canadian Supreme Court recently dealt with some of these questions in *R v Kang-Brown and R v M(A).* [35]

[35] *R v Kang-Brown* [2008] 1 SCR 456 and *R v M (A)* [2008] 1 SCR 569

Questions relating to search warrants

61. Should a mechanism for the oversight of the application and issue of search warrants, such as the mechanism in the Surveillance Devices Act 2004 (Cwlth), be included in the legislation?

We agree with the Discussion Paper's argument that there should be an oversight mechanism for all warrants issued, based on the model already developed for the *Surveillance Devices Act 2004.*

62. Should the ACT Chief Police Officer be authorised under the Crimes (Surveillance Devices) Bill 2010 to allow the use of tracking devices without warrant for serious offences?

In relation to the *Crimes (Surveillance Devices) Act 2010,* which we note is now in force, the Commission has concerns that the current regime allows emergency applications to be made to the Chief Executive for the use of a surveillance device when there is imminent risk of serious violence or serious damage to property. The fact such applications can be approved by a non-judicial officer is clearly contrary to the human rights jurisprudence cited above in relation to the issuing of warrants generally. Most particularly *Funke v France* in which the European Court stated,

'Above all, in the absence of any requirement of a judicial warrant, the restrictions and conditions provided for in law, which were emphasised by the government, appear too lax and full of loopholes for the interferences in the applicant's right to have been strictly proportionate to the legitimate aim pursued.'[36]

We accept that the facts of that case concerned a search of a private dwelling, but a number of the devices contemplated in the Bill are akin to such searches, including, for example, an audio or video surveillance device. Whilst an imminent risk of serious violence might justify an emergency non-judicial warrant, we are concerned that a non-judicial warrant may also be granted where there is only a threat of damage to property. This appears to be an unreasonable limitation on the right to privacy. This is particularly so as there appears to be adequate access to judicial officers out of hours in our small jurisdiction. Professor Bronitt has questioned whether this is appropriate:

> *In several respects, the present laws governing electronic surveillance in Australia fail to provide adequate protection for individual privacy and thus may constitute an arbitrary interference with privacy contrary to Article 17 of the ICCPR. As the European Court indicated in a case examining the legality of customs searches under Art 8, the proportionality question is most effectively addressed through a warrant procedure… Warrantless surveillance can take several forms. In situations of emergency, the relevant legislation may dispense with the requirement of a warrant or prior authorisation.*[37]

[36] (1993) 18 EHRR 297.
[37] Simon Bronitt, Electronic Surveillance, Human Rights, and Criminal Justice (1997) 3 AJHuman Rights 183.

Professor Bronitt suggests that issues like the notification to non-suspected persons of their inadvertent surveillance, compensation for unjustified violations of privacy and the rights of individuals to challenge such warrants must also be considered. Professor Bronitt has also questioned whether listening devices disproportionately limit the right to fair trial and right to remain silent (s.21).

The Discussion Paper is silent on these questions, but does propose that the non-judicial approval of warrants be extended to tracking devices in non-emergency situations. We have not had the opportunity to consider this suggestion in detail, but note the argument from the police that a tracking device does not impinge on a person's privacy to the same extent as other devices. The authorities we have identified in relation to the need for warrants generally certainly include this as a relevant factor. However, so too is the feasibility of obtaining a warrant and we would suggest that where police have the time and opportunity to seek such a warrant, this should occur.

Finally, we have concerns with the threshold currently contemplated in the legislation for assessing the appropriateness of issuing such warrants. The New Zealand *Crimes Act 1961* requires that a Judge can only issue a warrant for the interception of private communications if there is a 'reasonable belief' of a crime taking place. This covers a range of crimes including violence offences and threats to property. For example, even in relation to terrorism offences, the risk of which may proportionately limit rights to a greater degree than other criminal offences, s.312CC states:

> *(1) An application may be made to a Judge of the High Court for a warrant for any constable to intercept a private communication by means of an interception device if there are reasonable grounds for believing—*
> *(a) that a terrorist offence has been committed, or is being committed, or is about to be committed; and*
> *(b) if the offence has yet to be committed, that the use of an interception device to intercept private communications is likely to prevent its commission; and*
> *(c) that it is unlikely that without the granting of such a warrant the Police investigation of the case can be brought to a successful conclusion or, as the case may be, the commission of the offence can be prevented.*

A similar threshold has been included in the Search and Surveillance Bill 2009 recently introduced in New Zealand, which has been criticised on human rights grounds. Nonetheless, s.46 requires that for a Judge to issue a surveillance device, there are reasonable grounds:

a) *to suspect that an offence has been committed or is being committed, or will be committed in respect of which this Act or any relevant enactment authorises an enforcement officer to apply for a search warrant; and*
b) *to believe that the proposed use of the surveillance device will obtain information that is evidential material in respect of the offence.* [38]

[38] We understand this still remains before the NZ Parliament.

The existing threshold in the New Zealand *Crimes Act* and even the lesser threshold proposed in the new NZ Search and Surveillance Bill would appear to place a higher threshold that is currently included in the ACT *Crimes (Surveillance Devices) Act 2010*.

It also appears that the relevant United Kingdom legislation governing surveillance equipment, including the *Regulation of Investigatory Powers Act 2000* ('RIP Act') requires a threshold of reasonable belief before a search warrant will be issued. The United Kingdom has different rules around the use of such information (i.e. it is not usually admissible) and so is not directly comparable but it still refers to a 'belief'.

Given the nature of the surveillance equipment included in the ACT *Crimes (Surveillance Devices) Act*, it is likely to be used in situations where individuals would have a reasonable expectation of privacy. In particular, data and optical surveillance devices have the potential to impact upon an individual's privacy to a great degree. While the intrusion of privacy is one matter a judicial officer must consider under the Bill before issuing a warrant, the threshold of 'suspicion or belief' is also critical. We consider that 'reasonable belief' rather than 'reasonable suspicion' should be the appropriate standard.

63. Should a magistrate be able to issue an 'assistance order' for search warrants involving computers or data storage devices?

We have not had the opportunity to consider this question at length, but note that little rationale is included in the Discussion Paper to justify the creation of such an order. Prima facie it appears a clear limitation on the right against self-incrimination (s.22 of the HR Act).

Questions relating to the power of arrest

64. Is 'reasonable suspicion' or 'reasonable belief' the appropriate threshold for the police power of arrest?

As the Discussion Paper recognises, many of the same considerations and human rights jurisprudence applies to the question of reasonable belief versus reasonable suspicion in relation to searches discussed above also apply to the question of arrest. Whilst Article 5 of the European Convention refers to 'reasonable suspicion' for arrest, as the Discussion Paper notes, Article 9 of International Covenant on Civil and Political Rights was the basis for s.18 of the ACT *Human Rights 2004*. Section 18 prevents against arbitrary detention. Neither Article 9 or s.18 of the HR Act refer to 'reasonable suspicion'. Further, as the Discussion Paper notes, the British Government has legislated that 'reasonable belief' is the appropriate threshold for arrest.[39] On this basis, we maintain that reasonable belief is the appropriate threshold for an officer to arrest without warrant.

65. Are the matters listed in the Crimes Act 1900, s.212(1)(b) that guide whether a police officer should proceed by summons or arrest adequate?

The human rights jurisprudence in this area suggests that police should operate by way of warrant unless to do so is not feasible and is reasonable. Reasonableness will depend on the

[39] See s.24(4) of the *Police and Criminal Evidence Act 1984.* We note that s.1 of this Act does however refer to 'reasonable suspicion' in relation to powers to stop and search.

circumstances, and particularly on the person's reasonable expectations of privacy. Further, as the Discussion Paper notes, international precedents suggest detention will be arbitrary not only where it is against the law, but where it includes elements of inappropriateness, injustice and lack of predictability. Taking into account these precedents, the list at s.212(1)(b) appears reasonable.

Questions relating to arrest for domestic violence offences
66. Should the threshold for the arrest of a person alleged to have committed a domestic violence offence include additional criteria?

We understand the historic basis for this provision and share concerns about the safety of those who are victims of domestic violence. However, we are also concerned about the arbitrary nature of this provision in its current form and the fact that concerns which existed when the provision was enacted may no longer be present. The Discussion Paper cites the Canadian authority of *R v Hufsky*[40] for the proposition that a power of arrest without any criteria will be arbitrary. We understand that other human rights jurisdictions with domestic violence intervention programmes, such as Canada and the United Kingdom, have not enacted similar provisions. We are also concerned of the situation where people with disability or children and young people may be needlessly arrested because of the lack of criteria in s.212.

We question whether a way of mitigating this but retaining protection for potential victims would be to include relevant criteria, being chiefly that proceeding by way of arrest will 'preserve the safety or welfare of a person.'

Questions relating to police powers of seizure
67. Are police powers of seizure adequate?

We are unable to comment based on the limited information in the Discussion Paper.

68. Should legislation provide for compensation for property damages caused in the course of police entry and search for evidence relating to an offence?

We would agree that where substantial damage is done to property in a situation where a person is not charged or convicted, there should be an opportunity for compensation to be paid for that damage.

69. Are provisions for the destruction of abandoned, illegal goods or hazardous goods adequate?

We are unable to comment in detail based on the limited information in the Discussion Paper. For example, the Discussion Paper suggests that large quantities of hazardous substances currently cannot be destroyed because to do so would 'harm the prosecution's case'. Such legislation allowing evidence to be destroyed appears to unreasonably prejudice the defendant, but an opportunity could be given to the defendant to take a sample.

[40] [1988] 1 SCR 612.

However, we would require more information on how such a regime might work before we could consider the human rights implications of such a proposal.

Questions relating to crime scenes

70. Should the ACT adopt crime scene provisions similar to those in New South Wales and Queensland?

We agree in principle to such powers, subject to how they are implemented. For example, how a crime scene is defined, what threshold an officer would have to meet to establish a crime scene (eg reasonable suspicion or belief) and what impact such powers would have on individuals, particularly in public places. It appears that the Queensland model, based on a specific crime scene warrant which must be sought as soon as is practical, may involve a reasonable limitation on any rights engaged.

Questions relating to forensic procedures legislation

71. Should the provisions in the Crimes Act 1900 and the Crimes (Forensic Procedures) Act 2000 that apply to the same forensic procedures be amended?

To the extent that provisions of the Crimes Act and the Crimes (Forensic Procedures Act 2000) (FP Act) overlap, we agree that it may be preferable to streamline these provisions into a single consistent regime regulating forensic procedures. It is important that in consolidating these provisions that where levels of protection differ across regimes, the highest level of protection for human rights should be maintained.

72. Which of the three options (discussed at 8.3) relating to reform of the statutory framework for forensic procedures is preferable?

While we do not have a preference for a particular option, it is important that any scheme provides appropriate safeguards and criteria for different classes of forensic procedures and data. Although all forensic procedures potentially impact upon the right to privacy, some forensic procedures and the retention of data from those procedures have a particularly significant impact on this right. Thus the European Court of Human Rights has drawn a distinction between fingerprints which contain relatively limited information, and cellular samples and DNA profiles which contain a much greater range of personal information. [41] Cellular samples reveal a great range of information about a person's health and genetic makeup, while DNA profiles may reveal information such as ethnicity and familial relationships. It is thus vital that any scheme ensures greater protection and safeguards for procedures and data that place more serious limitations on human rights.

73. Should it be necessary for police to obtain consent from a suspect, or the suspect's guardian or parent, to conduct forensic procedures?

[41] *Van der Velden v the Netherlands*, no. 29514/05 ECHR 2006; *Case of S.and Marper v the United Kingdom*, nos. 30562/04 and 30566/04 ECHR 2008. See also generally the Canadian case of *R. v. Rodgers*, [2006] 1 S.C.R. 554, 2006 SCC 15.

In our view the requirement to seek a suspect's informed consent to a forensic procedure at the initial stage should be maintained. Section 10(2) of the HR Act provides that no one may be subjected to medical treatment without their free consent. While further action may be initiated under the FP Act if the suspect refuses consent, the requirement to request consent is important as it enshrines respect for the rights of the individual and minimises any limitation on this right. For the concept of informed consent to have true meaning, however, it is important that the person understands the full implications of this decision. While there is provision under s.23WF(2)(b) and (c) for specified written and verbal information to be provided, it is vital that the information is presented in a format that is clear and easily understood, and that suspects are able to access independent advice regarding this decision. [42] Section 23WF(2)(d) provides that the suspect should have a reasonable opportunity to communicate or attempt to communicate with a legal adviser. However, it is not clear whether suspects would be able to easily access legal advice regarding this decision while in custody, particularly after business hours. In our view it would facilitate the obtaining of informed consent if suspects were able to access free legal advice on this issue (for example from the Legal Aid Commission), and if the forensic procedure could be delayed, where there is no risk of evidence being lost or contaminated, until the suspect has had the opportunity to seek such legal advice if they wish.

74. Should the police be permitted to enter premises and arrest a serious offender in order to facilitate the carrying out of forensic procedures?

We accept that there is an anomaly in the current situation under the FP Act where, in the case of a suspect, the court may issue a warrant for entry and arrest to allow a forensic procedure to be carried out, but in the case of a serious offender, can only issue such a warrant for the conduct of an intimate forensic procedure. We share the concern noted in the Discussion Paper that this may encourage police to seek authorisation for more invasive procedures in order to allow entry and arrest, which would not amount to a proportionate limitation on the right to privacy. In our view it would not be appropriate for police to be given power to authorise entry and arrest of serious offenders, which is a very grave limitation on an individual's right to privacy and family life. Authorisation for entry and arrest should require a court warrant to ensure that this power is not used unnecessarily.

75. How should the drafting inconsistencies identified in paragraph 8.2.4 be rectified?

We consider that the wording in s.77(1) of the FP Act which contemplates a court ordering a person to 'consent' to a forensic procedure is problematic, and is inconsistent with the concept of 'free consent' to medical treatment in s.10(2) of the HR Act. Where the court is in fact authorising an involuntary forensic procedure to be carried out, ie regardless of the wishes of a person, this should be made explicit.

[42] See further the discussion of the need for plain English information in the Report of the NSW Ombudsman: *DNA sampling and other forensic procedures conducted on suspects and volunteers under the Crimes (Forensic Procedures) Act 2000*, at p72.

76. In relation to the carrying out of forensic procedures by police on serious offenders, is the current test of 'justified in all the circumstances' appropriate?

An important aspect of the right to private life is that any limitation on this right must be authorised by law, and must not be arbitrary. We are concerned that the general test requiring that a request to a serious offender to undergo a forensic procedure must be 'justified in all the circumstances' provides too little guidance as to the factors to be taken into account by police. There is thus a risk that this highly discretionary test could be applied in a way that is arbitrary. I note that the serious offender provisions cannot be used if the person is a suspect in relation to a particular crime (as in such cases the provisions relating to suspects apply), and thus only apply where the material is obtained on a speculative basis for matching to past or future crimes. If, as the Discussion Paper suggests, the objective of these provisions is to target offenders statistically likely to commit further crimes of the same nature (such as violent or sexual crimes), then these criteria should be made explicit in the legislation.

77. Should the provisions relating to people volunteering for forensic procedure be reviewed?

In our view the provisions of the FP Act relating to volunteers raise serious human rights concerns and should be reviewed. Where a person is neither a suspect in relation to an offence, nor a serious offender, but submits to a forensic procedure voluntarily, it is vital to ensure that the person gives fully informed consent to the procedure, and to the uses that may be made of the data obtained from that procedure. We are concerned that under the present scheme, the police rather than the volunteer decide whether the data will be stored on the limited purpose index or the unlimited purposes index, given that the statistics suggest that overwhelmingly volunteer data is stored on the unlimited purposes index. Volunteers (including victims) are likely to be focused on assisting police to investigate a particular crime and may accede to the police request without fully appreciating the consequences of this decision. A volunteer is unlikely to realise that if their information is stored on the unlimited purposes index it may be used as evidence against them in relation to other offences. It is concerning that a volunteer has less protection than a suspect in a crime, whose data must be destroyed if they are not convicted of the offence. Although there is provision for a volunteer to withdraw consent for the retention of the information, this requires a positive action on behalf of the volunteer, who may not appreciate the significance of its retention. Volunteers may not be prompted to retract consent until the information links them to a crime, and at that stage the withdrawal of consent is likely to be overridden by a court order.

In our view these provisions should be amended to ensure that information obtained from a volunteer should be stored only on the limited purpose index unless the volunteer specifically requests that the information be stored for an unlimited purpose. The legislation should also prescribe a time limit for the storage of volunteer information, unless a court order is obtained to extend this time.

78. Should Crimes (Forensic Procedures) Act 2000, section 84 be expanded to encompass all offences as opposed to only serious offences?

Section 84 of the FP Act provides that a Magistrate may authorise the retention of forensic information provided by a volunteer after the volunteer has withdrawn consent, in certain circumstances where the information may have probative value in relation to a serious offence. In our view, as discussed above, there should be greater protection for the rights of volunteers who submit to a forensic procedure to assist police to investigate a particular offence. The expansion of the power to authorise retention of information where a volunteer has withdrawn consent would weaken the safeguards available for volunteers. Although the Discussion Paper suggests that retention of information against the wishes of the volunteer may important in cases such as domestic violence offences, it appears that many domestic violence offences including assault occasioning actual bodily harm would already fall within the definition of a serious offence in s.9 of the FP Act, and would not justify the further erosion of the rights of volunteers.

79. Should the court's powers to authorise retention of forensic materials following the withdrawal of a volunteer's consent be broadened in respect of all or specific categories of offence?

As discussed above, there is no clear justification for broadening the courts powers to override the withdrawal of consent by a volunteer.

80. Are the provisions relating to the destruction of forensic materials and the retention of identifying information satisfactory?

In the case of *S. and Marper v the United Kingdom,* the European Court of Human Rights found that the 'blanket and indiscriminate' retention of cellular samples and DNA profiles of suspects after they had been acquitted or proceedings discontinued violated the right to privacy under Article 8 of the European Convention. In contrast to the UK regime, the FP Act provides protection for suspects by requiring the destruction of materials and identifying information where the suspect is acquitted, or proceedings against them are discontinued.

Nevertheless, it appears that there may be a possible lacuna in protection for suspects under s.98A of the FP Act where a sample is taken from one suspect in relation to an offence, but proceedings in relation to that offence are commenced against another person. In such a case, the suspect will not be acquitted and the proceedings may not be discontinued, so the automatic destruction provision under s.98A may not apply. This could be clarified by amending s.98A(2)(b) as follows to refer to a proceeding 'against the suspect' for an offence to which the forensic material relates, eg:

> (2) If—
> (a) 1 year has elapsed since the forensic material was taken; and
> (b) a proceeding **against the suspect** for an offence to which the forensic material relates has not been begun or has been discontinued;

the identifying information must be removed from the ACT DNA database unless a warrant for the apprehension of the suspect has been issued.

81. Should the "same sex" requirements be amended to increase the circumstances in which a person carrying out or helping carry out a forensic procedure is subject to the "if practicable" proviso?

We have concerns about the reduction of the 'same sex' requirement for some forensic procedures such as (non self-administered) buccal swabs and hair plucking, which involve touching of the body. Although the Discussion Paper suggests that these procedures are no more intimate than taking blood samples or dental impressions, our understanding is that these latter procedures would be undertaken by health professionals rather than police officers. We are concerned that the conduct of non self-administered buccal swabs or hair plucking, which would normally be conducted where the subject does not consent (as opposed to the normal buccal swab which is self-administered) may be more intimidating for a female where undertaken by male police officers. Such procedures may be of particular concern to women of certain cultures, such as Muslim women. It is possible that the conduct of these procedures using force by an opposite sex officer may amount to inhuman or degrading treatment (s.10(1)(b)), or may breach the right to equality (s.8). In our view these protections should be maintained unless there is a very clear justification for their removal.

82. Should police be permitted to use photo-board identification if they are unable to identify sufficient participants for an identification parade?

While the use of photo-board identification may assist police where there are insufficient similar participants for an identification parade, the issue is not clear cut. At present we understand that suspects have the right to refuse to participate in an identification parade, and it appears that photo boards might be used to circumvent this lack of consent. Any change in this area would require careful consideration of the justification for photo boards, and evidence about the accuracy of photo identification, as opposed to live or video identification.

19 July 2010

actlawsociety

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Dear Mr. Martin,

RESPONSE TO REVIEW OF POLICE CRIMINAL INVESTIGATIVE POWER DISCUSSION PAPER

Thank you for the opportunity to make a response on the Review of Police Criminal Investigative Power Discussion Paper. The paper was referred to the Society's Criminal Law Committee and in relation to the discussion paper questions, the following responses in terms of principle are made:

Single piece of legislation

The location of powers in single piece of legislation is supported on the basis that this is the best way to provide both clarity and coherence in relation to investigative powers. However, the recent tendency of the legislature to develop highly complex legislation as a replacement for relatively simple legislation (eg The Children and Young Persons Act) ought not be repeated.

Crimes Act 1914 safeguards

The Part 1C safeguards are supported as generally appropriate in their manner of operation. The development of widely divergent provisions for the ACT is not supported, on the basis that this is more likely to lead to confusion in instances where both Territory and Commonwealth offences are involved. However, one aspect that ought to be the subject of change is the imperative to caution. In part 1C the caution becomes mandatory for a person under the extended definition of arrest. This ought be extended further to questioning where the officer has formed a suspicion that the person may have committed an offence.

However, it is recommended that the operation of Part 1C be clearly applicable to all summary offences, including those punishable by less than 12 months imprisonment.

Further, Part 1C protections ought to be extended to road transport offences, on the basis that road transport matters carry with them serious consequences in terms of the penalties that are available. The major points of application would be the recording of

admissions and the cautioning of suspects. The recording of admissions operates to the benefit of both the accused and the prosecuting authorities, by removing disputes as to the making of and terms of admissions. Given the ready need for police to have recording devices in any event this does not appear to be practically onerous. It ought be noted that the practice of NSW has recently changed to adopt the recording of conversations by Highway Patrol members.

Further, there appears no reason in principle to consider that a caution ought not be administered in road transport matters.

Treatment of detainees

An inadequacy of the treatment of detainees is the lack of mandatory provisions in respect of the provision of the opportunity to communicate. In particular the police ought to be placed under an obligation to notify a detainee of persons making enquiries about the detainee, and be furnished with the opportunity to provide information to those requesting information about the detainee.

Investigation periods

An inadequacy of the current regime is the almost invariable extension of investigation periods on request by the investigating officials. The frequency of extension is suggestive that this provision, designed to be protective in nature, is not being examined in a sufficiently robust manner. A lack of robust examination would conflict with the principles contained within the *Human Rights Act 2005.* It also appears to be the case that lip service is paid to the fact that the investigation period sets out the maximum and that there is an imperative to deal with suspects being held expeditiously rather than to the maximum length of the investigation period.

The extension of investigation periods ought be solely the domain of a Magistrate or Judge. The extension ought be subject to the qualification that it will only be provided in the context of special exigent circumstances, recognising that the deprivation of liberty without charge is an extreme imposition on a member of the community, requiring robust justification.

With the above qualification as to extension, the current time limits are appropriate.

Cautions

See previous response, including in relation to extension of the obligation to caution.

A further onus ought be placed upon the cautioning officer to ensure that the manner and circumstances of the giving of the caution are such as to make it reasonable to believe that the caution would have been understood. This is not an onerous imposition, but merely involves the police in having the caution explained back by the recipient. This is a process the police usually employ in any event in a recorded interview.

There is no necessity for a clarification of "not practicable". Given the widespread use of portable recording devices by the police, circumstances of "not practicable" would be both rare and readily identifiable in their individual circumstances.

Legal Practitioners

Refusal of contact with legal practitioners ought only be authorised by the rank of Superintendent or above. This ought only occur on the basis of the special exigent circumstances of the case as they relate to the protection of the public/investigation of the offence. The reasons ought be recorded and made available from the point of charging of the person.

No provision ought be made for down time in relation to waiting for legal advice. The basis for this is that failure on the part of an accused person to answer questions ought not be taken as a basis to extend the time that person is held before charging.

Interview friends

Provision ought to be made such that Aboriginals in custody are able to receive relevant advice from an ACT based service. A notification process which brings the taking of an aboriginal person into custody effectively to the attention of a relevant legal service is a necessary precursor to the receipt of such advice.

Mentally ill persons constitute a group of particular vulnerability, being persons less able to determine whether they ought to answer questions or seek legal advice. Such persons ought to be advised that a lawyer provided by legal aid is available by telephone to assist them, and that recourse to such will not lengthen the time that they are in custody.

Provision of information

See previous comments

Interpreters and consular officials

The provisions in relation to these matters are sufficient, save that advice to a suspect of such rights ought to be accompanied by advice that recourse to such cannot extend the time that the person will spend in custody prior to being charged.

Children and Young People

It is difficult to see a safe way to reduce the complexity of provisions regarding the investigation of a child.

Forensic procedures and part 1C

There is no reason to exclude forensic procedures from the operation of part 1C.

However, forensic procedures should not form a part of down time. The purpose of the investigation period is to allow investigation to take place. Forensic procedures do not justify a further extension of time per se.

Preventative action

The *Crimes Prevention Powers Act 1998* contains an appropriate limitation designed to protect peaceful assembly and association.

Search and stop without warrant

Reasonable belief is the more appropriate threshold. It is important that the use of such a power be limited to circumstances where there is information which due to its quality and content allows a rational determination that a state of affairs does in fact exist which necessitates a power to search without a warrant. Reasonable suspicion falls short of this threshold, requiring merely a state of mind that such affairs might exist.

The lower threshold is insufficient to justify a departure from the general principle that a person ought not be subjected to such a process absent a judicial determination as to its propriety.

Animals

No case has been put forward as to the need for specific legislation relating to police use of animals.

Further, it is difficult to conceive of a need for a particular offence provision in relation to police animals, in that it is difficult to conceive of circumstances where an offence against such an animal could warrant a term of greater than 2 years imprisonment.

Search warrants

The issue of warrants in the Territory is governed by too many different principles and pieces of legislation. A warrant involves a fundamental invasion of the rights of the individual, and is a process which requires both clarity of principle and clarity as to the obligations applicable to the granting of such.

The threshold for the issue of a warrant ought to be reasonable belief that evidential material will be obtained. A suspicion is an unfortunately amorphous concept, by which it may be considered reasonable to hold a suspicion under circumstances that the community would not accept as sufficient to allow a significant invasion of the individual's person or property. A reasonable belief need not be correct in order to justify the issue of a warrant, but does require material of such quality and cogency as to lead to a belief that there is present material of evidential value. If that level of satisfaction is not present, then it is contended that there is insufficient to justify such an invasion of the rights of the individual.

The comments contained at pages 76 – 78 of the discussion paper regarding oversight mechanisms are adopted. It is indeed the case that the issue of warrants is not subjected to sufficient systemic review to ensure that the powers are being exercised in an appropriate manner. The unavailability of information as to patterns of the issue of warrants deprives the community of any basis of determining whether such powers are being utilised properly.

In relation to the question of tracking devices, it is contended that the authorisation of such a technique ought to be a matter for a magistrate or judge, not for a police officer.

The concept of an assistance order is opposed on the basis that it involves a fundamental departure from the privilege against self incrimination. Requiring a person to undertake actions which demonstrate their familiarity with a system being used for criminal purposes is akin to requiring them to perform an incriminating demonstration. It is a fundamental and unfair departure from principle.

Arrest

For the reasons outlined above in relation to searches and warrants, the test ought to be reasonable belief rather than reasonable suspicion.

The criteria contained in s212(1)(b) are appropriate criteria in determining whether arrest is justified in addition to the formation of a reasonable belief that an offence has been committed.

Domestic violence

Properly understood and applied, the criteria outlined above are adequate to deal with domestic violence offences. Historically they have not been appropriately applied.

However, it is not conceded that a blanket pro arrest policy is appropriate either.

In this instance the legislative principles are sufficient and the more appropriate area for improvement is in the proper implementation of those principles (such as forming an adequate understanding of the need to take protective action in a domestic context).

Seizure powers

Police seizure powers are adequate. Where property is damaged as a result of a search it is appropriate that compensation be given to place the person back into the position they were in prior to the execution of the search.

Crime scenes

It is appropriate that police have the power to maintain a crime scene in order to properly process the scene for evidence. To this end it is appropriate that police have the power to establish and hold a crime scene for a period of 3 hours while a crime

scene specific warrant is obtained for the longer term dealing with the scene. It is agreed that a new form of warrant is necessary to cover such circumstances.

Forensic procedures

The provisions in relation to forensic procedures ought to be amalgamated into a single scheme. It is appropriate that the scheme contain specific provisions in relation to the retention of dna and fingerprint material. An acquitted person ought not have his or her dna or fingerprints retained on a database.

In relation to obtaining forensic material, the mechanisms should either be by consent or by court order. A police officer ought not be able to simply make a directive. The threshold for a court order ought, similarly to search and warrant provisions, be the test of reasonable belief that the obtaining of the sample will provide evidential material in relation to the offence.

Should you require any further information, please do not hesitate to contact me or the Chair of the Criminal Law Committee, Mr Michael Kukulies-Smith by emailing michael@kslawyers.com.au

Yours sincerely,

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20 July 2010

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Dear Mr Martin

The Australian Capital Territory Bar Association welcomes the opportunity to comment on the ACT Government's proposal titled *Review of Police Criminal Investigative Powers* and are pleased to provide the following submissions. In relation to the discussion paper questions, the following responses in terms of principle are made:

Single piece of legislation

The location of powers in single piece of legislation is supported on the basis that this is the best way to provide both clarity and coherence in relation to investigative powers. However, the recent tendency of the legislature to develop highly complex legislation as a replacement for relatively simple legislation (eg The Children and Young Persons Act) ought not be repeated.

Crimes Act 1914 safeguards

The Part 1C safeguards are supported as generally appropriate in their manner of operation. The development of widely divergent provisions for the ACT is not supported, on the basis that this is more likely to lead to confusion in instances where both Territory and Commonwealth offences are involved. However, one aspect that ought to be the subject of change is the imperative to caution. In part 1C the caution becomes mandatory for a person under the extended definition of arrest. This ought be extended further to questioning where the officer has formed a suspicion that the person may have committed an offence.

However, it is recommended that the operation of Part 1C be clearly applicable to all summary offences, including those punishable by less than 12 months imprisonment.

Further, Part 1C protections ought to be extended to road transport offences, on the basis that road transport matters carry with them serious consequences in terms of the penalties that are available. The major points of application would be the recording of admissions and the cautioning of suspects. The recording of admissions operates to the benefit of both the accused and the prosecuting authorities, by removing disputes as to the making of and terms of admissions. Given the ready need for police to have recording devices in any event this does not appear to be practically onerous. It ought be noted that the

practice of NSW has recently changed to adopt the recording of conversations by Highway Patrol members.

Further, there appears no reason in principle to consider that a caution ought not be administered in road transport matters.

Treatment of detainees

An inadequacy of the treatment of detainees is the lack of mandatory provisions in respect of the provision of the opportunity to communicate. In particular the police ought to be placed under an obligation to notify a detainee of persons making enquiries about the detainee, and be furnished with the opportunity to provide information to those requesting information about the detainee.

Investigation periods

An inadequacy of the current regime is the almost invariable extension of investigation periods on request by the investigating officials. The frequency of extension is suggestive that this provision, designed to be protective in nature, is not being examined in a sufficiently robust manner. A lack of robust examination would conflict with the principles contained within the *Human Rights Act 2005.* It also appears to be the case that lip service is paid to the fact that the investigation period sets out the maximum and that there is an imperative to deal with suspects being held expeditiously rather than to the maximum length of the investigation period.

The extension of investigation periods ought be solely the domain of a Magistrate or Judge. The extension ought be subject to the qualification that it will only be provided in the context of special exigent circumstances, recognising that the deprivation of liberty without charge is an extreme imposition on a member of the community, requiring robust justification.

With the above qualification as to extension, the current time limits are appropriate.

Cautions

See previous response, including in relation to extension of the obligation to caution.

A further onus ought be placed upon the cautioning officer to ensure that the manner and circumstances of the giving of the caution are such as to make it reasonable to believe that the caution would have been understood. This is not an onerous imposition, but merely involves the police in having the caution explained back by the recipient. This is a process the police usually employ in any event in a recorded interview.

There is no necessity for a clarification of "not practicable". Given the widespread use of portable recording devices by the police, circumstances of "not practicable" would be both rare and readily identifiable in their individual circumstances.

Legal Practitioners

Refusal of contact with legal practitioners ought only be authorised by the rank of Superintendent or above. This ought only occur on the basis of the special exigent circumstances of the case as they relate to the protection of the public/investigation of the offence. The reasons ought be recorded and made available from the point of charging of the person.

No provision ought be made for down time in relation to waiting for legal advice. The basis for this is that failure on the part of an accused person to answer questions ought not be taken as a basis to extend the time that person is held before charging.

Interview friends

Provision ought to be made such that Aboriginals in custody are able to receive relevant advice from an ACT based service. A notification process which brings the taking of an aboriginal person into custody effectively to the attention of a relevant legal service is a necessary precursor to the receipt of such advice.

Mentally ill persons constitute a group of particular vulnerability, being persons less able to determine whether they ought to answer questions or seek legal advice. Such persons ought to be advised that a lawyer provided by legal aid is available by telephone to assist them, and that recourse to such will not lengthen the time that they are in custody.

Provision of information

See previous comments

Interpreters and consular officials

The provisions in relation to these matters are sufficient, save that advice to a suspect of such rights ought to be accompanied by advice that recourse to such cannot extend the time that the person will spend in custody prior to being charged.

Children and Young People

It is difficult to see a safe way to reduce the complexity of provisions regarding the investigation of a child.

Forensic procedures and part 1C

There is no reason to exclude forensic procedures from the operation of part 1C.

However, forensic procedures should not form a part of down time. The purpose of the investigation period is to allow investigation to take place. Forensic procedures do not justify a further extension of time per se.

Preventative action

The *Crimes Prevention Powers Act 1998* contains an appropriate limitation designed to protect peaceful assembly and association.

Search and stop without warrant

Reasonable belief is the more appropriate threshold. It is important that the use of such a power be limited to circumstances where there is information which due to its quality and content allows a rational determination that a state of affairs does in fact exist which necessitates a power to search without a warrant. Reasonable suspicion falls short of this threshold, requiring merely a state of mind that such affairs might exist.

The lower threshold is insufficient to justify a departure from the general principle that a person ought not be subjected to such a process absent a judicial determination as to its propriety.

Animals

No case has been put forward as to the need for specific legislation relating to police use of animals.

Further, it is difficult to conceive of a need for a particular offence provision in relation to police animals, in that it is difficult to conceive of circumstances where an offence against such an animal could warrant a term of greater than 2 years imprisonment.

Search warrants

The issue of warrants in the Territory is governed by too many different principles and pieces of legislation. A warrant involves a fundamental invasion of the rights of the individual, and is a process which requires both clarity of principle and clarity as to the obligations applicable to the granting of such.

The threshold for the issue of a warrant ought to be reasonable belief that evidential material will be obtained. A suspicion is an unfortunately amorphous concept, by which it may be considered reasonable to hold a suspicion under circumstances that the community would not accept as sufficient to allow a significant invasion of the individual's person or property. A reasonable belief need not be correct in order to justify the issue of a warrant, but does require material of such quality and cogency as to lead to a belief that there is present material of evidential value. If that level of satisfaction is not present, then it is contended that there is insufficient to justify such an invasion of the rights of the individual.

The comments contained at pages 76 – 78 of the discussion paper regarding oversight mechanisms are adopted. It is indeed the case that the issue of warrants is not subjected to sufficient systemic review to ensure that the powers are being exercised in an appropriate manner. The unavailability of information as to patterns of the issue of warrants deprives the community of any basis of determining whether such powers are being utilised properly.

In relation to the question of tracking devices, it is contended that the authorisation of such a technique ought to be a matter for a magistrate or judge, not for a police officer.

The concept of an assistance order is opposed on the basis that it involves a fundamental departure from the privilege against self incrimination. Requiring a person to undertake actions which demonstrate their familiarity with a system being used for criminal purposes is akin to requiring them to perform an incriminating demonstration. It is a fundamental and unfair departure from principle.

Arrest

For the reasons outlined above in relation to searches and warrants, the test ought to be reasonable belief rather than reasonable suspicion.

The criteria contained in s212(1)(b) are appropriate criteria in determining whether arrest is justified in addition to the formation of a reasonable belief that an offence has been committed.

Domestic violence

Properly understood and applied, the criteria outlined above are adequate to deal with domestic violence offences. Historically they have not been appropriately applied.

However, it is not conceded that a blanket pro arrest policy is appropriate either.

In this instance the legislative principles are sufficient and the more appropriate area for improvement is in the proper implementation of those principles (such as forming an adequate understanding of the need to take protective action in a domestic context).

Seizure powers

Police seizure powers are adequate. Where property is damaged as a result of a search it is appropriate that compensation be given to place the person back into the position they were in prior to the execution of the search.

Crime scenes

It is appropriate that police have the power to maintain a crime scene in order to properly process the scene for evidence. To this end it is appropriate that police have the power to establish and hold a crime

scene for a period of 3 hours while a crime scene specific warrant is obtained for the longer term dealing with the scene. It is agreed that a new form of warrant is necessary to cover such circumstances.

Forensic procedures

The provisions in relation to forensic procedures ought to be amalgamated into a single scheme. It is appropriate that the scheme contain specific provisions in relation to the retention of dna and fingerprint material. An acquitted person ought not have his or her dna or fingerprints retained on a database.

In relation to obtaining forensic material, the mechanisms should either be by consent or by court order. A police officer ought not be able to simply make a directive. The threshold for a court order ought, similarly to search and warrant provisions, be the test of reasonable belief that the obtaining of the sample will provide evidential material in relation to the offence.

Yours sincerely

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President

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REVIEW OF POLICE CRIMINAL INVESTIGATIVE POWERS
April 2010

INTRODUCTION

This submission focuses on those police powers that primarily affect people who report offences to police either as victims or complainants or witnesses. The intention of the Review to ensure compliance of police powers with the ACT *Human Rights Act 2004* particularly as they affect suspects and accused persons is applauded. At the same time, I draw the attention of the Review to expand its conception of the application of human rights to the wider community. Police have a vital role in protecting the human rights of victims, complainants and witnesses.

The role of police within any community is to enforce the law, keep the peace and to prevent crime. This role is performed with the consent of the community. By in large this consent rests upon a consensus that the community as a whole has set the basic standards of social and personal behaviour and upholds these standards. It is when these standards are seen to have been breached that police may be called upon to intervene. At these times it is not solely the rights & interests of suspects that need to be considered.

Overall the Review appears to consider that the voluntary engagement of members of the community as victims, complainants and witnesses with police is unproblematic. This view appears to suggest that there are no rights made vulnerable nor issues arising in consequence of police and citizen interaction.

In the main this view holds true. Members of the community are well served by a professional and dedicated police service. However, particularly for some victims of crime, there are issues of police powers that do need to be considered within this Review.

COMMENTS

On the substantive question of the Review, I agree that consolidated legislation for police investigative powers within the ACT is sensible.

Part 1C
Treatment
This section discusses the issue of vulnerability of certain persons and the involvement of third parties, notably legal practitioners and interview friends, in protecting their interests as suspects or detainees. People who report crime to police and who may also have an intellectual impairment or who may have mental health problems are also particularly vulnerable. It is **recommended** that the Review also give consideration to extending

protective third party provisions to these people (Q12 also at 4.2.5). I address the importance of informing victims of their rights and of rights protecting entities later.

Investigative Period
I do not have the expertise to suggest particular time frames to enable police investigations. However, it is relevant to state that many people who have reported offences to police have expressed a view that an early and fulsome investigation by police militates against later problems. It would seem to be in the interests of both suspects and victims that there is sufficient time early in an investigation to enable this to happen. This point applies whether the suspect is an adult or juvenile.

Cautions & Admissions
There have been a number of matters brought to my attention where a person has admitted their conduct to police at the scene. This is particularly so in relation to family violence. However, it appears that such admissions are not drawn upon in evidence which causes much concern from victims.

The use of police cautions is an important component of police powers and particularly in matters involving young persons. However, it can appear that victims' interests, the harms they have experienced and the losses suffered are not prioritised. Police diversionary conferencing was particularly useful as a supplement to cautioning. It is **recommended** that consideration be given to strengthening provisions for conferencing as part of a caution.

Cautions should also be recorded formally on a person's record. This can protect victims in a number of ways. Firstly, should the offending occur again the suspect's history is recorded. Second, in other entitlements such as a victim application for financial assistance it is vital that some clear resolution of wrong-doing is recorded. Finally, a definition of a 'less serious offence' should be made.

Provision of Information (4.2.6)
It is **recommended** that members of the community who report offences against them as victims should be provided with information about sources of third party advice, assistance and support. This need becomes particularly acute where a juvenile is the suspect and the victim is a parent who may also be deemed to have parental responsibility.

Children & Young People
I concur with the proposition to simplify legislation on police powers as they relate to children & young people. In so doing, I **recommend** that the Review understands that, in relation to interpersonal violence in particular, the victims of such offences are also vulnerable children & young people.

Powers to Prevent Injury
Police powers to prevent injury or to protect a person are crucial to their role in protecting the community. The powers of entry are particularly important in situations of family violence or where a vulnerable person is at risk.

Breach of the peace can be a confusing concept in reality and at law. It is **recommended** that police powers on such options be included in ACT legislation.

Power of Search & Stop
It is **recommended** that 'reasonable suspicion' be the standard for powers of search & stop, and for a search warrant.

Power of Arrest
It is **recommended** that the threshold for the police power of arrest is 'reasonable suspicion'. The matters listed to guide officers in their decision whether to proceed by way of arrest or summons are adequate although the provision is confusing. If they meet one or more of the provisions, *should* they proceed by way of summons?

It is **recommended** that s.212(2) be retained as reasonable and proportionate, and subject to adequate protections for the exercise of an officer's discretion. This provision has been essential in supporting a sustained change in police practice that is evidence-based and appropriate to the circumstances of individual incidents. Further the three day training that officers receive under the FVIP should be considered mandatory in order to ensure full understanding of their responsibilities.

Forensic Procedures
It is **recommended** that the category of volunteers being the victim of crime be specified in the legislation. The reason for this recommendation being that, in the main victims are volunteers but they are within particular circumstances where the idea of 'voluntariness' is acutely circumscribed by the fact of victimisation, often in traumatic circumstances.

It is further **recommended** that the requirement for 'informed consent' be specified. The 'voluntariness' of a victim should always be understood with regard to the traumatic and particular circumstances of victimisation. How can a person fully know the consequences of consent in these circumstances? I concur with the comments noted on p103 and derived from the Sherman Report that, ultimately, the volunteer should have final say on the uses to which their forensic sample is put.

It is further **recommended** that forensic samples taken from volunteers who are victims be specified as a particular category within the limited purposes index of the NCIDD.

I **recommend** that the requirement be retained for a person of the same sex to take intimate forensic samples.

Robyn Holder
VICTIMS OF CRIME COORDINATOR
26th July 2010

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Review of Police Criminal Investigative Powers

The Domestic Violence Prevention Council (the Council) appreciates being provided with the opportunity to respond to the *Review of Police Criminal Investigative Powers Discussion Paper*. The Council is limiting our response to issues relating to 212 *'Power of arrest without warrant by police officers'* and more specifically to 212(2) *'Arrest without warrant for domestic violence offences'* – Question 66. The Council also briefly refers to Question 64 under our conclusion.

The Council believes that additional criteria for police to consider in relation to arrest in domestic/family violence incidents are not necessary, and could potentially result in a regression of response from ACT Policing. Specifically, the Council is concerned the ACT could regress to the situation that existed prior to the Community Law Reform Committee (CLRC) decision to create a specific power, 212(2). Prior to the implementation of pro-arrest, the ACT had the unenviable position of having the lowest arrest rate for domestic violence nationally – *'under utilisation by the police of the power of arrest in appropriate cases'*.

The Council was pleased to note that the Discussion Paper (p.93) acknowledges the evidence that Section 212(2) has been an integral part of the ACT's successful and award winning Family Violence Intervention Program (FVIP).

CLRC enquiries considered this concern and recognised that while there were matters that could be somewhat addressed in legislation; it was more than anything else the *enforcement* of the legislation that was at issue, rather than the legislation itself. These considerations drove the implementation of the Family Violence Intervention Program and the policies; procedures and legislation that underpin that Program.

The Council recognises that for some stakeholders, 212(2) is controversial and is considered by them to deny some people who are arrested on family violence charges their human rights. The Council is concerned that this particular representation of the issue is flawed. It does not consider the greatest violation of human rights in these circumstances, ie the right of victims of violence to live their lives free of violence and abuse in their own home.

The Council's view is that, generally speaking, human rights legislation is an important and positive step forward for governments across Australia. However, the Council has concerns that the enactment of legislation such as the *Human Rights Act 2004* (ACT) on its own is not sufficient to protect rights which are of importance to all people. The Council considers that the Act focuses on the rights in a defined way, which limits attention about human rights - for example, in the criminal justice system - on the rights of the accused person. This focus could serve to undermine the rights of other groups of people, including victims of domestic and family violence.

It is important to acknowledge at this point, the way in which traditional human rights constructs have served the interests of particular groups of people to the disadvantage of other groups of people. This point is elaborated below, but it is sufficient at this juncture to note that neither women nor the victims of crime have traditionally been served well by a human rights structure. The Council notes that domestic and family violence offences are predominantly perpetrated by men against women. This means that domestic and family violence is a particularly important example of the way in which both women and victims of violence have been 'left out' of the traditional rights based approaches.

The views of the Council can be applied in the federal context. The Council is supportive of a human rights framework, but considers that it is important to include a number of rights within that framework which specifically address the needs of people who may be disadvantaged by a more restrictive human rights regime. In the view of the Council, these people include victims of violence, especially victims of domestic and family violence. All people deserve to live free from violence, and in the view of the Council, it is important to recognise this as a human right.

In the ACT we have a 'young' police force. It is not uncommon for two relatively new officers to be required to attend domestic and family violence calls, well known as the most difficult and potentially dangerous type of calls police attend. ACT Policing Officers are required to attend three days of specific family violence training, possibly more than what is provided by other jurisdictions. The Council commends ACT Policing for its ongoing commitment for family violence response training.

Council recognises that the training ensures officers have the legislative foundation and through scenario based experiences, are provided with some practical application of working with family violence. We question though if it is indeed sufficient to effectively train young recruits to understand and work effectively with the complexities that are inherent in domestic and family violence and then deploy them to family violence incidents with limited experienced peer support. Council believes that exposure to and experience of working with family violence is what equips any service provider, not only police, in understanding the multitude of complexities. Attending officers' combined inexperience would certainly impact on decision making in these circumstances. This point is relevant as to why the Council is not supportive of additional criteria for police to consider; we think that the more complex the considerations are made, the more difficult it is for police to make the decision to arrest/not arrest.

Council acknowledges that from time to time an arrest is made perhaps inappropriately. However what must also be acknowledged is that the reverse also occurs. That is, officers fail to arrest where the circumstances called for an alleged offender to be arrested. These incidents will often not end up in court and therefore are incidents that stakeholders concerned about the human rights of the accused person do not encounter. In such situations, it could be argued that victims of domestic violence have already had their human rights violated, but in a way that remains invisible to the law enforcement system.

Council understands that the arrest rate is currently about 45% (averaged over six months) of the total number of family violence incidents. The Council thinks this highlights the use of officer discretion – there is clearly a significant perceived grey area between 212(2) powers and actual arrest rates. There will always be room for improvement in the enacting of legislation but clearly, given officer discretion, there will also be individual officer inexperience and personal bias which impacts on the issue of arrest/no arrest.

Council also commends ACT Policing for the internal review mechanisms in place to monitor action by officers through FVIP Case Tracking and weekly Family Violence Incident Review (FVIR). Council is aware when issues of concern are identified regarding police intervention through these and other processes, the matter is addressed with the relevant officer. This enables them to learn from their experiences and to use this as a learning opportunity for others.

Conclusion:
The Council considers that 212(2) is reasonable and appropriate as it currently stands but is concerned at what we perceive as a decreasing percentage of arrests. The evidence does not show any increase to arrest rates that would justify the need for additional criteria. We would raise the question of access to human rights for women and children who are living with domestic and family violence. Further, in domestic and family violence incidents, the safety of those that have been subjected to violence must be the priority in all considerations. Due to the complexities inherent in domestic and family violence, it is often difficult for police to make informed decisions regarding safety of family members as it is a changing environment.

Furthermore, the Council is of the view that 'reasonable suspicion' and not 'reasonable belief' is the threshold that should be required in all matters relating to domestic and family violence

For any further information or clarification please do not hesitate to contact me on 6280 5111.

Yours sincerely,

Dennise Simpson
Chair
Domestic Violence Prevention Council

August 2010

OFFICE OF CHILDREN, YOUTH AND FAMILY SUPPORT

DEPARTMENT OF DISABILITY, HOUSING AND COMMUNITY SERVICES

A RESPONSE TO THE DEPARTMENT OF JUSTICE AND COMMUNITY SAFETY's DISCUSSION PAPER: **'REVIEW OF POLICE CRIMINAL INVESTIGATIVE POWERS'.**

In reviewing the above discussion paper, the Department begins from the position that any legislation should reflect Youth Justice Principles as contained within the *Children and Young People Act 2008* and the *Human Rights Act 2004.* When applying those principles, it should then follow that there is a consistent minimum standard of safeguards and protections applying to all provisions relating to young people during criminal investigations. Consideration should therefore be given to the developmental stage of children and young people and their resultant need for adult support in order to understand the investigative processes resulting from their alleged actions. It should also follow that within any criminal investigation by police that the provision of effective diversionary options is explored and applied as appropriate so as to reduce the interaction of children and young people with the criminal justice system.

The following responses are offered to a range of Discussion Paper Questions as found on pp 9-14 of the Discussion Paper.

Q1 Should all of the relevant provisions relating to police criminal investigative powers be situated in a similar piece of legislation?

It would be preferable and would overcome the current inconsistencies that exist between the legislation. For example p33 of the Discussion Paper refers to differences in definitions relating to children and young people being in the company of a police officer in connection with an offence.

12. Is there a category of people who are particularly vulnerable, for whom enhanced protections should apply?

The Department considers that children and young people are particularly vulnerable within the justice system given their individual developmental stages as related to their behaviour and capacity to fully understand their situation within legal processes. Legislation should therefore be consistent in enabling appropriate protection and safeguards together with the appropriate provision of adult support.

At present the Department has some concerns regarding wording around the amount of time that a person can be detained when that person has been arrested – ie "as soon as is reasonably practicable". However a 'protected suspect' when in the company of an investigating official is one who has not been arrested but would not be allowed to leave if he or she wished to do so. This would apply where a young person is 'in the company of a police officer' in connection with an offence (pp 32-33). The Department would consider that provision needs to be made for a maximum amount of time for a young person to be held in this way, without being able to request adult support.

Similarly there is currently no limit on 'down time' or 'dead time' such as waiting for a lawyer or medical treatment to arrive (p34). As acknowledgement of the vulnerability of children and young people, and in order to comply with 10.2 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 'The Beijing Rules', which states:

> "A judge or other competent official or body shall, **without delay** [our emphasis] consider the issue of release",

the Department would seek a statutory maximum down time of two hours which is not undercut by numerous waiting periods.

Q45 and Q46 relating to simplification of provisions relating to children and young people.

Please see discussion points included above.

Q47 Should the relevant laws, as they apply to young people, reflect the principle that the more serious the offence the more comprehensive the protections for suspects?

The Department is of the view that all young people should be accorded the highest level and most comprehensive protections and safeguards, including diversionary options as appropriate.

Section 20 of the *Human Rights Act 2004* states

> "An accused child must be treated in a way that is appropriate for a person of the child's age who has not been convicted."

Q51 Do the limits in the Crime Prevention Powers Act 1998, section 4(5) adequately protect a person's right for freedom of peaceful assembly and association?

The Department is concerned that the 'move on' powers of section 4 of the *Crime Prevention Powers Act 1998* may be used to 'move on' groups of young people who are associating in groups, "...exclusion from community space (where ownership is not in public hands) is often justified in terms of health and safety, public liability or duty of care obligations. It most frequently occurs not in response to illegal activity but as a response to behaviour that is seen as annoying, 'anti-social', or simply involves people congregating or 'hanging around'. Those most often excluded from such spaces are young people, particularly homeless and Indigenous young people." (Crane, 2000)

Studies in major cities in Australia have shown that when young people are 'moved on' by police they move to areas that are less safe and less monitored and young people are particularly vulnerable to violence in these places. The changes towards having more public space privately owned, should not increase the vulnerability of children and young people, or increase police powers to facilitate this. For example:

- Young People & Public Space: A Research Report into Young People and Their Use of Public Space (2008) Kate Whelan—Open Family Australia (Melbourne Victoria)
- Young People and the Struggle for Public Space in Australia (1995) Edith Cowan University for the Youth 2000 Conference, University of Teesside

Or any of the papers prepared by the Youth Action and Policy Association of NSW at http://www.yapa.org.au/youth/topics/public.php

The Department is concerned that future policy directions are unable to be determined as a result of a lack of adequate and comparable ACT data on this matter. Specifically, it is unclear what proportion of the 64 apprehended people (p64) were children or young people.

Q73 Should it be necessary for police to obtain consent from a suspect, or the suspect's guardian or parent, to conduct a forensic procedure?

Yes. All children and young people should be afforded the opportunity to have support for decision-making processes as they are particularly vulnerable within the justice system. All children and young people should have the forensic procedure clearly explained to them, the procedures to be undertaken and the possible outcomes, including the long term implications for them. This information should also be given to the parent or guardian.

As stated in the Discussion Paper (p104) under s8.4 'Identification of Children and Young People' section 230 (ii) of the *Crimes Act 1900* only permits identification material to be taken from a person under eighteen in accordance with section 84 of the Children and Young People Act 1999, which has now been repealed. The Department agrees with the Discussion Paper suggestion at s8.4 that this power should be reinstated in the relevant legislation.

There should also be a provision for young people to have the opportunity to make their own decisions regarding consenting to forensic procedures. The requirement for consent used by the medical profession is derived from the common law that requires that a valid consent be given before physical contact with another person can lawfully be made. The "Gillick" Principle is enshrined in Australian law and is used to decide whether a young person is developmentally able to consent to his or her own medical treatment, without the need for parental permission or knowledge.

"The parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates if and when the child achieves a sufficient understanding and intelligence to enable him or her to understand fully what is going on." (Gillick Principle)

Consideration could also be given to the NSW legislation. The NSW *Crimes (Forensic Procedures) Act 2000* contains these requirements for children and young people:

- The Act does not allow for forensic material to be taken from anyone under the age of 18 for the purpose of purely identifying the young person;
- The Act includes a statutory prohibition on carrying out forensic procedures on any child under 10;
- Senior police may not require a young person between 11 to 17 years of age to submit to a forensic procedure if they are a suspect;
- A Magistrate can require a forensic test to be undertaken;
- If a parent or guardian gives permission for a test to be carried out, the child needs to be informed;

In conclusion, the Office of Children, Youth and Family Support within the Department of Disability, Housing and Community Services is appreciative of the opportunity to comment on the Department of Justice and Community Safety's Discussion Paper on 'Review of Police Criminal Investigative Powers'.

To summarise, the Department highlights the vulnerability of children and young people in criminal investigations and the Department endorses consistency across legislation and the simplification of provisions applying to children and young people so as to ensure a consistent minimum standard applying to them during all criminal investigations. As discussed above, there are concerns regarding definitions applying to the investigation period and the presence of support people and the need to ensure that such definitions consider the developmental needs whilst promoting the best interests of the young people.

In consideration of the likelihood of young people to gather as groups, and in consideration of likely experimentation with drugs and alcohol there is also concern regarding provisions around peaceful assembly and association procedures and forensic procedures. In both areas the Department would hope that documents such as the *ACT Young People's Plan 2009-2014* with its priorities of 'Health, wellbeing and support' and 'Families and Communities' pp8-14' are referred to in order to assist police in appropriate responses to young people in our community.

The Department also seeks to ensure that provisions are in place to ensure the application of effective and appropriate diversionary options at all possible points of intervention with children and young people so as to prevent inappropriate experiences with the criminal justice system.

Finally, the Department would, of course, consider it essential that any review of Police Criminal Investigative Powers is actively informed by key pieces of recent legislation such as the *Human Rights Act 2004* and the *Children and Young People Act 2008*.

Crane, Philip R. (2000) *Young people and public space: Developing inclusive policy and practice.* Scottish Youth Issues Journal, 1. pp. 105-124.