LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

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

Members:

MR P CAIN (Chair)
DR M PATERSON (Deputy Chair)
MR A BRADDOCK

TRANSCRIPT OF EVIDENCE

CANBERRA

THURSDAY, 28 APRIL 2022

Secretary to the committee:
Ms K de Kleuver (Ph: 620 70524)

By authority of the Legislative Assembly for the Australian Capital Territory

WITNESSES

Privilege statement

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Amended 20 May 2013

The committee met at 11 am.

TREVITT, MS SOPHIE, ACT Convenor, Australian Lawyers for Human Rights
GOULD, MS NAOMI, Senior Litigation Solicitor, Canberra Community Law
HASSALL, DR DOUG, Barrister, and Member, ACT Bar Association

THE CHAIR: I declare open this public hearing of the inquiry by the Standing Committee on Justice and Community Safety into petition 32-21.

I would like to acknowledge on behalf of the committee that we meet today on the land of the Ngunnawal people. We pay our respects to their continuing culture and the contribution they make to this city and this region.

The Assembly referred this inquiry on 23 November 2021. The committee has received 27 submissions, which are available on the committee website. Today's proceedings are being recorded and transcribed by Hansard and will be published. The proceedings are also being broadcast and webstreamed live.

We will now move to our first witnesses appearing today—Sophie Trevitt from the Australian Lawyers for Human Rights, Naomi Gould from Canberra Community Law and Doug Hassall from the ACT Bar Association. On behalf of the committee, thank you for appearing today and for your written submissions to the inquiry.

I remind witnesses of the protections and obligations afforded by parliamentary privilege and draw your attention to the privilege statement that is before you on the table. Could each of you confirm for the record that you understand the privilege implications of the statement?

Dr Hassall: Yes, indeed.

Ms Trevitt: I do.

Ms Gould: Yes, I do.

THE CHAIR: Before we proceed to questions from the committee, would each of you like to make a brief opening statement? It is not compulsory, but there is an opportunity to do so.

Ms Trevitt: Yes, I would like to. Thank you very much for the opportunity to appear today. As the committee is aware, I lodged the petition that has brought us here today. It was supported by the Australian Lawyers for Human Rights and ACTCOSS.

Australian Lawyers for Human Rights recognises the leading role that the ACT has played in promoting human rights and establishing itself as a jurisdiction where human rights are respected and complied with. As one of only three states and territories to have introduced a legislated human rights framework, the ACT plays a significant role in leading the country on human rights compliance. However, we are here because providing an accessible way for people to make complaints when breaches of the act occur is itself a human right that is protected in international law. This is currently not a right which is enabled through the Human Rights Act in the ACT.

In our submission we have documented a number of models here and overseas that provide useful guidance for the ACT when considering how to establish an accessible complaints mechanism. It is our view that the ACT already has the infrastructure in place that it needs to provide a simple and affordable way for members of the community to have their complaints heard. It simply needs the legislative framework and resourcing to enable it.

We have made two primary recommendations. The first is for the Human Rights Act to be amended to allow complaints to be brought before the Human Rights Commission for conciliation and then to be referred to the ACT Administrative Tribunal if conciliation is not successful for resolution. The second is for these bodies to be adequately resourced, along with independent service providers and a program of community education to hear and resolve these complaints.

We have made these recommendations because the Human Rights Commission and the ACT administrative tribunal already hear a range of complaints which they successfully and accessibly resolve for members of our community every day.

The Human Rights Commission was born of the Human Rights Act and, as a specialist body, is most appropriate to deal with complaints that arise from the act in the first instance. The administrative tribunal is already the no or low cost jurisdiction for a wide range of matters in the ACT.

We can only really claim to respect and uphold human rights if there is a way of enforcing them. International human rights law recognises this in numerous international instruments. We ask the committee to ensure that the ACT is not just a human rights jurisdiction in name alone but also in practice.

I recommend that the ACT Legislative Assembly take this important step in establishing a way for members of our community to have their complaints heard and responded to.

THE CHAIR: Ms Gould, is there anything that you would like to say?

Ms Gould: Yes, I would like to make an opening statement. Thank you for the invitation to meet with you today. Canberra Community Law recognises and works closely with the traditional custodians of this land, and we celebrate their continuing connection.

At Canberra Community Law we are experts in using, interpreting and applying the ACT Human Rights Act. We regularly raise it in our advocacy and in our litigation. We provide specialist legal advice and representation through our various programs, including housing law; social security law; Street Law for homeless people or people at risk of homelessness; disability discrimination law; our parachute program for women escaping family violence; and our Dhurrawang Aboriginal Human Rights Program. I personally specialise in litigation in the ACAT.

CCL spends a lot of our time quietly assisting clients to resolve issues to avoid the need for ongoing litigation. The tribunal regularly refers clients to us to assist in this

process, and we are adept at the quick and efficient resolution of problems involving government action.

Through our work, we have a deep understanding of the way the ACT systems work and do not work. We are firsthand witnesses to how ACT government practices can, often unintentionally, profoundly impact on the human rights of individuals.

It is essential to understand that the obligations under the Human Rights Act apply only to public authorities. That means government agencies and those contracted to carry out a government function. The Human Rights Act is designed as a mechanism for keeping government agencies accountable for actions that interfere with the dignity of individual lives. However, the Human Rights Act fails in its job if there is no readily accessible mechanism to ensure that accountability.

We have a Human Rights Commission with no ability to hear a freestanding complaint brought by an individual under the Human Rights Act. I will repeat that because it is widely misunderstood: we have a Human Rights Commission with no ability to hear a complaint brought under the Human Rights Act. The only exception to that is if the human rights complaint is attached to another complaint which it could otherwise hear, such as a discrimination complaint.

In our written submissions we gave you stories of the types of scenarios we see—Trisha, Peter, Kaylee and Ryan. These are the stories of individuals caught in bureaucracies that sometimes through their processes have stopped seeing the rights of individuals affected by their decision-making.

You will know through your own work in the community that most people caught up in situations dealing with government agencies do not want a public fuss. They do not want media attention. They do not want to bring expensive court action. They often are not seeking compensation. The individuals and families that we most often see have backgrounds of extreme trauma or have cognitive or mental health disabilities, and are even less likely to want to go to court. Our clients in these situations want their human rights recognised and their issues resolved efficiently so that they can be free to continue their lives with dignity and to contribute to their communities.

The Human Rights Act incorporates a large number of balancing mechanisms. It is actually quite a conservative document that allows the ACT government to explain why a decision that impacts on a person's right is nevertheless proportionate to the end seeking to be achieved.

We are under no illusion that some of the cases and the scenarios we gave would be all successful, but the conciliation process allows complaints to be aired in a private setting, for an explanation to be given directly to the person, for a person to feel they have been heard and for a resolution to be reached. With sufficient resourcing, an organisation such as ours would also be in a position to explain to clients when they do not have a basis for a complaint and when there might not be merit in going to the tribunal in cases where conciliation has failed.

Canberra Community Law is of the view that introducing a complaints mechanism is a very cost-effective, efficient way to ensure that our Human Rights Act is finally

used in the way that it was intended—to hold government agencies to account for their actions when those actions interfere with the human rights of individuals engaged in that system.

The frameworks necessary are already in place. The additional funding would be limited. It would not involve setting up any new mechanism or agency but would simply add resources to existing services, including the ACT Human Rights Commission, the ACAT—the tribunal—and, we say, an independent community legal centre such as our own, to enable individuals to seek legal advice and representation in navigating the new process.

THE CHAIR: Dr Hassall?

Dr Hassall: On behalf of the ACT Bar Association president, Mr Andrew Muller, and the ACT Bar Council, I have been asked to appear and to say that the Bar Association strongly supports the initiative for developing legislation as proposed in petition 32-21. We do so for the reasons that we have set out in the Bar Association's submission to the committee.

The committee will see that the gist of our submission is that it is time for people of the ACT to have accessible remedies where their human rights and fundamental freedoms are infringed or are denied. It is coming up now for 20 years, almost, since the 2004 legislation which, indeed, was of limited scope. It was a great reform but it was of limited scope, as has already been indicated in the opening comments this morning.

We at the Bar Association believe that the two measures, which are modest measures, proposed in the petition would be a significant and very useful law reform, giving people an affordable and accessible means of vindicating their rights and freedoms. The Bar Association certainly stands ready to assist in the development of any legislation along those lines.

An initiative for the territory to provide such remedies in this way would, in our submission, be entirely consistent with the tenor of Australia's declaration which it made at the time that it acceded to the International Covenant on Civil and Political Rights. As indicated in our paper, there was a declaration to say that, yes, Australia is a federation, and that the states' parties have obligations to do certain things.

We point out in our submission that one of the things—and this is very germane to the topic before the committee—was that states' parties would, through their various governmental agencies, undertake to ensure that there were remedies and to ensure that judicial remedies are developed.

A couple of the points that we make, to sketch them briefly, in our submission are that not only are we looking at statutory provisions but statutory provisions which give the courts scope, proper scope, to develop a positive jurisprudence in this respect; rather than, for instance, simply a string of cases which might talk about, read down or limit the rights.

We do think that the accessible and affordable remedies point is very important.

Certainly, with the points that have been raised, we recognise the importance of the points that Ms Trevitt and Ms Gould have raised this morning in their openings for their organisations.

THE CHAIR: Thank you. I will start off with a question. As you are probably aware, the Law Society also provided a submission but are not appearing this afternoon. They have provided support, as you all have, for this petition, but they have listed three categories of exceptions to this complaints process. The first one may seem rather obvious—federal departments and agencies, private businesses who are not actually doing a government function, and decisions by judges or courts. I am interested in each of your views on exceptions, and whether there are any other exceptions to what is at the moment a very broad, overreaching petition.

Ms Gould: The Human Rights Act, as I said in my opening, applies only to public authorities. The definition of public authorities includes government agencies and agencies contracted to provide a public function. For example, community housing providers might be covered if they are providing social housing and contracted with Housing ACT.

THE CHAIR: You would mean ACT public—

Ms Gould: ACT only. The Human Rights Act only applies to ACT government agencies, so any complaints mechanism that is brought in will provide a remedy only against actions by ACT public authorities. The petition is not seeking to broaden that scope in any way. Those exceptions would remain there.

Ms Trevitt might like to say something about this. We know that the ACT police are giving evidence before the committee later today. That is one of the key questions they raised in their submission—that it is not clear at the moment, because of their role, being part of a federal agency, exactly how or if it applies to them. Dr Watchirs is here; I am sure she will provide more evidence as to that.

The concerns we have relate to ACT government authorities. We are talking about housing, education, care and protection, and actions within the Alexander Maconochie Centre. I cannot think of any more off the top of my head. They are the key ones.

Ms Trevitt: I would probably not characterise those areas as exceptions; they are just not covered by the act, and this petition does not seek to change that.

THE CHAIR: Obviously, it is of interest to me that the Law Society went to the trouble of listing those three categories. Is it a common view that they did not need to say anything at all?

Ms Trevitt: My understanding—and Ms Gould will be able to speak more to this—is that there is broad confusion in the community at times as to what the Human Rights Act covers. My understanding is that that is a clarification of what the scope of the act is and therefore how a complaints mechanism would operate and function, but it is not necessary to set out those exceptions because that is already defined within the scope of the act.

Dr Hassall: Certainly, broadly, from our point of view, we would concur with that view; the act is the act and it has limited terms. With respect to federal departments, private businesses and decisions by judges or courts, I refer to the special position of the AFP, for instance, acting under a ministerial arrangement. There have been various court cases in which the AFP has been characterised as an instrument of the territory for that purpose, in any event. The broad point, though, is that the three categories mentioned are already outside the statute, and there is no attempt to expand those. The time may be rapidly approaching when we are looking at a national bill of rights, for instance, but that is for other governments and other forums.

MR BRADDOCK: Is there clarification required of the role of the AFP under this act, in providing ACT police, if there seems to be uncertainty about that?

Dr Hassall: That might be a separate area that might be looked at, in my view. I have not especially researched that at this stage. Also, the Law Society mentions the courts. The ACT Supreme Court, for instance, is within the scope of the act, but not generally, only as to certain administrative functions. Presumably, that is to do with internal administration of the court. In other countries, for instance, my understanding is that the courts, too, where there are bills of rights, for instance, would have to abide by them. But that is a different question.

MR BRADDOCK: Not in the judicial; it is more in the administrative.

Dr Hassall: At present, if I understand and read the act correctly—Dr Watchirs may correct me on this—the provision says that the Supreme Court is not a public authority for that purpose, except for, in its judicial function, limited administrative purposes. I just mention that.

DR PATERSON: There are so many other models which were outlined in the submissions, but particularly in comparison to the New Zealand model, where the Human Rights Commission do receive complaints but do not make decisions. I think they call it mediation, as opposed to conciliation. What is the difference there, in what this proposal here in the ACT is? Would the Human Rights Commission make a decision? Are they a decision-maker or a mediator?

Ms Gould: What we are proposing is a model that reflects the current process for bringing a discrimination complaint.

DR PATERSON: Okay.

Ms Gould: The way that works is that a person brings a complaint to the Human Rights Commission. The Human Rights Commission does not make any decision but conducts what is called a conciliation, which, for all purposes, is the same as a mediation. The parties sit in a room with a neutral mediator, or conciliator, and what is said in that room stays in that room. The people can speak openly. A government agency can speak openly to the aggrieved party, and often that is all the person wants. Many, many of these matters resolve within that process. It is a very efficient, effective process.

Where something comes out of that, it is by consent. There will be a form of consent

agreement. I have temporarily forgotten what that is called. That then can be registered with the tribunal. That document is public, but only with the consent of the parties in the room. Everything that is discussed in that room happens through a conciliation. You have expert mediators conducting that. It is one of the reasons that that process is so efficient at resolving, and only a few matters then go onto the tribunal itself.

DR PATERSON: And so, for example, if someone was trying to negotiate compensation, they could negotiate it at that initial level with the Human Rights Commission? It would not necessarily need to go to the ACAT?

Ms Gould: That is right. Under our Human Rights Act at the moment there is no right to seek damages.

DR PATERSON: Okay.

Ms Gould: I do not think that would stop someone in a conciliation asking for it, and that could be one way of resolving the issue, but that is not something that is currently afforded by our Human Rights Act. You might be aware that a case was handed down last week in the Supreme Court in relation to the management unit at the Alexander Maconochie Centre. It got a bit of media. The Supreme Court made a declaration that the way that that centre is operating is in breach of the Human Rights Act, but there was no ability for that individual to seek damages in relation to that breach.

All that was made was a declaration that there was a breach and then the private lawyers representing that person got their costs. So it probably cost a lot more. That process would have cost everyone involved a whole lot of money. The Supreme Court spent a huge amount of time investigating that through a judicial process. It was a very important case; it went through international law.

But in terms of expense and the ability to come to a resolution, it is a much more cost-effective way for those conversations to be happening in a conciliation. That is what our clients want. Our clients are scared of the court process. It is daunting; it is expensive. It requires either pro bono counsel or private lawyers willing to act in return for seeking their costs, and it is a real barrier to people actually achieving outcomes using the Human Rights Act.

DR PATERSON: Just a quick one: is the idea of this that it would be almost a preventative? People would come forward earlier with issues and seek a remedy, as opposed to it escalating and becoming a very entrenched issue?

Ms Gould: We think so. Through our Dhurrawang Aboriginal Human Rights program, we speak to a lot of men in the AMC who have individual complaints about the way they are being treated. Bringing a complaint about that is a very difficult process, but if they were able to bring a complaint through the Human Rights Commission, sit down, have that discussed and have an agreement about the way forward, we think it would be a very cost-effective and efficient way of resolving some of those issues and also improving government decision-making processes.

Ms Trevitt: May I just add one thing to that, which is that through the conciliation

process, unlike a formal, judicial, legal process, the types of remedies that are available are really broad. As Ms Gould described, it is up to the parties in the room to decide how to resolve a matter. So that might be that someone just needs an apology. It might be that there is some sort of in-kind restitution of the right that has been breached. If someone has been denied something, it might be that they are then granted that.

There are a whole range of legal and non-legal ways that the matter could be resolved. In that sense, it is also not just a far more efficient way to resolve complaints of human rights breaches but potentially a more effective way, in that the black-letter law is sometimes a clumsy tool to try to resolve breaches of people's rights. There might not be the specific remedy available that that person actually wants, whereas through this more informal, party-driven process—as in the parties to the complaint—there is a way of having that dialogue in private to try to resolve the matter before it needs to escalate through these more formal processes.

MR BRADDOCK: I am interested in what will happen, should this change be implemented, in terms of the government. Have you seen any experiences in other jurisdictions of what you might anticipate in terms of changes to culture, systems, processes, within the ACT government that could arise from this?

Ms Trevitt: What we refer to in our submission is the Queensland Human Rights Act and the mechanism that they implemented there. By all counts, it seems that it has been successful in expediently addressing people's complaints, ascertaining whether the complaints are found to be substantiated and then finding a resolution.

There is some data included in our submissions which I think is of note, in that it also covers the COVID period. They were dealing with the additional influx of COVID-related complaints, but there has not been a skyrocketing of complaints. There has been an increase but no big-time blowouts. So it appears that, as a complaints mechanism, it is working well.

I do not have the expertise to comment on the flow-on effects of how that has then influenced government decision-making, but we know that having a Human Rights Act, having these matters relatively regularly addressed, is a mechanism by which there can also be a cultural shift amongst the departments that are being engaged and amongst the government as a whole.

MR BRADDOCK: So there is no evidence of, for example, human rights being more respected in the jurisdiction of Queensland as a result of that change?

Ms Trevitt: I do not know how you would measure that with strong data. However, there are a number of case studies that we have provided in the submission that describe, for example, responses to the way in which COVID was restricting young people's access to family members in detention centres. The fact that there was a complaint then changed how that practice happened, so that young people were given video access for their families. So in that sense we can see cultural change. I do not think there is hard data that says that there were X number of human rights breaches and now there are Y, because you also have a situation where people are able to air their human rights breaches when in the past they were not because they did not have

the mechanism to do so.

One thing that some of the case studies that we illustrated demonstrate is that that flexibility that I mentioned earlier in terms of what the remedy might look like can also extend beyond that individual. I am just trying to find out, but I think there is an example where there was a woman who had a disability who made a complaint about the lack of accessible parks at a bus terminal. The complaint was resolved with her personally, but part of that resolution was around the transport service contracted by government reviewing its policies and procedures on the use of ramps and then there being a change to how access to public transport was provided.

So in that sense there is a broader benefit to all people that have mobility issues that arose from this individual's complaints about her rights being breached. I think you can see examples like that, where you have a resolution provided for an individual but also that has then led to a broader benefit for the whole community.

MR BRADDOCK: Thank you.

Ms Gould: I will just add that one of the outcomes of disability discrimination complaints, which is something we run in our office, is that often an individual is seeking an apology and training. They are not actually seeking anything. They are saying, "I want an apology," and the agency will often agree: "Okay; we are going to be providing training to all our staff on this particular disability issue so that these problems do not arise again in future." So that is one of the ways cultural change can be effected through these processes.

THE CHAIR: Yes. Dr Hassall?

Dr Hassall: Yes. I wonder if I might just add something, briefly. We very much note the importance of the particular points that Ms Trevitt and Ms Gould have made, from their closer experience on the ground with clients and case studies. I think that is important. I might just briefly revert to another aspect relating to this that Dr Paterson raised: the proposal is in two stages. There is the complaint to the commission, with the usefulness of that, and then, if successful, a complaint to the ACAT. Of course, that is cognate with, for example, existing anti-discrimination cases or claims. The tribunal would have a suite of appropriate remedies which it could choose from. The ACAT has been very successful, and so have like tribunals around Australia.

I have also supplied, through the committee secretary, a copy of the recent decision of Associate Justice McWilliam in the case of Islam and the Director-General of the Justice and Community Safety Directorate, in 2021. I draw the committee's attention particularly to paragraph 136 and paragraphs 76 and 79 of that decision, where Justice McWilliam referred, in fact, to Kafka-esque—Kafka's *The Trial*. It is descriptive of a situation that complainants, not only in the ACT but the world over, often find themselves in when there is a mire of regulations and requirements. With those sorts of things, when that can be clarified and worked out, for instance, at the commission stage, it may well filter the litigation later. Those are just some aspects we raise.

THE CHAIR: Thank you. I think we circulated that to the members this morning, or late yesterday, so thank you for those references. I have a new line of questioning,

looking at it from the other end from Mr Braddock's perspective, and that is: where do you think the complainants will be coming from if this door is opened and do you have a sense of, perhaps, a frequency? Again, this is going to touch on the resourcing question.

Ms Gould: We see cases quite routinely where we are arguing, on behalf of our clients, the Human Rights Act, through advocacy internally with the department. Often that is effective. It is a huge amount of work for us as we work our way up the chain and write letter after letter, trying to resolve a situation. So we can imagine that, in some of those situations, we would be advising clients that they have this alternative route—that, instead of us spending a lot of our time sending letters up the chain, and eventually to ministers often, they have this other option of bringing a complaint to the Human Rights Commission.

I do not think the numbers will be huge. I really don't. But the sorts of cases that we hope will be brought—not a huge number—are the sorts of complaints we see clients bringing where they feel like they have nowhere to turn. Those might be in relation to the practices of the CYPS, for example. In the care and protection space you would see some of those.

It is particularly with our Aboriginal clients. There are certain cases where I would hope that we could bring complaints in relation to the practice of, for example, Housing ACT seeking to evict a single woman with multiple children on the basis of a debt of a few thousand dollars, where there is no way of reviewing that decision internally. The cost of that is to the whole community, in making a single mother and these children homeless. In thinking about the best interests of the children involved, I would hope that, where those cases arise, we might bring a complaint. They are not a huge number of cases, but they certainly exist. There would be cases against the Department of Education, I imagine, but not a huge number, again.

THE CHAIR: Okay, thank you. Are there any other thoughts on that, or supplementary questions?

Dr Hassall: I think just from the bar's point of view, the bar mainly has contact with this in terms of claims in the Supreme Court, where the few cases are where declarations have been sought, but also, in other civil or criminal matters where there is another common law or criminal law, or legal or statutory claim or issue, but in association with that, it is possible at law to raise certain of the issues, or certain of the rights and freedoms that the act declares everyone has. For example, you might have a civil case and there might be, say, a housing issue or a house involved, or something like that. There is the right to security of one's home against search and seizure for instance. And that is a matter along the lines of the jurisprudence that appears to be developing in that case which we indicated—in the Islam case—where Associate Justice Verity McWilliam had regard to the importance of the fact that the Assembly recognised these certain rights and freedoms exist.

And so, certainly, we concur with the observations that have been made already in that we do not see it as a floodgates exercise in terms of that. It would be those areas where members of the public come into issues with particular categories of officials, I suppose, and generally it is a bit hard to predict. But I would have thought that the

experience in Victoria, for instance, would indicate that it is not going to be a floodgates exercise. And of course, if there are complaints that are baseless or groundless, the courts and tribunals have the power to deal with vexatious or hopeless cases.

DR PATERSON: So when Queensland brought their mechanism in, where is the cut-off line between cases that would come to the Human Rights Commission here? I saw somewhere in a submission that there was a 45-day mention—that after 45 days you could bring a case, I think. But in starting a process like this, where would you begin in hearing cases?

Ms Trevitt: I think the reference there is to, in the Queensland model, a complainant is required to make a complaint directly to the public authority first, and then give them 45 days to respond. Then, if they have not, or if it is not resolved to the complainant's satisfaction, they can then bring the complaint to the Human Rights Commission.

I do not have a strong view on this and would defer to the ACT Human Rights Commission as to how this mechanism would work. There are obviously situations in which it may not be appropriate, or it may not feel appropriate, or feel safe or comfortable for an individual to make a complaint directly to the public authority. For example, I could think of a situation where, perhaps, that individual is someone that is detained at the AMC and they do not want to make the complaint directly, they would prefer it to go through a mechanism. There might be situations like that where it would not be appropriate to have that 45-day requirement. Or there may be situations where a decision is having an immediate impact, or is likely to have an immediate impact on that person's rights, and so needs to be remedied or addressed before that 45-day window has elapsed because the harm done to that person, or the potential harm posed to that person, is too great.

The Queensland act does allow that. It allows for exceptions if there is a case of urgency or some other criteria, I think, based on the type of risk that that person might face. It allows the matter to be brought directly to the Human Rights Commission in Queensland to be dealt with. So in terms of whether, in the ACT, a similar model should be adopted, where a requirement is made for a complaint to be made first to the public authority, there be a timeframe put in place to give that authority the scope to respond to that complaint and resolve it informally before it then goes to the Human Rights Commission, I think is a live question and something that the Human Rights Commission is probably best placed to have a view on. I think from the Australian Lawyers for Human Rights perspective, the most important thing is to ensure that nothing is put in place that reduces the overall goal of this mechanism, which is to resolve these matters expediently.

We do not want to create a structure or barriers to someone accessing the type of informal and quick resolution that the Human Rights Commission provides and that having that compliance process provides. Do you have a firmer view either way?

Ms Gould: No. I think I misunderstood the question initially, but that sounds right.

Dr Hassall: I might just add, if I may, that those sorts of details would be for the

development of the legislation. The ACT could develop its own model, perhaps having regard to the Queensland or other state examples, and it could frame its own procedures tailored to the sorts of factors that Ms Trevitt has indicated.

DR PATERSON: I have a quick supplementary question. In terms of, for example, Queensland cases, when it talks about complaints finalised, what are their timeframes for finalising? Do they have an average from making a complaint to a resolution? Is there any information regarding that?

Ms Trevitt: I think there probably is. I would have to take that on notice unless you—

Ms Gould: I do not know the answer, but I can provide to the committee an article written by Mr Sean Costello, who used to work for the ACT Human Rights Commission and is now up in the Queensland Human Rights Commission. He recently published an article addressing some of these questions. Or else, the ACT Human Rights Commission might be in a better position to answer them directly. If it assists, I can try to track down that article.

THE CHAIR: You are happy to provide that?

Ms Gould: Yes, sure.

THE CHAIR: Have you got a quick substantive question, Mr Braddock?

MR BRADDOCK: Hopefully it is a quick one. Do you have any insight into what resources the government had to provide to its Human Rights Commission to be able to support the changes?

Ms Gould: I do not, but it is really important to understand that this was introduced at the same time as the Human Rights Act in Queensland. We already have in place a Human Rights Act. We are also a much smaller population. They were setting up something brand new. We have a Human Rights Act. We have an ACT Human Rights Commission, which is already hearing discrimination complaints. This would not be the sort of revolution that occurred in Queensland.

Dr Hassall: I would just add to that that this would be simply adding another to the list of things that the ACAT does, for instance, in this regard. It does the other cognate things, such as antidiscrimination, at the moment.

THE CHAIR: I am just musing out loud now, but I wonder why this was not in place originally, whereas the current process is limited to discrimination and a few other types of complaints. But that is a musing.

Dr Hassall: It may have been—I just venture this to speculate—something to do with the notion of the dialogue between the Supreme Court and the legislature rather than individual cases.

THE CHAIR: I want to thank you all—Ms Trevitt, Ms Gould and Dr Hassall—for appearing today. When available, a proof transcript will be forwarded to witnesses to provide an opportunity to check the transcript and identify any errors in transcription.

Witnesses undertook to provide further information. So, thank you, Ms Gould; I think we have just that one coming. We would appreciate it if that could be provided within a week of the date of this hearing.

Short suspension.

CHEYNE, MS TARA, Assistant Minister for Economic Development, Minister for the Arts, Minister for Business and Better Regulation and Minister for Human Rights

MCKINNON, MS GABRIELLE, Senior Director, Legislation, Policy and Programs, Justice and Community Safety Directorate

THE CHAIR: I welcome the next witnesses appearing today, the Minister for Human Rights, Ms Tara Cheyne, and Ms Gabrielle McKinnon, from JACS Directorate. On behalf of the committee, thank you for appearing today and for your written submission to the inquiry.

I remind witnesses of the protections and obligations afforded by parliamentary privilege and draw your attention to the privilege statement that is before you on the table. Could you confirm for the record that you understand the privilege implications of the statement?

Ms Cheyne: Yes, I do.

Ms McKinnon: Yes, I confirm that.

THE CHAIR: Before we proceed to questions from the committee, Minister or Ms McKinnon, would you like to make a brief opening statement?

Ms Cheyne: Yes, I have some opening remarks, Chair. Firstly, the ACT government thanks the petitioner, the sponsor of the petition and indeed the committee for bringing this forward for an inquiry. The ACT government is proud of our human rights culture in the ACT, and we are also committed to building and strengthening it. We value any opportunity to shine a spotlight on it and to explore what more we can do.

You may be aware that the government has already committed to significant reforms in this term of parliament, including exploring the introduction of the right to a healthy environment, reforming the Discrimination Act and establishing an Aboriginal and Torres Strait Islander children's commissioner. All of this work is currently and concurrently underway.

What is proposed in this petition is a significant reform. It is presented simply and effectively in the petition, but there are a number of issues that are worthy of being worked through, many of which we have started to hear today, and which our submission also touches on. We very much welcome the opportunity that has been given to discuss some of them today. It is why an inquiry has been so welcomed by me personally and by the ACT government—to do this deep dive across the community, to examine whether this is necessary and how it would work practically, and what would need to be done to ensure that it works practically.

At the outset I can say that the principles proposed have merit. It would provide another layer of access. Recognising that the Supreme Court action can have barriers, which has been detailed in several submissions and in the evidence that you have heard today, it would be another remedy and it would, of course, help further strengthen our human rights culture. We certainly acknowledge that.

However, there are several areas that we see as having a level of complexity—the use of ACAT and the pathway to that, and noting that this element of what is proposed would be novel in Australia. Expanding the complaints jurisdiction of the Human Rights Commission would not be, but expanding to ACAT would be. We can go into more detail on that in a moment.

With respect to resourcing, several submissions have picked up on that, and you have already heard about it today. The petition and several submissions contemplate or indeed recommend that compensation is considered as part of this which, again, would be novel in Australia.

With the legal arrangements for policing, Chair, you picked up on this in your first line of questioning. I do not intend to speak to this today, given you are hearing from the Chief Police Officer later today, and they have provided a comprehensive submission, but it would be remiss of me if I did not draw attention to it.

I also note that a number of submissions and the petition describe the Human Rights Act as being largely theoretical. This is something that I would like to take a moment to refute. The Human Rights Act actively influences us. Section 40B in particular creates a specific obligation for public authorities to act consistently with human rights.

I will note, though, that, to a large extent, how that is realised is in a way that is frontloaded. By that I mean that human rights considerations occur in formulating policy and legislation, and in scrutiny—so right at the outset. Essentially, we prevent rights infringing laws from being enacted in the first place. We are strengthening agencies' understanding of and engagement with this all the time.

This does not mean it is theoretical, but due to it being in the development or indeed the scrutiny phase, necessarily it is not as public as perhaps responding to a breach may be.

In addition to this we were the first to include a standalone action for a breach of human rights by a public authority under 40B to be brought to the Supreme Court, and we continue to be the only jurisdiction that has this exact mechanism. A person can also rely on their human rights in relation to a claim against a public authority in other legal proceedings. Indeed the Human Rights Commissioner can intervene in these proceedings.

Finally, the ACT government and the Human Rights Commission more specifically have roles in educating about human rights. I will leave it there, Chair. I am very happy to take questions.

THE CHAIR: Reflecting on the first session, it does not seem like there will be an opening of floodgates issue, and that is from people who actually work with complainants, obviously, with a different opportunity for them to get that resolved. I am particularly interested in why you think this is a significant reform, whether for resourcing or other reasons, and why in particular you feel that the ACAT role may add some complexity.

Ms Cheyne: I will begin and then I will go to Ms McKinnon for some further detail. Currently, the Human Rights Commission—and I am pleased they are speaking next—can investigate and conciliate complaints in a range of areas, including unlawful discrimination, health services, services for older people, disability services and services for children and young people. They already have a large jurisdiction, but we recognise that there are gaps in that coverage.

Expanding the role of the Human Rights Commission is the more straightforward element of what is proposed in the petition. However—and we will talk about ACAT momentarily—regarding resourcing, first of all, I acknowledge that some submissions have picked up on the fact that there may be less of a cost or less of a burden in the Supreme Court. We simply cannot say this for sure, so it is not clear whether ACAT decisions, if we went down that path, would be appealed to the Supreme Court.

There are resourcing requirements that would be necessitated out of this, not least for the Human Rights Commission, ACAT, community legal centres, Legal Aid ACT and the ACT government. I believe it is only our submission that picks up on this, but there would be resourcing implications for agencies in responding to complaints and potentially the financial implications if conciliated financial outcomes were being considered which some elements have contemplated.

While I will not direct the committee, it would be very useful for us, in our consideration of this and, in the future, in responding to recommendations, if you are hearing from some of these entities, to drill down perhaps a bit further about the quantum of what the resource ask would be.

What is difficult is that, as you noted, we do not know whether the floodgates would be opened or not. Regardless, there will be an increase in resource requirements across several areas. That makes it, in and of itself, significant in how many areas it touches on.

We can probably talk about compensation separately. The use of ACAT is why we describe it as significant. As I flagged in my opening remarks, this would be novel. This would be different from how it works in the other jurisdictions. In Queensland, if a human rights complaint is made, first it goes to the respective agency to try to resolve it; then it goes to the Human Rights Commission, but no further. Human rights can be piggybacked on legal action in the Supreme Court, and that is what happens in Victoria. But there is no role for the Queensland tribunal in how complaints are considered.

That is a really important thing to stress here. While the Queensland Human Rights Commission jurisdiction complaints handling is larger than ours in the ACT, the tribunal is not contemplated. Indeed, when they were setting up their legislation, there was consideration given to involving the tribunal, and the committee did not go down that path. It said that human rights complaints should be resolved in a relatively informal way. In Victoria, a human rights complaint again goes to the respective agency to resolve or to the Ombudsman. Again it is not involving the tribunal. We would be alone in doing this.

I also want to acknowledge that, again, we are the only jurisdiction in Australia where a standalone complaint can be taken to the Supreme Court. It has to be piggybacked, essentially, in Victoria and Queensland. We are already ahead of them in some ways regarding the role of the judiciary.

Ms McKinnon: In relation to the complexity in ACAT, while the numbers of cases that might come to ACAT potentially might be small, it would require ACAT developing a whole jurisdiction and expertise around quite complex human rights matters that is currently in the purview of the Supreme Court. They would have to be prepared to take cases, regardless of the numbers. At the moment in the Supreme Court, where a human rights issue is raised, it can become a significant matter. The Attorney-General can intervene. The Human Rights Commission can intervene. It can become a significant proceeding, which befits a finding that the government has breached human rights as a formal legal finding.

THE CHAIR: Obviously, there is already jurisprudence on the Supreme Court which would guide the ACAT. I am struggling to see why there is a level of complexity for the ACAT that is of concern.

Ms Cheyne: We can go to that, Mr Cain, if you like.

Ms McKinnon: I would say, in response to that, that with the jurisprudence in the Supreme Court, while there is some jurisprudence there, it is not well developed on every aspect. It probably tends to focus particularly on issues around detention and criminal law, whereas this would be bringing human rights cases in relation to a much broader range of issues.

There may also be some complexities around areas where otherwise there might be provisions for review—for example, bringing human rights complaints in relation to child protection matters. At the moment those matters are generally heard by the Children's Court and there is a proposal to develop a review jurisdiction in the ACAT. If we were to have a separate ability to bring human rights cases that would also consider the same matters, there might be some overlap and complexity there. It is a matter of thinking about what other avenues there are for review and how they would work together. That is not to say that it cannot be done; obviously, it would need to be considered in developing legislation, and considering resourcing.

DR PATERSON: Would an alternative proposal be to have a complaints mechanism within the Human Rights Commission and then go to the Supreme Court—cutting out ACAT altogether? Is that an alternative to this?

Ms Cheyne: Potentially, yes. As I said, the more straightforward element of the two parts proposed in the petition would be expanding the complaints jurisdiction of the Human Rights Commission. Adding in ACAT is a separate element. Already, human rights complaints can go to the Supreme Court, but, as you have heard today, and probably will continue to hear, and as you have seen in the submissions, there are barriers to accessing the Supreme Court option. I am not sure that those barriers would necessary be alleviated if it went from the Human Rights Commission to the Supreme Court, simply due to some of the things that have been touched on—cost, fear of the judicial system, time and, simply, stress.

DR PATERSON: I very much take your point that we are a human rights jurisdiction. The laws are sort of dictated by human rights, so we have a very good starting point. It seems like it is really in the implementation of government services where breaches may occur. I guess the people that are using these services—CYPS, Housing—the most vulnerable in our community, really do need that. Accessibility is key and critical, and if they cannot access justice then what is the act actually doing? I was wondering what your thoughts about that were.

Ms Cheyne: The point that I would go back to is that the Human Rights Commission already considers a significant number of areas within its existing complaints jurisdiction—so discrimination, health services, disability and community services, services for older people, services for children and younger people, treatment of vulnerable people, victims' rights, occupancy disputes, retirement villages and prohibited conversion practices. It is considerable already, but I appreciate that there are some gaps in coverage.

To your point, Dr Paterson, I do not think that the Human Rights Commission is by any means a toothless tiger. I think it has quite extraordinary—perhaps not extraordinary; that is too strong a word—it has considerable scope. I think the live question is: should all of the human rights be able to be investigated and potentially conciliated through the Human Rights Commission?

MR BRADDOCK: On the issue of the ACAT and possibly being able to avoid damages and the flow-on implications on government, I want to try and understand where would be a good balance point in terms of awarding damages versus the impacts to directorates who are still trying to deliver services to other members of the public as well.

Ms Cheyne: I think that is a really thoughtful question. I think the starting point here is that compensation for human rights breaches would be new. This is not within the Supreme Court's jurisdiction at the moment and not anywhere else in Australia either, so we would, again, be going a step further. I think there was another submission, perhaps by a professor at Victoria University, that noted that compensation is necessarily an individual remedy. It might not necessarily be as effective as perhaps a declaration or indeed a remedy to the law.

I think that in terms of the resourcing implications it is a little difficult for us to know, because we do not know the volume of the cases. It could well be the complexity, but simply in terms of agencies responding to the complaints and developing their own expertise, for lack of a better word, in responding to complaints it could have a substantial impact, but it is difficult to say.

On the other hand, I certainly appreciate what we have heard from the petitioners and also seen in other submissions that, knowing that there is an enforcement mechanism, it might further help do the front-end lifting and make sure that those human rights obligations are fulfilled in the first place. However, it is already required as part of the act. I think that is a very circular response, but you can see the elements to it, I hope.

THE CHAIR: Would the government at the moment support the first part of the

petition?

Ms Cheyne: The government does not have a position, Mr Cain. I think what is clear in our submission and perhaps in our evidence today is that this is a significant policy consideration. It has several elements that we would need to be working through and it also necessarily has budget implications. In addition to that, we have a very big reform agenda in this term of parliament, of which we are coming up to a halfway point. As I mentioned, these are election commitments, but they are also key elements of the parliamentary and governing agreement, which are necessarily resource-intensive as well.

Because this is such a significant reform—and I am on the record, I think, repeatedly saying that I welcome an inquiry—this deep dive that you are doing will assist the government in helping to formulate a position on both of those elements. Going back directly to your question, as I mentioned, expanding the Human Rights Commission's jurisdiction regarding complaints would be the simpler element for us. But, again, it would have resource implications.

THE CHAIR: Following on from that, would there be categories of government operations that you would say you are probably most concerned about, including in this proposed approach? You mentioned child protection as one example that might be a feeder area, so to speak. Are there categories that you would be very comfortable with agreeing to, at least in the first part of this petition?

Ms Cheyne: As in adding in additional rights rather than across the whole government?

THE CHAIR: For certain agencies, effectively excluding some from the current proposal.

Ms Cheyne: I think, Chair, what has occurred over the last several years is that the complaints handling jurisdiction has expanded. We have the Discrimination Commissioner here, who will be able to talk to you about that and what the impact of that has been. I would not say I have a formal view on what could be next, to put it crudely. But we have certainly been open to that in the past and we have done that, including arriving into the pandemic, I suppose, as recently as in the last few years. I think there are complexities and this would require us to do a broader consultation with directorates including, as you mentioned, the Community Services Directorate.

I think ACT Policing will have plenty more to say on this. You would have seen that their submission detailed some of the complexities for them, not simply due to their legal arrangements, although that is very much a part of it, but also because they already have so many different avenues through which complaints can be pursued. I think that is where some of the complexity lies as well. I think that expanding the Human Rights Commission's complaints jurisdiction is more straightforward. I would not describe it as simple.

DR PATERSON: My layperson understanding is that in New Zealand they have the Human Rights Commission that hears complaints or mediates complaints and then it goes to the human rights tribunal. They have their own tribunal for these cases. I

guess that is an alternative model to the one proposed in the petition where it would go to ACAT. From what the petitioners were saying, going to ACAT actually seems quite a logical step in this process, where they are dealing with cases along these lines on a daily basis, rather than going and setting up an entire tribunal just to hear these types of cases. Again, I am interested in your thoughts on that.

Ms Cheyne: I think Ms McKinnon touched on it a little earlier in that ACAT would need to establish a greater—what was the word you used; you are much more eloquent than me?—expertise. I will get Ms McKinnon to supplement me in a second. That would be something that ACAT would necessarily need to do. As well, I think it goes to the question of, in going to ACAT, what are we actually trying to achieve here? Is it just about the enforceability of the conciliation? Is it that ACAT would be providing that declaratory role ordering government agencies to do certain things? I think that is what some of the submissions are silent on, in that ACAT would have a role, but what exactly would its role be? It is simpler, I think, in terms of a discrimination complaint. I might just ask Ms McKinnon to expand on that.

Ms McKinnon: I would really just say, in response to that, that in a small jurisdiction like the ACT, I imagine the resourcing impost of establishing a standalone tribunal, a separate tribunal—although it would be great to have a dedicated tribunal—is probably not going to stack up in terms of the budget case. If you were looking at a tribunal remedy mechanism, you would likely be looking at the ACAT as the most obvious place to go.

I think there is an issue about the additional benefit that you get from going to the ACAT. It does seem that you would get very significant benefits from going to the Human Rights Commission and being able to access their reconciliation process. They can involve both parties and take that restorative approach in really trying to seek to resolve and manage relationships. When you are dealing with public authorities you would hope that that is likely to be a fruitful process, because you are dealing with government agencies who would have an interest in trying to resolve those matters, as opposed to then going to that extra step. It seems that the extra complexity really does lie in that second phase.

Just in response to your earlier question, Mr Cain, the issue around excluding some directorates from the process, I think, would be complicated in terms of human rights being universal and applying to all public authorities. If that was limited to the Human Rights Commission's complaint jurisdiction, it is less likely to raise those complexities compared with the ACAT review mechanism.

DR PATERSON: Do you think that, by having a two-stage process—so Human Rights Commission to ACAT—you will not see resolution as often within the human rights conciliation process, knowing that there is another level? I might ask the Human Rights Commission that question.

Ms Cheyne: I think that is very difficult for us to know because we simply would not know what people's intentions are and what the reasons are for bringing the complaint. But I would say that the Human Rights Commission is a very effective operator. It certainly works very hard in its investigation and conciliatory approaches.

MR BRADDOCK: Has any thought been given to the implications of these changes to the ACT Ombudsman's role?

Ms Cheyne: Not directly by us. I know that the ACT Ombudsman provided a submission. I think the submission that I briefly read noted how the ACT Ombudsman works currently rather than how it potentially could work. I think that is because it perhaps would be outside the scope of the terms of reference, given the terms of reference are for the petition and the petition relates to ACAT. I will not speak for the Ombudsman, but I would guess that that is why the Ombudsman has only spoken about how its role operates currently, not how it could, so any questions would be directed to them. I would note that the Human Rights Commission and the Ombudsman talk about it further and that they do have a way of working together in handling complaints, which I think would be worth delving further into.

THE CHAIR: On behalf of the committee, I would like to thank the Minister for Human Rights and Ms McKinnon for appearing today. When available, a proof transcript will be forwarded to witnesses to provide an opportunity to check the transcript and identify any errors in transcription. I do not think there were any questions taken on notice.

Ms Cheyne: I do not think so, Chair.

THE CHAIR: Again, thank you for coming before us and for your submission.

Short suspension.

WATCHIRS, DR HELEN OAM, President and Human Rights Commissioner, ACT Human Rights Commission
TOOHEY, MS KAREN, Discrimination, Health Services and Disability and Community Services Commissioner, ACT Human Rights Commission

THE CHAIR: Dr Watchirs and Ms Toohey, on behalf of the committee, thank you for appearing today and for your written submission to the inquiry. Can I remind witnesses of the protections and obligations afforded by parliamentary privilege and draw your attention to the privilege statement before you on the table. Could you confirm for the record that you understand the privilege implications of the statement?

Dr Watchirs: I do.

Ms Toohey: I do.

THE CHAIR: Thank you. Before we proceed to questions from the committee, Dr Watchirs or Ms Toohey, would you like to make a brief opening statement?

Dr Watchirs: Yes, I would. Thank you for this opportunity. We really welcome the inquiry into this very important petition and note the more than 500 Canberrans who signed this petition and the 26 people and institutions that made a submission, given the importance of the subject matter.

The inclusion of a complaints mechanism under the Human Rights Act with recourse to ACAT is, I think, the most significant reform in the 18-year history of the Human Rights Act in which I have held the position of Human Rights Commissioner. More than any other provision, it will bring international law home to Canberrans. The commission has an existing framework for handling complaints using the practical discrimination jurisdiction model, which incorporates conciliation as well as the expertise to provide a one-stop shop to freely redress for breaches of human rights.

If MLAs and the government are serious in their commitment to the actual realisation of human rights every day for ordinary people, then they will support and implement this grassroots petition which enables the Human Rights Act to finally reach its potential. It will fill the biggest gap in human rights protection in the ACT and enable us to catch up with Queensland and Victoria.

Legislative reform would recalibrate accountability by holding public authorities responsible for noncompliance with the act and would provide an immediate incentive to comply, rather than far-away recourse to the Supreme Court, which is largely inaccessible to ordinary people due to cost, time, stress, complexity and risk. The complaints mechanism would be supplementary to and not replace the direct right of action in the Supreme Court.

I would also like to highlight that in both Queensland and Victoria significant resources were brought to bear to prepare for a complaints jurisdiction in those places, as well as human rights generally, the human rights acts, and there was actually a delay in the implementation to enable them to bring people up to speed in terms of how their internal complaints processes would work, particularly in Queensland with

that 45-day gap between internal review and ability to go to the Human Rights Commission.

Disadvantaged people—such as people with disability, Aboriginals and Torres Strait Islanders, refugees, and migrants—are most likely to suffer human rights breaches and least likely to bring protracted and expensive litigation; having a complaints mechanism is giving them a voice.

The dialogue model has improved the quality of debate and legislation in the Legislative Assembly. However, more work needs to be done to build a human rights culture in the public and legal sector, to enhance the implementation of laws in policies and practices that respect, protect and promote the human rights and wellbeing of all Canberrans.

THE CHAIR: Thank you. The commission strongly supports the core request of the petition—and you have both just heard the presentation from the Minister for Human Rights—which is a significant reform involving complexities, particularly the role of ACAT. As a very significant stakeholder in this space, how would you address those arguments?

Dr Watchirs: I might let my colleague Ms Toohey answer that because she handles the complaints jurisdiction generally, where we have discrimination complaints with ACAT and other complaints that do not always have ACAT.

Ms Toohey: I appreciate the minister's perspective. I think what she also said was that obviously our complaint jurisdiction provides a remedy for Canberrans across a whole range of issues. At the moment, some of our jurisdictions already proceed to ACAT—a number of them do—and I think the diagram on the back of our submission indicates that.

I am not entirely persuaded by the argument that ACAT does not have the expertise in this space. I think, as you have heard from some of the earlier petitioners, ACAT already considers some of those issues in a range of matters that it looks at—certainly in its housing and tenancy lists and its guardianship matters. So I am not entirely persuaded by that argument.

Yes, it would be novel but, equally, while it is not directly comparable, the Victorian model is also able to consider human rights issues at the tribunal level before it escalates up the court hierarchy. I appreciate the comments. I do not think we are persuaded by them. If you wanted us to put more thought into it, that might be a supplementary submission for us.

THE CHAIR: Thank you; I note your offer to provide a supplementary submission.

Ms Toohey: Yes.

THE CHAIR: I think the committee would benefit from your response to what we have heard today from the Minister for Human Rights.

Ms Toohey: We would be happy to take that opportunity.

THE CHAIR: Thank you. I do not mind saying that I probably was a bit surprised by thinking the ACAT was not well placed, having worked there myself professionally. What about the resourcing side of the minister's concerns?

Ms Toohey: I understand that. I think we are in the early days of this process. I just note that I think in the last annual report Queensland reported 180 human rights complaints. They have a population of five million people. If you look at it proportionately, it would seem that potentially we are not looking at a floodgate. Part of the reason I say that is that a range of matters that we already get, across multiple jurisdictions, raise human rights issues, even though we do not formally have that jurisdiction.

I think the clarity that having a complaint jurisdiction would provide to us would be a benefit not just to us but to the community, and certainly I think my colleagues in the community and legal sector would be looking to resource, because they are already running many of these matters. The resourcing, again, is something that we would be looking at. As we have taken on a number of jurisdictions, we have brought on the jurisdiction and then reassessed the resource as we have gone along, certainly at the commission level.

Regarding some of the other resource implications that the minister referred to in terms of agencies having to deal with their internal complaint mechanisms, you would be aware from our submission that the Auditor-General dealt with that matter a couple of years ago. Agencies, I think, have put in place much more comprehensive complaint-handling processes over the last couple of years, and we find that to be a significant benefit in the matters that we deal with.

THE CHAIR: Do you believe that if this were implemented through law it would have a consequential effect on public sector behaviour and treatment of individuals, so it may actually increase their own proactivity in considering the human rights impact of their decisions?

Ms Toohey: Certainly, what we see from our existing complaint mechanisms is that our ability to work with agencies to understand the lens that a complainant brings to a matter and to articulate that experience, both in terms of the complaint and, often, the conciliation process, has significant flow-on effects to the agency in terms of how they then go back and look at their processes.

We have seen that a number of directorates have used the case studies directly to go back and help with training and with repositioning, as I have said, a different lens over a particular circumstance. While sometimes there is a negative connotation on a complaint, the fact is they have an educative mechanism about them. They also, I think, have that unique experience of bringing parties to a table in a manner that often agencies do not experience. That is a significant benefit. I would suggest that a lot of the directorates would support me in that.

DR PATERSON: In relation to the need for the two tiers, an individual makes a complaint to the directorate initially and then they would come to you at the Human Rights Commission. Do you feel that you could be the one-stop shop rather than

going to ACAT, or do you think that you do need the ACT as the decision-maker in it?

Ms Toohey: I have complaint jurisdictions that have ACAT as a remedy and also those that do not. It acts in both ways. Sometimes it acts as a disincentive to settle; sometimes it acts as an incentive. Again, that would be, I would suggest, subject to a broader consultation process. Certainly, as my colleagues have indicated earlier, there are matters where you need an enforcement mechanism at the end of the process, particularly for some parties that may be less amenable to resolution options. We have had that experience with some of the directorates; I would have to be honest and say that. But I also think that having a clear jurisdiction in this space would give us a much better vehicle to work with those agencies around those matters. Again, we would be happy to take that as part of a supplementary submission.

DR PATERSON: I took from the police submission that there were two main issues: the complication of the commonwealth versus the ACT around how they are structured, and that there are multiple complaints mechanisms and scrutiny on Policing currently. I am interested in your thoughts on their submission and their views on this.

Dr Watchirs: We have encountered that view because they are not subject to the Discrimination Act. We are the only jurisdiction in Australia that does not have jurisdiction over police. I would say that their existing mechanisms may not be as transparent and trusted, particularly by the disadvantaged community, particularly Aboriginal and Torres Strait Islanders. The Ombudsman has made an adverse report in the last year or two about the engagement of ACT Policing with the Aboriginal community. Police are currently a public authority under section 41C. A police officer, when exercising a function under a territory law, is subject to the Human Rights Act. With careful drafting, that could be addressed. We would be happy to provide a supplementary answer to that, if that would assist. My colleague may have more to say.

Ms Toohey: We already have the victims of crime charter of rights jurisdiction. We have done a lot of work with our colleagues at the AFP in terms of looking at resolution processes: what does a response that lends itself to a resolution look like? As Dr Watchirs has indicated, part of the issue in the ACT community is that that is the only jurisdiction that we have that holds ACT Policing accountable in the ACT, apart from the Ombudsman. The Ombudsman does not have a conciliation resolution model, so it is not an opportunity to bring the parties together

I think the gap that we have, as Dr Watchirs indicated, is that in every other state and territory, the police in that state or territory are accountable under federal discrimination law, which our police service is, but also under state and territory law. We do have a gap there. Our community feel that gap, I would have to say. It is an ongoing source of pain that people express to us; that their expectation is that they can bring those matters to us. There is a drop off between contacting us about police-related discrimination complaints and people contacting the federal commission. We have that from individuals and we can see that in the data.

While I appreciate that the police may have concerns about a jurisdiction being

expanded to them, I think the Queensland experience demonstrates that there are not a large number of complaints but they often get significant outcomes. It is an opportunity for the community to participate in that feedback mechanism with an agency that has a significant impact on them.

MR BRADDOCK: Dr Watchirs, did you say that you would provide some further information in a supplementary submission on the issue of the police?

Dr Watchirs: If you would like us to, we are happy to do that.

DR PATERSON: That would be great.

MR BRADDOCK: I would appreciate that; thank you. I am trying to understand what the implications of these changes would be on your roles and the Ombudsman's roles in terms of what might need to change. Do you have any ideas or insights?

Ms Toohey: We already have an MOU with the Ombudsman at a complaint working level. Obviously, we and the Ombudsman can take similar matters in some settings—some of our jurisdictions do not overlap. That relationship, I feel, works really well and we have a very good communication set-up. The Ombudsman does not have an explicit jurisdiction for human rights.

As far as I am aware, given the nature of the work that they do, they certainly do not have the expertise that we do in looking at human rights, particularly across the breadth of jurisdictions that we have. I think that if government were to move to get us a complaint jurisdiction in this space, it would continue in much the same way that our current work does, which is, where it would appear that the Ombudsman may have an interest or may already be dealing with the matter, we would be in communication with them, as we would be now.

MR BRADDOCK: So there will not be some transfer of responsibilities with this change; it will probably be business as usual?

Ms Toohey: No. We already have formal and informal referral pathways. We are very cognisant, particularly in a small jurisdiction, of not duplicating. I think it is obvious from the number of jurisdictions I have that the government has very much tried to make sure that, when we are dealing with organisations, we are dealing with the organisation. It is not that we are dealing, as often occurs in other states, with multiple organisations around the one matter. Those mechanisms already exist. Were the government to see fit to expand our jurisdiction in this way, that would be a piece of work that we would do, again, to enhance our relationship with the Ombudsman.

Dr Watchirs: In Queensland last year there were 893 human rights internal reviews. Of those, 32 were upheld, 40 went on to the Queensland Human Rights Commission, and 15 were finalised. That might give you an idea of the volume. It is a jurisdiction of five million people, though.

THE CHAIR: If you pro rata that, it is certainly not a floodgate, even in that area. Given your experience with the discrimination jurisdiction, if this petition were enacted, where would you see the complainants coming from? Do you have evidence

to say that there is a part of the community that does not have adequate redress at the moment and you think this petition will allow them that avenue?

Ms Toohey: Yes. We have included a number of case studies in the submission where there are matters that do not naturally fall into one of our existing jurisdictions because they explicitly raise human rights issues. The other petitioners have given a range of examples—disadvantaged groups, certainly. I say that broadly because, again, with the breadth of jurisdictions that I have, they cross over a whole range of services in the ACT.

What we have tried to do with the examples that we have provided is articulate where some of those issues arose—for example, the young person in Bimberi, which was in the media and is on the public record, looking at issues around cultural rights. That matter ended up in the Supreme Court. It was not a matter that needed to go to the Supreme Court, I would submit. It was a matter that should have been resolved. If we had had a clearer jurisdiction and been able to articulate that clearly, I think that would have helped the agency understand why the young person was bringing the matter to the commissioner and eventually to the Supreme Court.

There are a range of other examples, as I have said. Certainly, we have looked at it. In our annual report you will see that, where we have inquiries, we have an "other", where we cannot report on the jurisdiction. Often those are about human rights matters that we are not able to help with.

Dr Watchirs: Can I just add something about the Queensland and Victorian experience? In Victoria it is not just the Ombudsman—IBAC also has jurisdiction over police instead of the Ombudsman. There are definitely economic, social and cultural rights areas where the complaints seem to be focused—so health, housing, education and disability work. Police and corrections seem to be two prime agencies as well.

THE CHAIR: Thank you.

Dr Watchirs: Also, in relation to the impact on the Supreme Court, there has been at least one detainee, Mr Islam, who has had multiple self-represented cases in the Supreme Court. I know that that is an issue for the Supreme Court. ACAT is much better equipped to deal with self-represented clients, so it would be less of a burden of resources on ACAT than it is the Supreme Court.

THE CHAIR: Obviously, it would be a saving to the Supreme Court list if these matters had an earlier process.

DR PATERSON: My question is about your views on compensation. We heard from the minister that there are no other jurisdictions in Australia that give compensation. I am wondering what your thoughts are—if it is warranted and if it is an important part of this process, or not?

Ms Toohey: Certainly, we are on record as saying that we should have the UK model of compensation that is fairly modest. New Zealand has an interpretive model under the Baigent case, which is also quite modest. We do not want that to slow down this

process. We would rather proceed on the issue of complaints and look at the issue of compensation generally under the Human Rights Act, which includes Supreme Court actions, separately. You might note that ACAT has a cap of $25,000 for civil cases currently, affecting discrimination matters, anyway.

THE CHAIR: Following on from that, are you are able to say what percentage, roughly, of discrimination conciliations would involve some compensation payment, which is something that can be done as agreed by the parties, or is that uncommon?

Ms Toohey: No, it is not uncommon at all. Having worked across a number of discrimination jurisdictions at a state and commonwealth level, compensation is a recognised means of redress, so I do not think it is exceptional in any way. The benefit of conciliation is that it is not always the only thing and often when you get to court, because you have expended a lot of money getting there, that does become the focus of the matter; whereas I think in our jurisdictions compensation may be an element, and it is not capped in the way that it is with ACAT. For some matters, that is a benefit to the parties in terms of resolution at our stage of the process, but nationally it is a recognised means of redress in the conciliation process in discrimination claims.

THE CHAIR: Would the majority of the current discrimination settlements—

Ms Toohey: I would not say the majority do. It would depend on the circumstance. If it is a child out of school or not attending school full time, they are not looking at compensation; they want their child to get an education. If it is an employment-related matter where the person has lost their job, it may be. If it is an age discrimination complaint about residential aged care, it is often about improving the care; it is not necessarily about compensation. In our annual report we put in examples. I am not sure we have specific data, because that is a difficult thing to report on, but in the supplementary we can certainly address some of those concerns.

Dr Watchirs: Another issue that might be relevant is the number of cases that go from the commission to ACAT. It is only five to 10 per cent of cases that are unresolved that go to ACAT, so it is fairly tiny.

THE CHAIR: Are you able to report on, perhaps going forward, the elements of the conciliation agreement, whether it includes monetary payment or not? That would be an interesting bit of information to inform discussion about compensation generally.

Ms Toohey: It would be a manual exercise based on my current database.

THE CHAIR: Okay.

Ms Toohey: I am happy to look at a sample, if that would assist, because obviously not all matters go to conciliation and not all matters resolve. We are happy to provide a sample data, if that would assist.

THE CHAIR: Thank you.

MR BRADDOCK: What changes would you hope to see in the ACT government in

terms of its systems, policies, culture and so forth coming out of this change, not at the micro or individual case level but more at the macro level?

Dr Watchirs: I think the Auditor-General's 2019 consideration of the implementation of the Human Rights Act in agencies showed that there were big gaps. We are very good at scrutiny and legislation, but in terms of how that is implemented in practice and policy there are gaps. They could not be assured that it is actually being implemented in practice. We are in a similar position. Complaints coming to us is one way of managing that.

Certainly, in Bimberi and AMC when there are problems we try to resolve them through Karen's complaint mechanism. We have been intervening more frequently in Supreme Court matters. The case of Davidson that was decided last week was about a prisoner in the management unit not being allowed to use the general exercise yard and being limited to a small yard at the back of the cell, which we thought did not comply with ACT or international standards. We were supported in that. That could have been easily resolved by a complaint. There were three parties: the plaintiff, the defendant and us. All of us had two counsel and solicitors appearing. That was a great amount of resources, as well as the court's resources, with its staff.

We think there are shortcomings within the ACT implementation of human rights. This change would be an assurance that it is being understood more widely by the community. A lot of people think that discrimination complaints are human rights complaints. Having that comprehensive jurisdiction would be much better for us and the community and agencies. I think it would deepen the human rights culture and the compliance by government.

MR BRADDOCK: Thank you.

Ms Toohey: During COVID, the pandemic and the lockdowns, the commission put out a lot of information to assist people to understand not just how their human rights were being impacted but the balancing of rights and why their human rights were being impacted. Behind that was work that we were doing with a number of the directorates. We were getting complaints coming in that may or may not have fallen clearly within our remit—so things like parenting agreements being affected by the travel bans and those sorts of things—and we were trying to bring a different lens to how those matters were being looked at. There are a lot of constructive conversations that are happening in that space—that human rights is not this theory thing; it is about this parent not being able to quarantine for 14 days when their parenting order is only for 48 hours.

The dialogue model is not just about the courts; the dialogue model is about human rights commissions working with agencies to broaden the understanding and deepen the understanding so that those matters do not come to us; they get resolved right at the front end as people think through what the consequences might be.

THE CHAIR: You have probably touched on this with comparison to Queensland numbers, but what additional resources would the Human Rights Commission need to accommodate this change?

Ms Toohey: I am not one to ask for resources in an Assembly inquiry.

THE CHAIR: Have you modelled—

Ms Toohey: It is not just about handling the complaint; it is about educating the public—that is what the commission endeavours to do alongside the work that we currently do. Yes, there is a resource implication. Again, with the number of jurisdictions that we have brought on, we have brought the jurisdiction on and then we have looked at what the resource implication was as we have gone forward. The difference between us and Queensland at the moment is that Queensland's act came in at the same time as the jurisdiction. We have had the act for some time. With JACS we work on educating people from a complaint handling perspective. Again, I think we would need to look at the numbers.

THE CHAIR: And you would do that once the scheme was in place, I suppose, rather than anticipate numbers?

Ms Toohey: One of the approaches that we have taken has been to say, "Give us the resource for a year so that we can work out what we need," so that it is evidence based rather than necessarily using a predictive model.

Dr Watchirs: It would be a two-stage process with Treasury. We would ask for a number of staff and, if that was not sufficient, come back the following year with data.

DR PATERSON: How long do conciliation processes take? Are these often resolved quite quickly between two parties or can they go on?

Ms Toohey: It depends on the nature of the matter. Because of the breadth of jurisdictions we have, there are some matters that come in in the morning and we are on the phone with the directorate straightaway. Some of those matters get dealt with very quickly. I would have to say at the moment my colleagues in Housing are being very responsive on a whole range of matters.

Where they are complex matters—for example, in the health space—where either there has been an adverse outcome and a death or there has been a long and sustained issue, they can take longer. I have KPIs around matters being dealt with in under 250 days, which we consistently meet. It is very difficult to tell. If it is around a child that is out of school, for example, we are not going to sit on that. If it is a matter that is not quite so urgent then it may take a bit longer and we will go through a formal investigation process.

We triage every matter that comes in. I have a very small team, so often that involves someone yelling out to me saying, "We've got this matter." I think that is partly where we have built the confidence in the community to come to us, which is why the numbers go up. People understand that we are resource constrained—all agencies are—but we put a lot of effort into trying to triage matters and work collaboratively with the respondents to try and resolve complaints. Again, the data is in the annual report, but I would be happy to include some data to that effect in the supplementary.

THE CHAIR: On behalf of the committee, I would like to thank Dr Watchirs and Ms

Toohey for appearing today on behalf of the Human Rights Commission. When available, a proof transcript will be forwarded to witnesses to provide an opportunity to check the transcript and identify any errors in transcription. I do not believe there were any questions taken on notice.

Dr Watchirs: We have a number of matters to be dealt with in the supplementary, but no questions.

THE CHAIR: You have volunteered to provide a supplementary submission.

Dr Watchirs: Yes.

THE CHAIR: It is not like a question on notice.

Dr Watchirs: No.

Hearing suspended from 12.46 to 13.30 pm.

KLUGMAN, DR KRISTINE, President, Civil Liberties Australia
ROWLINGS, MR BILL, Chief Executive Officer, Civil Liberties Australia
STAMFORD, MR CHRIS, Campaign Manager, Civil Liberties Australia

THE CHAIR: We move to the next witnesses for today, Kristine Klugman, Bill Rowlings and Chris Stamford from Civil Liberties Australia. On behalf of the committee, thank you for appearing today and for your written submission to the inquiry. Sorry, I should have done a welcome back, for those watching, to the inquiry by the Standing Committee on Justice and Community Safety into petition 32-21.

The proceedings are being recorded and transcribed by Hansard and will be published. They are also being broadcast and webstreamed live. I remind witnesses of the protections and obligations afforded by parliamentary privilege and draw your attention to the privilege statement before you on the table. Could you each confirm for the record that you understand the privilege implications of this statement?

Dr Klugman: Yes.

Mr Stamford: Yes, I have, thank you.

Mr Rowlings: Yes, I do.

THE CHAIR: Thank you very much. Before we proceed to questions from the committee, perhaps one of you would like to make an opening statement.

Dr Klugman: Yes, I would. Thank you, Mr Cain. Civil Liberties Australia believes that the process recommended by the petition will provide an accessible complaints mechanism for any breach of human rights in the ACT. CLA looks forward to the committee recommending that the Assembly move to enact the no rights without remedy proposal.

Case studies and submissions from organisations that deal with rights breaches every day in the ACT demonstrate the limits of the current human rights processes. That is where people are falling through the cracks, from elder abuse to denial of education.

Nineteen of the 27 submissions say that implementing the proposal will make justice more available to people who are currently missing out, including every participant in the current complaints process other than the courts and Policing ACT. More broadly, those 19 submissions agree that the proposal will remove inequalities in the complaints process.

Those inequities prevent the ACT government from reaching its stated aim of putting human rights at the foundation of a jurisdiction that is sustainable, liveable and fair. CLA would like to emphasise that the proposal will improve governance in the ACT by embedding objective third-party scrutiny into the human rights aspects of all ACT government decisions.

Doing that provides a substantial incentive to ensure that the best practice decisions are taken at the lowest possible level, improving decision efficiency and effectiveness

and ultimately lowering costs. The proposal will also increase the accountability of government decision-makers to individuals. Doing that will increase people's confidence in the ACT government.

Importantly, those outcomes will be measurable and reportable through the ACT's wellbeing framework, which underpins future budget processes. As a result, the proposal will increase confidence across the ACT that human rights are protected and that the ACT government will behave ethically in genuine participatory democracy. These are two criteria for the jurisdiction looking to become more sustainable, liveable and fair, which will confirm that Canberra is the best place to live in Australia. Thank you.

THE CHAIR: Thank you. I will lead off with a question. I am particularly interested in your commentary on the position of the Minister for Human Rights that this would be a significant reform that would involve complexities that perhaps the ACAT forum is not amenable to, and that they basically do not support either point but are happy to look into it.

Mr Stamford: Thank you, Chair. I am the manger for Civil Liberties Australia's federal Human Rights Act campaign. I was in the room this morning when Minister Cheyne took the committee through the petition and the government's preliminary thoughts around it.

We agree with the government that the opening section, the first part of this proposal, is a relatively straightforward and sensible exercise. I was as surprised as the Human Rights Commissioner was to subsequently hear the minister say that there was a considerable degree of novelty attached to taking these matters forward to ACAT.

I think it is very important to remember, firstly, exactly why Civil Liberties Australia, at least, wants to see ACAT in this process. If a person is engaged in an unlawful act, ACAT can make an order that can include that the respondent does not repeat or continue that unlawful act. It can ask that they perform a stated reasonable act to address any loss or damage suffered by the applicant because of that unlawful act. And it can impose a payment on the applicant, of a stated amount, by way of compensation for any loss of damage suffered by the applicant because of the unlawful act. Bear that thought in mind, because if there is an authorising law attached to the decision that is being questioned in ACAT, ACAT can also uphold, remake and set aside the government decision, provided that there is an authorising law. In other words, we are asking that the Human Rights Commission be allowed to extend its considerable skills around confidential conciliation across the whole range of the act.

Where there is a requirement for a mandated remedy—and that will happen from time to time—the option remains that, at the ACAT level, the mandated remedy be put forward, not just because of compensation but because of the fact that ACAT can uphold, remake and set aside decisions that governments have made under authorising laws and it can also look to compensation for damages. It provides that option, sitting there.

ACAT is already a part of the remedy process that the Human Rights Commission

actually has. It has a direct relationship in relation to discrimination laws and a number of other matters, all of which were raised by Karen Toohey this morning. So there is expertise and experience within ACAT to deal with human rights issues, and my expectation is that it would not be an enormous step for ACAT to take on new human rights obligations when considering its own mandated processes.

THE CHAIR: Thank you.

DR PATERSON: I was wondering what Civil Liberties' views are on that argument that the police have put forward in their submission around the conflict with the commonwealth versus the ACT jurisdiction and around the fact that they have so many oversight and complaints mechanisms within police already that this is an additional one.

Mr Rowlings: Basically, we and the police are relying on these. What we want to see is respect for the law, an enforcement of the law in a proper manner. Occasionally we run into trouble with the police when the police themselves do not do the right thing according to the law as they enforce it. That is a separate issue. The point about police is that, quite clearly, if they work under federal law then federal law applies. If they work under ACT law then ACT Policing is involved. That is the issue.

That is a matter for the drafters to get right when they draft the legislation and seek consultation on the matter. I assume that when draft legislation is put out, and explanatory memorandums, we will all get our chance to have a say on it. That is the place to get that right.

Quite clearly, the police handle the law every day and handle issues of this nature every day without difficulty, so we cannot see why this would create any extra difficulties for the police, particularly as they say that they have the best internal mechanisms or reviews et cetera. If those mechanisms work as they say they work then it will never get anywhere near the ACT Humans Rights Commission or ACAT. If their review mechanisms or complaint mechanisms are working properly, which is what we all want, it is not an issue at all.

Mr Stamford: Can I just add one or two thoughts to that? It is important to note that in the police submission there is a view that there is a supervisory role that the police seem to have imposed on the Human Rights Commission, should these amendments go ahead. In fact, it is just consequential. In other words, if the police processes are incapable of resolving an issue then the Human Rights Commission comes over and takes on that matter, in the same way as would be the case with any department and its internal processes.

The other point that I want to make, though, is that the vast majority of human rights complaints in the ACT do not involve police, including every example that I can see raised in the 27 submissions made to this inquiry. Human rights are indivisible, they are interdependent, they are equally important and it would be wrong to have access to remedies for the majority for human rights complaints denied because of complications arising from the complaints associated with the police.

Our view is that there is a much larger context in the consideration that the police

have in relation to this issue. We should make sure that the perfect is not the enemy of the good here. There is a great deal that these amendments can do which is not related to the police and where, as Bill has pointed out, it is a drafting issue.

MR BRADDOCK: I am just interested in Civil Liberties Australia's view on financial remedies. We heard Helen Watchirs talking about the models that exist in the UK and New Zealand as potential examples. Do you have views as to whether they should be in place and how significant they should be?

Dr Klugman: I think, again, that it is a matter for the drafters to really sort out that question. I do not think that that should be an issue that stands in the way of these reforms. It obviously will be an issue that needs to be addressed, but I do not think it should be a detriment to the Assembly accepting the proposal.

MR BRADDOCK: I am not suggesting it should be to the detriment. I am just asking: do you have a view that might be helpful down the track?

Mr Stamford: I will add one comment to the comments that Dr Klugman made, and that is that, at the moment, monetary remedies already form a part of human rights outcomes in the ACT. It is quite possible—and Karen Toohey was talking about it this morning in her session—that the conciliated outcome between two parties might include an agreement to pay reparation or compensation, or however you might want to frame it, in particular cases. Both parties have agreed to that, so it is already there.

Really, I think that people are talking about compensation as some kind of mandated compensation coming through ACAT, should the process get that far. Our view would be that compensation is only one small part of the authority that ACAT has. We talked at the beginning of this session about the whole other thing that ACAT can do. It can seek limited compensation. If you want more then there are other ways in which you might be able to do that, but it is already there in the process. Adding ACAT to the process does not add compensation. Compensation is already in it. Discrimination issues taken to ACAT may well include compensation now.

So, as I said, we do not see that this is as novel an idea as seemed to have been the case when the matter was discussed this morning. One of the issues that was not discussed much this morning was around this question of what role departments and agencies have in this exercise. We talked about the Human Rights Commission and ACAT, but there may well be compensation arrangement put in place at the front end of this exercise, as issues are raised with departments. The very reason we are keen to see this matter pursued is that there is nothing like the potential for third-party scrutiny to encourage departments to get their act together and force priorities on getting these sorts of things settled—making the decision right in the first place and making sure that if the decision is wrong then the matter is dealt with expeditiously at the decision-maker level.

I think that this was also mentioned by Australian Lawyers for Human Rights this morning. The Queensland experience is showing that, at least anecdotally, one of the outcomes that is coming out of the Queensland experience is that decision-making is being pushed to the lowest appropriate level, which is the most efficient and most effective way of getting decisions made.

Dr Klugman: And the cheapest.

Mr Stamford: Yes.

Mr Rowlings: Our concentration is on getting the remedy for having your rights breached and not so much on how you do that.

MR BRADDOCK: Thank you.

Mr Rowlings: Occasionally, as we said, it will involve some compensation, but that is, again, at the miniscule end of the discussion of it.

THE CHAIR: I think, Dr Klugman, you said in your opening statement—and please correct me if I have not quite got this right—that you could see the potential for actual savings by introducing this scheme. Could you expand on where you think those savings would be and what, if any, extra resources would be needed, either as a shift of resources or additional resources?

Dr Klugman: I think it goes to Chris's point about the bureaucrats making the right decision in the first place. It is obviously less costly to solve the problem at the grassroots level. That involves a change in the culture, in the bureaucracy, of taking human rights complaints seriously, dealing with it, rather than putting it aside. I think that, as Queensland experience has shown, if that becomes the law and the culture, then it is much cheaper economically.

It is much less stressful on everybody, particularly the complainant who is taking the complaint forward. If these issues are unaddressed then they go to the expensive Supreme Court costs sort of level, which is quite prohibitive and very time-consuming and very much delayed. I think solving the problem at the grassroots level is obviously the cheapest, most efficient and most just way of dealing with these complaints.

Mr Stamford: In the submission that we put forward we did say that we are not in the same position as an agency in being able to make estimate of the cost for this exercise, clearly. However, we did say that there are a couple of tests that Civil Liberties Australia would like to see applied to any argument in relation to cost here. The first is the effect of improved decision-making on ACT Human Rights Commission and ACAT case loads. In other words, if you make better decisions first, the case load is not going to go up that much.

Secondly, looking at the agency's overall workload and the context of the estimated rise in cases, most of the people who have appeared before you today have said that they are not expecting a flood of new cases. But if there are an increased number, you have got to remember that the ACT Human Rights Commission received 1,890 new inquiries and 922 complaints, of which 200 related to discrimination. In other words, discrimination itself is not a major part of their work.

Have a look at ACAT. It conducted 6,357 substantive hearings and received 4,136 applications and, of those, only 39 were discrimination referrals from the ACT HRC.

In other words, even if there are more cases, of a substantial order of magnitude, that go before ACAT as a result of this process—and not one witness you have seen today has suggested that that might be the case—the only issue around for ACAT is really about experience and expertise. And we would argue that experience and expertise already exists in large measure in ACAT as a result of them already being involved in human rights remedy issues. We just want to make sure that in any conversation around cost those two tests are applied to the cost-benefit discussions around this particular piece of legislation.

THE CHAIR: Those two tests being, again, just in summary?

Mr Stamford: Firstly, the effect of improved decision-making at the departmental level on the ACT HRC and ACAT case loads. Secondly, the agency's overall workloads—that is ACAT's overall workload and the Human Rights Commission's overall workload—in the context of the estimated rise in cases. In other words, they are doing 922 cases now. What percentage of effort are they going to have to raise in order to meet the new load of cases, if indeed there are any?

Mr Rowlings: The other cost question, which is impossible to answer, is: if you get it right at the base level, how much angst do you save and how much is angst worth? That is a very important consideration in terms of the people who have the complaints or who have the problems. That is where you are saving money. You cannot measure it, but you are going to save an awful lot in there.

Dr Klugman: In one way, the complaints are not being met terribly well at the moment. The surveys have shown the difference between the lived experience of people with human rights and the theoretical aspect of this. There is quite a gap. In other words, when people know the system they are less satisfied with it than the ones who do not know the system and agree with it in principle. If you are looking at a wellbeing budget, you have to take into account that the lived experience has to be positive. The no rights without remedy proposal, we believe, will improve that lived experience.

THE CHAIR: Arguably, providing savings to the government and parties by not starting in the Supreme Court?

Dr Klugman: Exactly.

THE CHAIR: Thank you so much for coming and spending time with us today. When available, a proof transcript will be forwarded to you to provide you with an opportunity to check the transcript and identify any errors in transcription. I do not believe there were any questions taken on notice. Thank you for presenting to us today.

Dr Klugman: Thank you.

Mr Rowlings: Thank you for the opportunity.

Hearing suspended from 1.51 to 2.10 pm

SCHILD, MR DEREK, Legal Aid ACT

THE CHAIR: Welcome back to the public hearing of the Standing Committee on Justice and Community Safety into petition 32-21. The proceedings are being recorded and transcribed by Hansard and will be published. They are also being broadcast and webstreamed live.

On behalf of the committee, I would like to welcome Derek Schild from Legal Aid ACT. Thank you for appearing and for your submission. I remind witnesses of the protections and obligations afforded by parliamentary privilege and draw your attention to the privilege statement before you on the table. Could you confirm for the record that you understand the privilege implications of the statement?

Mr Schild: Yes, I do. Thank you, Chair.

THE CHAIR: Thank you. Mr Schild, before we go to questions, would you like to make a brief opening statement?

Mr Schild: Thank you, honourable members of the committee. I am head of general practice at Legal Aid. We provided a submission and we are grateful for the opportunity to provide evidence to the committee today.

Legal Aid provides many thousands of legal services to the most vulnerable and disadvantaged members of the ACT community each year. We assist vulnerable clients in family violence, care and protection, tenancy and occupancy, elder abuse, NDIS, mental health, guardianship, detention, employment, discrimination and human rights matters.

Many of our clients are from culturally and linguistically diverse communities, are Aboriginal and Torres Strait Islander clients, and are clients with significant mental health and capacity issues. Relevantly, we have experience in providing advice to and representing those clients in the ACAT, in mental health, guardianship, discrimination and occupancy proceedings.

We support the petitioners' proposal for a two-stage complaints process. Similar processes are working well in the discrimination area at both the ACT Human Rights Commission level and the ACAT level. We assist applicants in ACT Human Rights Commission conciliations and in some of those matters which do not resolve with conciliation at the ACT Human Rights Commission that are then litigated in the ACAT.

Beyond our written submission, to effect the proposal we recommend that some additional funding is considered for the ACT Human Rights Commission and the ACAT, and for those agencies such as Legal Aid who will see some increase in work as a result of this proposal.

THE CHAIR: You commented just then on something I was interested in, and that is: how much work are you currently doing with respect to human rights complaints, even though there is not a formal mechanism? We heard from Canberra Community

Law that they do some advocacy work, mainly letter-writing, to deal with people who have a human rights issue with a government department.

How many of your resources are currently occupied with that? You thought that the passing of this petition into law would increase your workload. Could you talk more about that, because there might be an argument that those advocacy roles might be directly shifted to the Human Rights Commission and that would be a work saving for you.

Mr Schild: Sure. We have a very busy general practice. Where people come to us with complaints around human rights, we provide them with advice in relation to those matters and some of that advice does relate to how to go about commencing proceedings in the Supreme Court, if that is where they choose to go.

We have guidelines in relation to actually proceeding on grants of legal assistance in an ongoing capacity for people, and they determine whether or not someone is able to get a grant of legal assistance to run proceedings in the Supreme Court. In civil matters that does not often occur in terms of the Legal Aid budget. We rarely fund matters in the Supreme Court.

We are involved in discrimination matters, which of course have some elements of human rights breaches involved, from time to time. We consider that if access were made available through this proposal to the ACT Human Rights Commission then we would be involved in assisting people, providing advice and getting them involved in making those complaints to the ACT Human Rights Commission. A much smaller number of those may well then go through to ACAT. Whether or not we provided assistance at that stage would be another matter of looking at our grants unit and whether or not that person was then eligible for a grant of legal assistance.

THE CHAIR: Thank you.

DR PATERSON: If this process were put in place, would you provide legal representation through the conciliation process with the Human Rights Commission or would the Human Rights Commission take that role?

Mr Schild: That really is determined by the vulnerability of the client, whether or not they need that additional assistance of having a lawyer present at the conciliation. We appear at some conciliation conferences that are run through the ACT Human Rights Commission. On a number of occasions we provide advice to people who then represent themselves at those conciliations. Again, there is a similar consideration, for that small number of matters that do not resolve at conciliation in the discrimination area at the moment, when they are referred to ACAT. But, again, that is a small percentage—maybe five to 10 per cent of matters that do not resolve are then referred and go on.

DR PATERSON: When would a person in this process approach you? Do people approach you once they have made a complaint to the directorate or the government department and they have not got anywhere? Do they then come to you? Or do they come to you first and you help them there?

Mr Schild: There are various ways that they approach us. There is not just one avenue. People from the Alexander Maconochie Centre might approach us by asking for an audiovisual link appointment with us. There have been people who have approached us directly when they have raised the issue, or before they have raised the issue, with the relevant directorate. We are also asked, on occasion, by the ACT Human Rights Commission themselves to provide some advice or assistance to people who are already engaged in the conciliation process. They have already made their complaint. Sorry, that is in relation to discrimination but would be similar in relation to human rights if the proposal was effected.

DR PATERSON: So your workload and case load would not really change. If this was put in place, you would still perform a very similar role to now; is that correct?

Mr Schild: I think it is a little difficult to see how things would play out. I think with a more accessible process for pursuing remedies and with some appropriate education around that then there may be an increase in the number of people who are actually wanting to pursue those remedies. They are then more likely going to be seeking some advice or assistance from Legal Aid or other bodies. We would really have to monitor and see how that goes, but I would think that, initially, there might be some increase in work in the area, in that, rather than advising people, "You can take this complaint to the Supreme Court and that might take a couple of years and you might not get a grant of legal assistance there," we might be advising people that they have a complaint that they can pursue through this comparatively straightforward process. We would then be able to assist them along the way through that process or, significantly, if they have capacity issues or some heightened vulnerability.

MR BRADDOCK: Something has been thrown up from your submission, and I am not sure if you are the best person to ask. It talks about appropriate publicity, which can be correctly handled by ACAT in terms of either allowing it to be public or allowing for a private hearing. I am just wondering: earlier in the process, is it appropriate that it should be all done privately or is there a public benefit to be had in some of these issues being exposed to public profile in order for systematic changes to be addressed or issues to be identified? Have you given any thought to that?

Mr Schild: I think there are a couple of ways to think about that. If we are considering the individual who has that human rights complaint, often they are not interested in a public fleshing-out of that. Privacy in conciliation has the effect, I think, of enabling the parties to come to a resolution. Of course, publicity is one way of ensuring that the party that has been alleged to have breached the human rights is held accountable. There is the possibility for publicity to occur, of course, as we have set out. I am not sure that mandatory publicity is something that would assist.

MR BRADDOCK: I would not suggest that. I am just ensuring that there at least is some public information made available of: "X directorate was found in breach of human rights for Y reason." We have seen examples where nondisclosure agreements and public awareness of repeat patterns of behaviour or breaches have been swept under the rug. I am just wondering how we can ensure that there is a public book that is available whilst still affording privacy to the individuals.

Mr Schild: Yes. Without the complainant agreeing to that, that is ultimately

something that they may not be inclined to have publicly aired. I have not got an easy answer to that.

MR BRADDOCK: Thank you.

THE CHAIR: I do not know if you were here listening when the human rights minister was speaking to us.

Mr Schild: No, I was not.

THE CHAIR: She made a couple of statements of interest: (1) that this change would be a substantial change; and (2) she queried whether ACAT would be able to handle the complexities of such disputes if they moved from the Human Rights Commission. Do you have any view on that, as an overview?

Mr Schild: I think the proposal as it stands, to have access to that two-level, two-tier complaints system, is an important change that we support. I do not know that we are going to have this floodgates argument, really. I think, in this jurisdiction, the numbers of people who may have human rights breaches that need to be pursued are not going to be enormous. I think that this proposal would allow for easier resolution of those matters, a quicker, speedier resolution of those matters, and for complaints to be satisfied more quickly—that is, something is being done about breaches.

In terms of the complexity and whether that is something that ACAT would be across, that may well be a matter for ACAT, but I would have thought that they would have extensions in their jurisdiction from time to time and that the relevant members could get across those issues fairly quickly.

THE CHAIR: Okay. Thank you.

MR BRADDOCK: No more substantive questions. The submission was very good. Thank you.

THE CHAIR: Would you like an opportunity to say something in closing? Obviously, your submission supports the petition. Any reservations or exclusions that you think might be appropriate to consider?

Mr Schild: No, I do not think so.

THE CHAIR: Okay. We will come to a close on that. On behalf of the committee, I thank you for appearing on behalf of Legal Aid ACT. When available, a proof transcript will be forwarded to you to provide an opportunity to check the transcript and identify any errors in transcription. I do not believe you took any questions on notice or undertook to provide other information. I thank you for giving us your submission and your time.

Mr Schild: Thank you.

Short suspension.

GAUGHAN, DEPUTY COMMISSIONER NEIL, Chief Police Officer for the ACT, ACT Policing
WHOWELL, MR PETER, Executive General Manager, Corporate, ACT Policing

THE CHAIR: We welcome the next witnesses appearing before us today, Deputy Commissioner Neil Gaughan and Peter Whowell from ACT Policing. On behalf of the committee, thank you for appearing today and for your written submission. I remind witnesses of the protections and obligations afforded by parliamentary privilege and draw your attention to the privilege statement before you on the table. Could you confirm for the record that you understand the privilege implications of the statement?

Dep Commissioner Gaughan: Yes, Chair, I can acknowledge that I have read the privilege statement and I understand the contents of it.

THE CHAIR: Thank you.

Mr Whowell: Chair, I too have read and understand the privilege statement.

THE CHAIR: Before we go to questions from the committee, would you like to make a brief opening statement?

Dep Commissioner Gaughan: No thanks, Chair, not particularly. Obviously, we welcome the opportunity to appear before the committee. As I said previously, this is the first time I have actually physically been here, I think, for some time. We look forward to answering questions and having a general discussion in relation to what is actually a very important topic. Thank you.

THE CHAIR: Thank you. I will start us off. I have a question about the current jurisdiction of the Human Rights Commission in the discrimination space. Obviously, that can then lead to a referral to the ACAT if conciliation is unsuccessful. Currently, with discrimination cases and the complaint process, how does that impact ACT Policing?

Dep Commissioner Gaughan: I might get Peter to provide the legal, technical aspects, if you like, around this particular issue. Noting that we are basically a contracted service from the national side of the AFP—we are federal officers, in effect—it is complicated. I will get Peter to talk through the particular technicalities.

Mr Whowell: In brief, Chair, my understanding of the current jurisdiction for the ACT Human Rights Commission when it comes to discrimination is that it does not include the AFP. I think our matters there are more caught up within the commonwealth oversight bodies, including the Commonwealth Human Rights Commission.

THE CHAIR: So what happens if there is a charge of discrimination raised by an offender or a suspect or just a member of the public?

Dep Commissioner Gaughan: We would perform the normal AFP complaints process, with a number of different avenues: directly to a police officer at the time, to

a senior officer, or through our portal, our website, to our professional standards regime. There is also the opportunity, of course, to report a complaint directly to either the ACT or Commonwealth Ombudsman. Depending on the severity of the particular issue, there is also the opportunity to report that to the Australian Commission for Law Enforcement Integrity, ACLEI. So there are a number of different avenues, but, as Peter has already stated, directly to the ACT Human Rights Commission does not occur at this stage.

THE CHAIR: As far as discrimination goes?

Dep Commissioner Gaughan: That is correct, yes.

THE CHAIR: The reason that I am starting with this, rather than the usual direction—and I will get you to confirm for the record, but I think it is in your submission as well—is that if this petition does become legislation, you would prefer the same approach to apply with respect to complaints about human rights abuses.

Dep Commissioner Gaughan: Yes.

Mr Whowell: Yes. The analogy in my mind is the current relationship we have with the ACT Integrity Commission. They do not actually cover ACT Policing; those sorts of serious corruption matters are dealt with through the arrangements that the Chief Police Officer just described. One of the things that may not be obvious about those arrangements is that the way that matters actually get assessed when they are referred to either the AFP, through professional standards, or the Ombudsman or the Integrity Commission is that there are there are discussions about which body has the right jurisdiction, depending on the category of the complaint or the issue, to undertake that investigation. That is an active and ongoing process.

THE CHAIR: Just for clarity, regarding the current approach with discrimination complaints, your view is that if this petition becomes law you would want the same approach to apply?

Mr Whowell: Yes.

Dep Commissioner Gaughan: Yes.

THE CHAIR: Yes. Okay; thank you.

DR PATERSON: I have been trying to articulate and ask this question to others. It raised issues in your submission, but can I ask you to articulate why you would not want to be under that human rights jurisdiction in the ACT?

Dep Commissioner Gaughan: Yes. Look, I think—and Peter will talk to this—there are technically legal challenges with this. We spoke about this outside.

Mr Whowell: Yes.

Dep Commissioner Gaughan: The question for me is: how much oversight becomes too much? I mentioned a whole heap of agencies that already have oversight over us.

On the commonwealth side there is also the Parliamentary Joint Committee on Law Enforcement and the Parliamentary Joint Committee on Intelligence and Security. This Assembly has oversight over us, appropriately. There are also the courts. We then have things such as AGIS which have oversight of the intelligence part of the AFP, and other people that overlook our different types of legislation.

Every time we put in place another oversight mechanism, it does come at a cost. I know there is some argument that it does not come at a cost, but that is not true. We have to prepare papers and documents; we have to do research. It does come at a cost. If there is a significant gap in the way things are being managed, clearly we need to have a conversation around how we can address that significant gap. But if there is no significant gap or no identified problem, I think an additional layer of oversight becomes overly bureaucratic and I do not see how that actually provides any assistance or any comfort to our alleged victims of these issues. Do you want to add to that?

Mr Whowell: One of the things that may not have come through in our submission, in terms of what we were thinking about in preparing for today, is that since this was last considered by the Assembly or another independent review—it might have been the ANU—there has been the establishment of the victims' rights charter. We certainly are part of that jurisdiction with the Human Rights Commission. For us, it is about understanding how that process works against what this might add. As the Chief Police Officer said, if there is a significant gap we need to understand it. We do not actually see that gap at the moment. A lot of the other avenues that there are for members of the public to make complaints about what police may have done, from what we are hearing or what we are experiencing, are actually addressing that need. If they are not, that would be something for us to consider.

I think the chief also referred to the fact that there are some issues that would need to be worked through. That is, in particular, the proposal that is being considered, at least in the Human Rights Commission's submission, that they would have a conciliation role and then, if that did not work, there would be an ability to take it to the administrative tribunal. That is where there is an issue that would need to be worked through, in terms of whether they could compel us to give evidence and whatever that sort of conflict of laws issue might be.

Dep Commissioner Gaughan: Yes. Also, we want to be pretty clear not just to the Assembly but to everyone out there that we are not against oversight or people reviewing our actions. In fact, our police force should actually embrace that—the fact that it is being questioned about what it is doing, to ensure that there are processes and practices in place. As I have said many times before publicly, and indeed to this committee and others, we are custodians of the community and I see our role as being custodians.

If we are overstepping the mark with that and we are doing something that is not right and we are moving more towards a warrior mindset then we need to be pulled into line. We are happy to have these conversations, but I really do not want to get to a situation that is overly bureaucratic and where we are actually taken away from our core business, which is protecting the community.

DR PATERSON: The point was made pretty clearly by Civil Liberties Australia and also by the Human Rights Commission that police would not see many complaints, if any; that if your processes are working fine, you would not see any complaints. So the argument is that, by not going forward with this because of the police—which really do not figure as a big issue in human rights complaints—we are actually limiting the ability of people who have issues with child protection and housing to seek remedy.

Dep Commissioner Gaughan: Yes.

Mr Whowell: Our submission was meant to be talking about the impact on the AFP in the provision of policing services, not about any other broader judgement.

Dep Commissioner Gaughan: Correct.

Mr Whowell: I think that it has been clear in the other submissions that there may well be some gaps for exactly those people that you just described. Our view about how that applies to us should not affect any decision or recommendation about how it applies to other matters.

Dep Commissioner Gaughan: Yes. And all those other bodies that you have just spoken about do not have the same oversight we do.

DR PATERSON: Yes, exactly.

Dep Commissioner Gaughan: But, as I said, if there is an identified gap that the community has brought forward, we are more than happy to sit down and try to work our way through that. As I said, I want to get to the position where we are trusted by the community, more so than we are now. We have got to continually work on that every day.

MR BRADDOCK: Just a clarifying question: is an ACT police officer on the beat effectively subject to federal level oversight simultaneously with ACT oversight?

Dep Commissioner Gaughan: That is correct. The ACT Ombudsman wears two hats; it is the same person as the Commonwealth Ombudsman. The professional standards regime that we have in place is a commonwealth mechanism under the Australian Federal Police Act. We all wear the AFP badge, and we have since 1979, therefore technically we are commonwealth officers who are contracted, for want of a better terminology, to provide a policing service to the territory. Maybe that will change one day and the territory can afford its own police force, but that is a whole different issue.

MR BRADDOCK: You are just putting it out there.

DR PATERSON: Another inquiry!

Dep Commissioner Gaughan: A different inquiry, I am sure.

MR BRADDOCK: Can you educate me on the federal level oversight in terms of human rights?

Dep Commissioner Gaughan: We are covered by the Human Rights Commissioner. We are covered by the Information Commissioner and the Commonwealth Ombudsman—all the commonwealth oversight bodies that currently exist for all commonwealth employees. We are covered by them, so there is that mechanism in place. Probably the largest one for us as commonwealth officials is the Commonwealth Ombudsman.

I do not think we can dismiss the oversight responsibility that the court has in relation to police actions, particularly when it comes to the use of the powers of arrest and those sorts of things—any area where we take away a person's liberty. The court is the ultimate arbitrator about whether or not the action was lawful and whether or not it was discriminatory or anything else. That is the ACT courts; that is the Chief Magistrate and the Chief Justice, with directions to the magistrates and the judges.

Whilst there is a strong commonwealth oversight, my view is that the courts are the primary arbitrator of our actions, as they should be. The Assembly still sets the laws that we police here in the territory, so there is that Assembly oversight as well. To be honest with you, Mr Braddock, it is a really complicated space because we are the only jurisdiction in the country that has this situation whereby we deliver a service to a territory but we are actually commonwealth officers. It does not happen anywhere else. It probably happens in Norfolk Island, Christmas Island and Jervis Bay—

Mr Whowell: Which we are also responsible for.

Dep Commissioner Gaughan: A similar model is what the Canadians do in some of the provinces in Canada. They have the Royal Canadian Mounted Police. That is the only model that is similar.

Mr Whowell: Just to answer your question as well, Mr Braddock, all commonwealth legislation now undergoes human rights scrutiny. Many of the newer powers in particular that we have access to have had that human rights scrutiny as part of the legislative process through the commonwealth parliament. We probably have not mentioned, and we probably should, that we are also subject to oversight by the Privacy Commissioner and the Office of the Information Commissioner when it comes to FOI and those other avenues around human rights. It is quite a comprehensive package.

THE CHAIR: So all your oversight, in terms of government agencies, is from the commonwealth?

Dep Commissioner Gaughan: The ACT Ombudsman does have oversight over us.

THE CHAIR: In their capacity as the Commonwealth Ombudsman?

Dep Commissioner Gaughan: They are dual-hatted. You are right: in their capacity as the Commonwealth Ombudsman, because we are governed by commonwealth legislation in that respect. All our powers that exist for arrest—whatever it is: search and seizure—are under commonwealth legislation, whether it be the Crimes Act 1914 or the AFP Act. There is a power of arrest under the ACT legislation, but most of the

other powers are vested in the commonwealth legislation.

THE CHAIR: Regarding the Victims of Crime Commissioner and the human rights charter, legally, how does that compel you in any way at all?

Mr Whowell: I obviously cannot give you a detailed answer on that. I would have to take that on notice.

Dep Commissioner Gaughan: The reality is that we are adhering to the charter. We have an agreement that we are doing things that we are required to do under the charter in relation to victims of crime. That is taking place.

THE CHAIR: Who decides that you are complying with the charter?

Dep Commissioner Gaughan: It is a conversation between ourselves and the various commissioners. We meet with them regularly. Going to your point, Chair, if there are significant problems with the way we are behaving in relation to those particular issues, and there were teething problems when it was enacted—I am not going to shy away from that—it needs to be brought to our attention so we can remedy it.

THE CHAIR: But it is a charter to which you agree to rather than it must be—

Dep Commissioner Gaughan: That is correct. My layman's understanding is that that is true but, as Peter said, we will take that on notice.

Mr Whowell: I am new to this role in the ACT, but my understanding is that it is a relatively new charter. We certainly are in an ongoing conversation with the Victims of Crime Commissioner about how our compliance is working and what challenges we may have had through the implementation period but also with the pandemic and how they may have affected our ability to comply. That is active work that we are doing.

DR PATERSON: Do you have any data or anything on the level of complaints that come through that have a human rights element?

Dep Commissioner Gaughan: We do not have that, but we can definitely get it. Our professional standards area will have that. We get a quarterly update from professional standards and we received that just recently. I do not recall any being in it. It is the sort of thing that would, obviously, raise alarm. We will come back to the committee with that data. We should be able to get it pretty quickly.

Mr Whowell: The categories of misconduct are an instrument between the Ombudsman and ourselves, which sets out 1, 2, 3 and 4, and talks about the behaviours.

THE CHAIR: That is the Commonwealth Ombudsman?

Mr Whowell: Correct.

Dep Commissioner Gaughan: The data is there and we are happy to share that with

you.

Mr Whowell: It just might take some work.

THE CHAIR: Thank you.

DR PATERSON: Sorry!

Dep Commissioner Gaughan: No, it is all good.

THE CHAIR: On the actual petition, from what I am hearing and reading, your interest in this inquiry—and please correct me if I have got this wrong—is to make sure that this petition is supported by this committee, which would be a recommendation to the Assembly that ACT Policing are not captured by the jurisdiction of it.

Dep Commissioner Gaughan: I think the challenges that we have already alluded to would make that difficult. As Peter has already said, there are gaps there that probably, as Dr Paterson has said, need to be fixed. So we concede that; we are just making sure our equities are covered. We are noting and ensuring that the Assembly is well and truly aware that there are legal challenges proposed to put us in the umbrella, but we are not against the proposal in general terms. We are just trying to protect our own equities here.

Mr Whowell: I think even the ACT Ombudsman's submission to your inquiry noted that there is an agreement between them and the Human Rights Commission about how they handle matters. If there were something in there that said this would be better handled as a recommendation by the ACT Ombudsman—that is, the ability for somebody to use conciliation as opposed to some other remedy—it might be a better way to cover ACT Policing through this, rather than saying we are holus-bolus in there and we have to work through all these more complex legal issues, with the resources that come with compliance and things like that.

MR BRADDOCK: That was a very interesting idea you came up with in terms of conciliation. Are you just talking about human rights matters or any matters?

Mr Whowell: I guess in the first instance, the substance of this inquiry, it is about human rights. In terms of the remedies that are available for the way people complain to the AFP about the conduct of our members, there are a range of different outcomes. I do not know off the top of my head whether conciliation is already one of those, but certainly the way that they may be categorised in the way our act is constructed is that a human rights breach would not be one of those categories, on the face of it.

Dep Commissioner Gaughan: For minor matters, conciliation happens regularly. If someone is confused with the law or one of our officers has been uncivil to someone in relation to the exercise of their powers, the supervisor or the OIC of the station will get the person that has made the complaint and the officer together and they will talk through the issue. They will resolve it at that sort of immediate area. Most times, that resolves—well over 75 per cent of our complaints. Our officers sometimes do step out of line. They need to be held to account and they need to know there are consequences,

and people are quite happy about that. A lot of times it is just a misunderstanding in relation to the execution of their powers. Certainly, in minor matters conciliation happens now.

THE CHAIR: That happens internally?

Dep Commissioner Gaughan: It happens internally, yes, but with oversight from the Ombudsman. We have to report to the Ombudsman that that was the way that particular matter was resolved.

MR BRADDOCK: I look forward to talking to the Ombudsman in a little while.

THE CHAIR: This is not necessarily within scope of this particular inquiry, but the interaction of ACT law and commonwealth law is obviously something that would require a High Court judgment to resolve, it would seem. What about the current cannabis possession regime?

DR PATERSON: You are going way off track here!

THE CHAIR: I know.

Mr Whowell: I think we have given a lot of evidence about that already.

THE CHAIR: You do not have to answer. There is a pending bill, of course.

Dep Commissioner Gaughan: Yes, and no doubt we will be before the committee again when that gets up.

THE CHAIR: That is off track and you do not have to volunteer anything if you do not want to.

Dep Commissioner Gaughan: There are complications with the intersection of the commonwealth—not just here in the territory but in other jurisdictions as well—where the legislation is not necessarily even complementary. The officers will work through that, and we will work through that. Ultimately, the Assembly makes the laws and we, as police officers of the territory, enforce those laws.

THE CHAIR: So hypothetically, if this petition were legislated and ACT Policing were included, where would that leave you?

Dep Commissioner Gaughan: Depending on where we went with it and what the bill looked like, the Commissioner of the AFP may have a different view.

THE CHAIR: With what response, though?

Dep Commissioner Gaughan: I do not know. Being very transparent, he has an interest in this matter, but he has not delved down into the weeds of it at this stage because we are having a conversation and nothing further has been proposed. I think it is fair enough to say that in general, just shooting the breeze, in relation to the other issue you raised, there may be a time when the AFP Commissioner has a submission

in relation to a particular issue before the Assembly that might be different to what my submission would be, and I have to navigate that.

THE CHAIR: Really, your submission is as an AFP officer.

Dep Commissioner Gaughan: Yes, but I am also the Chief Police Officer of the ACT.

THE CHAIR: On a contracted basis.

Dep Commissioner Gaughan: I have a ministerial direction that is given to me by the minister, so it is really complicated.

DR PATERSON: Well, you do a good job.

THE CHAIR: So you are happy to give us some advice on how you see this environment? Is that what you are undertaking to do?

Mr Whowell: I think we picked up some questions around victims of crime data on complaints.

THE CHAIR: Yes.

Mr Whowell: They are the only ones that I recall from the conversation today.

Dep Commissioner Gaughan: We should be able to get that reasonably quickly.

Mr Whowell: Yes. If there are other issues, we can see what we can do. One of the limitations on anything we can do at the moment, which is unusual, is that of course the commonwealth is subject to caretaking conventions. We can talk about things, depending on where your questions go. There may be limits, because we cannot—

THE CHAIR: I have so many interesting questions that are unrelated to this petition.

Dep Commissioner Gaughan: We need a broad-ranging inquiry into this.

THE CHAIR: That might be a future inquiry. Is there anything you would like to say in closing?

Dep Commissioner Gaughan: Thanks for the opportunity. We appreciate it every time we come before the committee. These inquiries are important and we appreciate the fact that we are able to appear, even though we are technically commonwealth officers.

THE CHAIR: On behalf of the committee, I would like to thank you for appearing today on behalf of ACT Policing and/or AFP and/or both. When available, a proof transcript will be forwarded to you to provide you an opportunity to check the transcript and identify any errors in transcription. If you undertook to provide further information or questions on notice, these would be appreciated within one week from the date of this hearing.

Short suspension.

McKAY, MS PENNY, Acting Commonwealth and ACT Ombudsman, ACT Ombudsman
MACLEOD, MS LOUISE, Acting Deputy Ombudsman for Commonwealth and ACT, ACT Ombudsman
ANDERSEN, MS SYMONE, Acting Senior Assistant Ombudsman, Program Delivery Branch, ACT Ombudsman

THE CHAIR: On behalf of the committee, thank you for appearing today and for your written submission to this inquiry. Can I remind witnesses of the protections and obligations afforded by parliamentary privilege and draw your attention to the privilege statement before you on the table. Could you each confirm for the record that you understand the privilege implications of the statement?

Ms McKay: I have read the privilege statement and I am content with it.

Ms Macleod: I have read and understood the privilege statement.

Ms Andersen: I have read the privilege statement.

THE CHAIR: Thank you very much. Ms McKay, would you like to make a brief opening statement?

Ms McKay: Yes, I would; thank you, Chair. I thank the committee for the opportunity to be here today in relation to your inquiry into petition 32-21, no rights without remedy. The ACT Ombudsman has a statutory role to investigate complaints from individuals, groups or organisations about the administrative actions of ACT government agencies and to undertake own motion investigations in relation to administrative action.

The emphasis of our work is on considering complaints and achieving outcomes for people, with a broader focus on improving public administration for the ACT community. We ensure that agencies act with integrity and treat people fairly. In undertaking this function, the ACT Ombudsman is impartial and independent. We are not an advocate for the complainants, nor the agencies. We have no power to direct an agency to change a decision or provide a service. We rely on influence and agency cooperation to resolve problems.

When it comes to human rights complaints, or complaints that contain a human rights element, like other public authorities, we are required to act in a way that is compatible with human rights and consider relevant human rights when making a decision. Many of the complaints received by my office, whilst not categorised as human rights complaints, deal with aspects of fairness, equality and access to government services.

There is also provision under the ACT Ombudsman Act which requires me to refer a complaint to the Human Rights Commission if it would be more appropriate for the matter to be investigated by that commission. This is a mandatory referral mechanism that does not require consent. It is most often used in relation to health-related complaints which fall outside my office's jurisdiction. My office has a relationship

protocol with the Human Rights Commission that focuses on ensuring that the agency that is best placed to assess and potentially investigate a complaint can do so. The protocol forms an important part of the no-wrong-door approach to complaint-handling that is integral to the ACT complaint handling framework.

Whilst we support any legislative amendments that may enhance this no-wrong-door approach and ensure there are accessible, efficient and transparent complaint-handling pathways available to the ACT community, we would appreciate early consultation on any proposed legislative changes to assess the potential impact on our remit and our current arrangements with the Human Rights Commission. I am happy to take any questions you might have today.

THE CHAIR: Thank you. My question goes to how you closed, that you would like to be consulted on any attempts for amendments to the Human Rights Act. If the petition were enacted pretty much as it states—that a human rights complaint can be dealt with by conciliation in the Human Rights Commission and, if that were unsuccessful, the complaint would be dealt with by the ACAT—and if that is as simple as it is, in what way would you think that could possibly interfere with your Ombudsman role?

Ms McKay: In principle, it would not. It would just provide another mechanism for people in the community to make a complaint and provide an alternative way of dealing with that complaint—conciliation and the ACAT pathway. We cannot provide conciliation, or the ACAT pathway, but we can deal with complaints. It would not interrupt how we deal with the Human Rights Commission. It is just out of an abundance of caution that if there is an amendment to legislation that affects another complaints pathway within the ACT it is good practice that we would be consulted to see if it had any impact upon how we would do business.

THE CHAIR: Let us say that this is in place. If a complaint is going through this pathway, would you be of the view that it ought not also have a life in the Ombudsman's office, or do you think that they could just go hand in hand?

Ms McKay: Generally, we try not to duplicate. There are a number of different agencies operating in the ACT who can deal with complaints and we and the Human Rights Commission are two of them. Usually, we would have a discussion, and that happens quite regularly. When a complaint comes into our office we would take a look at it and think, "Is it best placed here or is it best placed with the Human Rights Commission?" We would have a conversation with them so we do not duplicate effort. We are all working with the resources we have and wanting to make the best use of them, so we would try and work out where it should best sit.

THE CHAIR: Would you favour some legislative arrangement whereby the complaint is dealt with by the Human Rights Commissioner and the Ombudsman is not compelled to deal with it until perhaps it is resolved?

Ms McKay: In principle, on the face of it, that sounds reasonable.

Ms Macleod: Going to the earlier question, often complaints comprise multiple issues. We will have had conversations with the Human Rights Commission already around

what issues under a complaint might be better dealt with by them and issues that might be better dealt with by us and we can carve a complaint accordingly. Each of us will deal with them and ensure that there is communication going on between both our organisations.

THE CHAIR: Does that require the agreement of the complainant?

Ms Macleod: We would communicate with the complainant if that was to occur, yes, definitely.

THE CHAIR: But if the complainant says, "No, I want both of you to look at everything"?

Ms Macleod: That is where we would have a conversation with the complainant to make sure they understand and, in a way, manage the expectations of the complainant in terms of what each of our organisations can do in accordance with our respective jurisdictions.

THE CHAIR: They have heard all of that and they want both of you—let us say it is a pure discrimination matter—to take it on?

Ms Macleod: We have the ability to decline to investigate.

THE CHAIR: Right.

Ms McKay: There is a provision under the act that gives us a discretion.

THE CHAIR: That is what I was getting at.

Ms McKay: Yes.

THE CHAIR: Is there anything further you would like to say? If this were part of the new scheme, would you want the same approach? I guess I am testing that with you.

Ms McKay: Ms Macleod is right—the proposition that you put to me before that, if the Human Rights Commission is dealing with a matter then we would not be. In principle, I would agree if it was the same issue but, as Ms Macleod pointed out, we can split a complaint. The Human Rights Commission might deal with the discrimination aspect of a complaint and we might deal with the service delivery from an ACT agency part of a complaint. In that instance, I think that works quite well.

THE CHAIR: The decision of the Ombudsman to decline to investigate or to only investigate an aspect of a complaint—is that a reviewable decision?

Ms McKay: No. We are the end of the line. There is an internal review mechanism but not an external review mechanism.

DR PATERSON: When a member of the community has what they feel is a human rights issue and they are looking for the appropriate pathway, what you said in your opening statement was that you cannot influence or compel a service; whereas, if they

went through the pathway as proposed in the petition, ACAT would be able to. So this would be, you would think, potentially a much more beneficial pathway for a community member to pursue, rather than going through your office.

Ms McKay: It depends on what outcome the complainant is after.

DR PATERSON: What outcome would they get from your office if they are seeking that individual remedy?

Ms McKay: Similar to the Human Rights Commission, we can deal with the agency, and we do; we deal directly with the agency. We can get apologies and further explanations. We can make recommendations to them to remedy some actions that they have taken. In some ways, that might be more appealing to many complainants because it might be quicker to get a result or a remedy or an outcome for that person.

I think it is horses for courses in terms of what people are looking for when they make a complaint. They may be after that quick remedy that we can provide. They might be after a legal remedy, which is a different thing entirely. They might be after conciliation. Those final two we cannot offer, but we can offer that first instance and that outcome that we can provide to them.

THE CHAIR: Is it not true that the outcome is a recommendation to the agency? You said that you could get them to make an apology.

Ms McKay: It is a recommendation, yes.

THE CHAIR: As a recommendation.

Ms McKay: Sometimes it is a formal recommendation; sometimes it is just a discussion.

THE CHAIR: Just to clarify: you cannot compel an agency to vary a decision or to enter some compensation or apology?

Ms McKay: We cannot compel them, no; we cannot direct them. We are not a regulatory agency.

Ms Macleod: When we receive a complaint and we assess it, quite often we will undertake what we call early resolution. It may involve dealing directly with the complainant on what we know and understand of the agency: how they operate, how they make decisions and that type of thing. We may also get in contact with the agency—it is almost like a shuttle discussion or shuttle negotiation between us, the complainant and the agency—or we might end up making formal recommendations if we feel that we are not getting the cooperation of the agency or the willingness from the agency. The Ombudsman is right; we cannot then compel them.

MR BRADDOCK: If implemented, would there be any change to your workload in terms of the handing in of cases and complaints from you to the Human Rights Commission, or would that stay the same?

Ms McKay: We would probably need to review our relationship protocol with the Human Rights Commission in light of whatever changes were made. In principle, I cannot see that it would affect in any real capacity our dealings with the Human Rights Commission.

THE CHAIR: Do you have many complaints that are on the basis of an abuse of human rights?

Ms McKay: We tried to look at this in preparation for this appearance. We were able to get a basic number—not a huge amount—of matters that we have referred under section 6B of the Ombudsman Act to the Human Rights Commission, on the basis that it would be more appropriate for them to be dealing with it.

THE CHAIR: There is no power for them to deal with it. It would just be for them to look into it. If an individual is complaining to you about a decision-maker in government, you could choose to do an investigation. When you are referring it to the Human Rights Commission, what does that actually mean?

Ms McKay: Sometimes it means that it is a matter that we cannot deal with because there is a carve-out in the act for health services matters. Other times it might be that it is clearly about discrimination or an issue that the Human Rights Commission can deal with, so we would refer it to them. We had a brief look at our figures. Under our systems and the way that we record these matters, they can be recorded under a number of different headings, so the figures may not be overly reliable. In fact, they may be a little bit under-reported. We could find about 32 matters since July 2019 that have been referred to the Human Rights Commission.

THE CHAIR: Can you tell how many of those were just purely a human rights issue?

Ms McKay: Not at this point.

Ms Macleod: I think it is important to note that, under our legislation—and as we say in our submission—we can consider whether actions are unjust, oppressive, improperly discriminatory or unfair. In a broad sense, that perhaps goes to human rights concerns and so forth. Interestingly, we may very well be able to deal with the same types of complaints that the Human Rights Commission looks at. It is then just that exercise, as the Ombudsman pointed out initially, where we need to make sure—particularly if we get a sense that a complainant has approached not only us but also the Human Rights Commission—who is going to deal with it so we do not duplicate.

DR PATERSON: If this were put in place, could you investigate each other if there were human rights complaints? Could a complaint come to the Human Rights Commission about the Ombudsman's office or vice versa?

Ms Macleod: There is no reason why not. I think we would tend to have a conversation in the first instance to try and better understand what is driving that complaint. It is not always the case, but you can have complainants who forum shop, particularly if they are unhappy and do not get the outcome that they want. That said—and I cannot speak for the Human Rights Commission—if we received a complaint about the Human Rights Commission that we felt raised concerns that fall

within our jurisdiction, there is no reason why we could not investigate. I think we are always mindful of the fact that they are another oversight agency and operate in a similar way as we do.

MR BRADDOCK: I am just trying to understand the role and the view of the ACT Ombudsman in terms of the oversight of ACT Policing and any issues that you might have encountered with them, human rights complaints or issues.

Ms McKay: We have extensive oversight of ACT Policing because we also oversee AFP as the Commonwealth Ombudsman. It is not only a matter of taking complaints about them and dealing with how they have dealt with complaints internally and inspecting those records; we also look at how they use their intrusive and covert powers. We do regular inspections of those. We also look at how they maintain their child sex offender register. We oversee how they deal with complaints, and we write reports on those regularly. We have a fair bit of oversight of both ACT Policing and AFP. More recently and over time we have done own motion investigations into both entities. I think it was in the last year that we published two reports into them.

MR BRADDOCK: The AFP suggested earlier that there was not a gap that needed to be filled in terms of the oversight of ACT Policing. Does the Ombudsman accord with that view? Would this help fill a gap, or is it not required?

Ms McKay: I think the commissioner's view was that there was not a gap to be filled.

MR BRADDOCK: That is what I meant, if that is not what I said.

Ms McKay: It is a matter for government as to whether they would require more oversight of ACT Policing or AFP. From my point of view, we certainly have a comprehensive oversight of AFP and ACT Policing.

THE CHAIR: On behalf of the committee, I would like to thank you all for appearing today. When available, a proof transcript will be forwarded to witnesses to provide an opportunity to check the transcript and identify any errors in transcription. If any questions were taken on notice, please provide these answers to the secretariat within a week of this hearing. On behalf of the committee, I would like to thank all the witnesses who have appeared today. If members wish to lodge questions on notice, please provide them to the committee secretary within five working days of this hearing.

The committee adjourned at 3.34 pm.