Dear Mr Moss

Inquiry into the treatment in custody of detainee Steven Freeman

Thank you for the opportunity to provide a written submission into the 'Inquiry into the treatment in custody of detainee Steven Freeman'. Whilst I do not have first hand knowledge of the circumstances surrounding Mr Freeman’s death, I hope that the following information will be of interest and relevant to your terms of reference.

1. Role and function of ACT Human Rights Commission (HRC) in relation to the Alexander Maconochie Centre (AMC)

The ACT Human Rights Commission has important but relatively limited oversight powers with respect to the AMC. This is due to a combination of limited jurisdiction, and limited resources to carry out mandated functions such as audits.

Legislative powers include:

- An ability to review the effect of territory laws on human rights and report in writing to the Attorney-General on the results of the review – ‘audit power’ (s41, Human Rights Act 2004 (HRA))
- The ability of the Human Rights Commissioner to, at any reasonable time, enter and inspect the AMC (s 56, Corrections Management Act 2007 (CMA)). This includes the power to inspect the register of detainees (s76(3) CMA), strip and body searches register (s110(4), CMA), use of force registers (s142(2), CMA), record of disciplinary action (s189(4), CMA);
- An ability for accredited persons (defined to include the Human Rights Commissioner and Public Advocate) to have adequate opportunities for contact with detainees (ss 12, 50, CMA) and to have protected communication with detainees (Part 9.3, CMA);
- An ability for the Human Rights Commissioner and Public Advocate to inspect corrections policies that have been excluded from notification (s 15(2)(b)(iv), CMA); and
- The Public Advocate has specific oversight regarding use of restraint, involuntary seclusion, and forcible giving of medication under s 65(5) the Mental Health Act 2015 if a psychiatric
treatment order has been made in relation to a person. It is noted, however, that the AMC is
not an ‘approved mental health facility’ for the purposes of the Mental Health Act.

As you would be aware, the HRC has conducted two human rights audits into adult corrections
facilities in the ACT, a Human Rights Audit on the Operation of ACT Correctional Facilities under
Corrections Legislation in 2007 (2007 Audit) and a Human Rights Audit on the Conditions of Detention
of Women at the Alexander Maconochie Centre in 2014 (2014 Audit). These audits are very time and
resource intensive and thus cannot be conducted regularly with current funding of a small legal team.
However, they do provide an excellent ‘snapshot’ of the human rights situation at a point in time,
which informs our policy and advocacy work. The HRC cannot receive complaints relating to breach
of human rights under the HRA, but can receive complaints in relation to provision of a health or
disability service, or discrimination in an area of public life from members of the community including
AMC detainees.

Less formal engagement that my office undertakes with AMC includes:

- Convening regular meetings with main oversight agencies (ACT Ombudsman, the Public
  Advocate, Official Visitors) and others (for example, Prisoners Aid) at the HRC office, and
  meetings between a wider oversight group and ACT Corrective Services at the AMC;
- Ad hoc dialogue on some matters, for example feedback on some draft policies, though I
  would welcome enhanced engagement between my office and ACTCS – for example, a
  requirement that ACTCS shares early drafts of policies for our input, given that consultation is
  often ad hoc and not always at early stages of policy development;
- Human rights training of new ACTCS custodial officer on a fee for service basis through Justice
  & Community Safety Directorate (JACSD); and
- The Public Advocate’s fortnightly clinic at AMC for vulnerable people.

2. AMC as a ‘human rights compliant’ correctional facility

The AMC was designed to operate as a ‘human rights compliant’ facility. The 2016 Auditor General’s
report on rehabilitation of male detainees at the Alexander Maconochie Centre (Auditor-General’s
Report) highlighted the performance of AMC in regards to rehabilitation of prisoners and covered
some of the key human rights issues. I broadly agree with the Auditor General’s discussion of human
rights compliance in that report. I also refer to my submission of 29 April 2016 (attached) and oral
evidence to the ACT Legislative Assembly Standing Committee on Justice and Community Safety on 16
May 2016, which outlines positive aspects and priority areas to be addressed.

We found in 2014 that a structured day where detainees are expected to rise, dress and leave their
accommodation at a designated time to participate in meaningful work, as well as undertaking
programs and education, would provide greater opportunities for rehabilitation. We suggested that
more should be done by ACTCS to foster such a culture through incentives and having consequences
for not engaging in purposeful activities, which would be consistent with human rights.

In addition to those issues, I would like to draw your attention to a number of further matters and
reflections.
3. Aboriginal and Torres Strait Islander detainees

Rates of indigenous incarceration in the ACT have been trending upwards at an alarming rate. Between July 2015 and June 2016 there was a 17% increase in the rate of Aboriginal and Torres Strait Islander incarceration in the ACT (currently 2,073 detainees per 100,000 adult Aboriginal and Torres Strait Islander population)\(^1\), and there was a similar significant increase in the year prior. The HRC 2014 Audit found ACTCS demonstrated a commitment to meeting the human rights of Aboriginal and Torres Strait Islander women detainees, evidenced through specific Aboriginal and Torres Strait Islander policies, celebration of cultural days, and the Elders and Community Leaders Visitation Program. This finding can broadly be extrapolated to men, although I have not specifically examined the treatment of male Aboriginal and Torres Strait Islander detainees.

The recent inclusion of Aboriginal and Torres Strait Islander cultural rights in s27(2) of the HRA, combined with the obligation in s40 of the HRA on public authorities to uphold this right makes it imperative that ACTCS give consideration and appropriate weight to a detainee’s Aboriginal and Torres Strait Islander status when acting and making decisions. This is particularly important on reception in AMC given that a detainee is often in a situation of vulnerability in the first hours of detention, and Aboriginal and Torres Strait Islander detainees may have additional vulnerabilities due to their cultural status. Appropriate weight must also be afforded to Aboriginal and Torres Strait Islander status when ACTCS make decisions around classification and placement.

Section 27(2) of the HRA supports access to culturally appropriate services, including health services, which forms part of the recommendations of the 1991 Royal Commission into Aboriginal Deaths in Custody. The engagement with Winnunga Nimmityjah Aboriginal Health Service is a positive development in this regard, and formalisation of the engagement through a contract should be prioritised.

Whilst courts are not currently considered to be public authorities under the HRA except when acting in an administrative capacity, the Aboriginal and Torres Strait Islander status of an accused and associated cultural rights as reflected in s27(2) of the HRA is an important matter for the court to consider at various stages – including bail and sentencing hearings. The Canadian model of ‘Glade reports’ appears to provide an excellent model to enable a court to consider cultural rights at sentencing stage, and a pilot program in the ACT would be welcome. Human rights arguments including cultural rights of Aboriginal and Torres Strait Islander defendants are also relevant to bail application as well. More broadly, I note that the Government has yet to legislatively respond to the first declaration of incompatibility issued by the Supreme Court In the Matter of an Application for Bail by Isa Islam [2010] ACTSC 147. I believe further reform to bail laws are needed as a result of the decision.

I am in favour of the HRA being amended to clarify that s 40C does not preclude lower courts and ACAT from assessing and remedying breaches of public authority obligations under s 40B of the Act.\(^2\) This would provide impetus for consideration of cultural and other human rights during proceedings. Other options to better enable the court to consider cultural rights of Aboriginal and Torres Strait

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Islander defendants could include exploring ways to notify HRC when human rights arguments are or could be central to the proceedings, and enhancing judicial and practitioner awareness of HRA rights.

4. Overcrowding in AMC

The issue of overcrowding was highlighted in the Auditor-General’s Report, as well as the 2016 Report on Government Services (ROGS) which recorded over-utilisation of AMC in 2014-15 at 126.8% of the capacity. Overcrowding poses particular human rights challenges – notably in relation to detainee privacy. It further complicates the challenges of the high level of separation of detainees required in the ACT. The ROGS report noted the link between overcrowding and a significant increase in general detainee on detainee assaults, more than doubling from 5.31 per 100 detainees in 2013/14 to 12.56 per 100 detainees in 2015/16. Many factors contribute to rise in detainee numbers. It is therefore important that discussion about the human rights impact of overcrowding, and measures to address overcrowding involve all stakeholders – including parliamentarians, the executive and the judiciary. The ACT Justice Reform Strategy and Justice Reinvestment work are key in this regard. Giving detainees that breach parole conditions credit for ‘street time’ should be supported for a more therapeutic rather than punitive approach, which may improve prospects for rehabilitation whilst also easing pressure on detainee population numbers.

5. Separation of remandees and sentenced prisoners

The Auditor General’s Report highlighted the extent to which the AMC prisoner population has differed to that envisaged prior to its construction, with far more ‘higher security risk’ and ‘protected status’ detainees currently detained than was envisaged at planning stage, and fewer remandees. However, recent building work at the AMC has improved the capacity to separate detainees.

I recognise the significant challenges involved in separating various categories of detainees within a small jurisdiction. The basic principle in human rights law requires separation of tried and untried detainees. This must be considered in light of the need to ensure that separation measures do not lead to restrictions of detainee access to services and care.

I cannot comment specifically on the classification and placement of Steven Freeman during his time at AMC. I understand that a common practice and due to overall small cohort size and operational challenges, remandees may be placed with sentenced prisoners. Whilst decisions around separation of detainees must be heavily influenced by operational considerations, human rights must feature prominently in decision making as mandated by the CMA and relevant policies. I would welcome further engagement between HRC with ACTCS on human rights aspects of decisions around classification and placement.

6. Improving oversight and constructive collaboration between HRC and Corrections

As noted in my attached earlier submission to the Assembly, the HRC’s oversight powers are limited. Given that the ACT has human rights legislation and a prison designed to be ‘human rights compliant’, the lack of human-rights based comprehensive (and preventive) oversight is a significant omission. Under the HRA, there is no mechanism for handling human rights complaints. Further, there is no

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3 This supports Recommendation 38, Standing Committee on Justice and Community Safety, Inquiry Into Sentencing, March 2015, para 7.114.
capacity for preventive detention monitoring as the HRC’s audit power does not provide a framework for ongoing assessment of risks and constructive feedback to and engagement with authorities. The ACT Ombudsman’s own motion power focuses on maladministration rather than human rights, and in many cases the reports are not made public.

**Human rights complaint-handling function**

A human rights complaint handling or dispute resolution function would provide an opportunity for detainee grievances to be aired (better informing HRC’s systemic and policy work) and addressed — for example through a conciliation framework. The five year review of the Victorian *Charter of Human Rights and Responsibilities* conducted in 2015 recommended that the Victorian Equal Opportunity and Human Rights Commission be given the statutory function and resources to offer dispute resolution for disputes under the charter. In the ACT I believe amending the HRA to empower the HRC to hear and conciliate complaints about breaches of human rights in the HRA is important to make legislated rights more meaningful, particularly for detainees, and could be commenced with a pilot in AMC.

**Human rights preventive monitoring**

Preventive monitoring has been described as ‘not about asking what happened and how it happened, but asking why it happens and how we can stop it happening’. Preventive monitoring enables oversight bodies to assess risk factors that contribute to abuse and ill-treatment, make recommendations to prevent them occurring and importantly, work constructively on an ongoing basis with oversight authorities to follow up on recommendations and make continual improvements.

International best practice requires that any detention complaints handling function should be handled separately from preventive monitoring, though the functions could still be (and often are) carried out by the same entity through internal separation. Complaint handling is individualised and reactive, and has the potential consequence of an adversarial dynamic between oversight body and detaining authority. In contrast, preventive monitoring focuses on the whole system, attempting to address risk factors and working constructively with detaining authorities to address them. A detainee may be unwilling to lodge an individual complaint about their treatment or conditions for many reasons including fear of reprisal, however, may be willing to meet with a monitoring team to provide general information (or specific information that can be de-identified) about conditions and treatment.

Preventive oversight of places of detention is a now well-established internationally in a domestic, regional and international context. The central principles are captured in the UN Optional Protocol to the Convention Against Torture (OPCAT) which requires State Parties to establish or designate an entity(ies) to carry out preventive monitoring, called a National Preventive Mechanism (NPM). Australia signed the OPCAT in 2009 and there has been significant momentum towards ratification in late 2016. The most likely model proposed for Australia is that existing oversight bodies in states and territories be mandated as National Preventive Mechanism (and supplemented with new oversight powers where gaps exist) with a body such as the Australian Human Rights Commission (or Commonwealth Ombudsman) acting as a central coordinating NPM.

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4 Victor Rodríguez, former member of the UN Subcommittee on Prevention of Torture.
The ACT has led the way in supporting Australia’s ratification, with the tabling of Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill in 2013. As one of only two jurisdictions with human rights legislation, the ACT could be a model jurisdiction in implementing preventive monitoring obligations under the OPCAT, and need not wait for treaty ratification to establish measures to be OPCAT compliant. The HRC would be well-placed to perform the role of prison inspectorate given it now combines expertise in health, the public advocate, children and young people, and disability and could bring the multi-disciplinary approach that is considered best practice for OPCAT compliance.

Whilst legislation already empowers existing ACT oversight bodies with some of the essential powers in relation to AMC (right of access to the place of detention, to detainees, to policies) these powers would most likely need to be supplemented (for example, emphasising the need for regular visits, for access to all people including staff, and a clear right to access all records and registers). Additional expertise could be brought in by the HRC through an on-contract basis to carry out thematic reviews (for example, specialist medical professionals for health reviews, or additional monitors for in-depth visits).

Augmenting the ACT oversight framework by empowering and adequately resourcing the HRC to perform the role of prison inspectorate would in my view make a significant contribution to assessing and reducing risks of human rights violations and serious incidents in AMC.

7. Role of oversight agencies in responding to serious incidents

Oversight agencies with preventive monitoring mandate can play an important role after serious incidents such as deaths in custody.\(^5\) In 2012 the New Zealand Independent Police Conduct Authority (IPCA) in its NPM capacity conducted a thematic review of deaths in police custody, examining 27 deaths over a ten-year period.\(^6\) The review examined cause of death in these cases to identify any recurring issues or developing trends. One of the recommendations of the review was for New Zealand to introduce a framework for reporting near-miss incidents internally within the police and to the IPCA.\(^7\) The report noted:

“By studying near misses in custody, we can find out more about what can go wrong while people are in custody, and we can also learn about what has gone right in order for death or serious injury to be avoided. This would help to identify the strengths and the weaknesses of the current police policies, procedures and training.”\(^8\)

The report also recommended that the IPCA and New Zealand Police work together to develop an OPCAT awareness strategy and develop an IPCA / Police OPCAT panel which as a platform for raising staff awareness about custodial issues and enable effective implementation of custody-related

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\(^5\) For example, the Luxembourg NPM is ‘available via phone 24 hours and has established that in cases of emergency such as deaths in custody, the authorities call NPM staff immediately, with the NPM staff being at the spot within 30 minutes’ - “Enhancing impact of National Preventive Mechanisms Strengthening the follow-up on NPM recommendations in the EU: strategic development, current practices and the way forward”, May 2015, Ludwig Boltzmann Institute of Human Rights and the Human Rights Implementation Centre of the University of Bristol, p 55.


\(^7\) Defined as “any incident which resulted in, or could have resulted in, the serious illness or self-harm of a detainee.” IPCA, 69.

\(^8\) IPCA, op cit n.2, p 87.
recommendations. The two recommendations from this review illustrate the potential for preventive oversight to adopt a whole-of-system approach, and frame recommendations in a way that engenders constructive and ongoing engagement with detaining authorities. Specifically, in the context of the AMC, I would support a system for recording information about ‘near-misses’, and then empowering an oversight agencies such as a prison inspectorate function within the HRC with the right to inspect these records.

I trust that these issues are of interest and would be pleased to discuss them further if that would be of assistance.

Yours sincerely,

Dr Helen Watchirs OAM
President and Human Rights Commissioner
9 September 2016