LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON LEGAL AFFAIRS

(Reference: Exposure Draft Terrorism (Extraordinary Temporary Powers) Bill 2005

Members:

MR B STEFANIAK (The Chair)
MS K MACDONALD (The Deputy Chair)
DR D FOSKEY

TRANSCRIPT OF EVIDENCE

CANBERRA

WEDNESDAY, 25 JANUARY 2006

Inquiry Secretary to the committee:
Dr H Jaireth (Ph: 6205 0137)

By authority of the Legislative Assembly for the Australian Capital Territory

The committee met at 10.04 am.

HELEN BOOTH WILES was called.

THE CHAIR: I welcome everyone to the first day of three days of hearings into the ACT government's exposure draft Terrorism (Extraordinary Temporary Powers) Bill 2005. After our three days of hearings we will make our report by the due date. The government will then look at that report and tinker around with its draft to make it an actual bill to be introduced in March and, I understand, passed at the end of March.

Thank you for coming today. Helen, you have got a little bit more time if you need it, given that we started a bit late. To start with, Helen, any witness before any Assembly committee has read out to them, basically, a statement of rights and responsibilities in giving evidence. There is nothing super scary about it; don't worry too much but we have to read this out. Prior to anyone giving any evidence we have to say that you should understand that these hearings are legal proceedings of the Legislative Assembly and are protected by parliamentary privilege. That gives you certain protections and also certain responsibilities. It means that you are protected from certain legal actions such as being sued for defamation for what you say at this public hearing. I hardly think that is relevant but occasionally, at a few committee hearings, you have some people who might say something against other individuals which would otherwise be construed as defamatory. That is the important part of the process. It doesn't happen very often. Normally, that is not relevant–I am sure it is not relevant here–but if for some reason it is, you are protected.

It also means that you have a responsibility to tell the committee the truth, because giving false or misleading evidence will be treated by the Assembly as a serious matter. Again, this is one of those inquiries where it is probably more your opinion and views. Again, that is a requirement. Do you understand all of that?

Dr Wiles: Yes.

THE CHAIR: Thank you very much. For the record, could you please give the committee your full name and the capacity in which you appear. You are appearing as a private individual, aren't you?

Dr Wiles: As a private individual. My full name is Helen Booth Wiles.

THE CHAIR: Thank you, Helen. I don't think you made a written submission, did you?

DR FOSKEY: Yes, she did.

THE CHAIR: You did. I am sorry.

Dr Wiles: I thought I might commence by reading it through.

THE CHAIR: Thank you for your submission. I read it yesterday. I compliment you on your very neat handwriting. I wish mine were so neat. If you want to read that into the record, that is fine.

Dr Wiles: I thought I could read it through and amplify it a little bit as I went along, just as a starting point.

THE CHAIR: That is a good idea. Feel free, if you are reading it through, to use that to say other things and add to it if you want to. It is over to you.

Dr Wiles: Thank you very much. First of all, I might mention I have this hearing problem. It has been adjusted this morning, but because I have got the hearing aids in I might talk too softly and you might not hear me.

THE CHAIR: You are going great guns there.

Dr Wiles: The reason why it is faxed to Mr Stanhope is that I began by sending it to him, not knowing the format, and just transposed it to this. It reads:

> Dear Mr Stanhope
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> This is my submission through you to the Standing Committee on Legal and Constitutional Affairs.
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> Thankyou for the opportunity as a member of the public to be able to make a submission on this bill, itself I think a good principle. The extra time accorded to the composition of the bill over the extreme haste apparent in the Federal Bill passed before Christmas, shows up as, being so important, deserving of the consideration. I support the intention to bring the anti-terrorism provisions into agreement with the ACT's Bill of Rights and Australia's agreement to the International Covenant on Civil &Political Rights. To include "Temporary" in the title of the bill welcomely reflects recognition of what is still a draconian set of laws in terms of what Australians have long believed to expect in what we dub our democracy. In particular it inherently sets aside the principle of "habeas corpus" as arguably necessary at the moment for the sake of security against terrorism.

I have since looked up "habeas corpus". In law, it means a whole variety of things. I am using it in the common concept of it, requiring that a suspected criminal—or here it is a suspected terrorist—must be charged and must have a fair trial before they can be detained or have other penalties accorded. My submission continues:

> The significance of your bill may not be limited to what happens in the ACT borders between now and its expiry date, but serve, if not as a model, as a reference point when, at whatever future point COAG & the Federal Government review these sections of its Anti-Terrorism Bill (No 2) 2005.
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> It therefore seems to me that not only its provisions but also its own review mechanism is important for the future. This would command more respect if that process were enshrined in the legislation and required to be independent. There is to be an annual report to the Legislative Assembly on your part on the operation and efficacy of the laws, and after 4½ years a more general review on your part, in advance of the Sunset Clause at 5 years. Division 3 of Part III in the ASIO Act 1979 had enshrined in it that a joint Parliamentary committee in 2005 would hold an inquiry, to Federal Parliament presenting a Report.

That of course has taken place, but the expiry date has not yet occurred. Any review will,

of course, be considering any review of renewal. My submission continues:

> Other independent mechanisms are possible. In the Senate's Enquiry into the Federal Government's Bill on the part of its legal committee it was submitted by Gilbert and Tobin Centre of Public Law that, in regard to the Sedition and Advocacy offences a review be made independent of the government either by referring the matter to the Australian Law Reform Commission, an independent expert committee or to a parliamentary committee. In Queensland we hear that the Public Interest Monitor has an ongoing survey role. I believe this is desirable for the whole of the ACT Bill.
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> I was surprised to find no reference in it to the Control Orders provided in the Federal Bill. Certainly the State Premiers were only required by the Australian constitution to enact state laws which would permit the Federal Government to enact laws applying to detention of Terrorist Suspects for longer periods etc, but this was not the case with the Control Orders. Yet they were asked to give these their blessing, were they not? Absence of any mention of these in the ACT Bill or in your speech introducing this raises the question of whether they were being tacitly agreed to, whether you would have no bar of them or whether you considered them outside your jurisdiction. It would be surprising if a number of these provisions were not at varience with the International Covenant on Civil & Political Rights.

And, I might add, or on the part of different, more applicable, international laws to which Australia has agreed. These are itemised, on some people's part, more clearly in that inquiry by the federal parliament's Senate legal committee. My submission continues:

> In the process of reviews I believe it would be desirable to include any ways the laws may cause avoidable burdens or distress to the families of the suspects. If a detainee is the kingpin as the financial provider for a family and is unable to work for 14 days this would mean financial loss. Damage to his reputation simply by becoming suspect may permanently affect a detainee's future prospects of employment once known &a respected place in his community. In a medical trial of a therapeutic drug not only is its efficacy in combatting an ailment noted but any serious side effects which can sometimes be curtailed. A small point is that "Children" need defining as to age.

I go to the section in the original bills in the federal sphere as being a differentiation, as you know, between 16- and 18-year-olds. Are they children or only under 16 and so forth? My submission continues:

> Again on being first detained a suspect is only allowed to notify a few specific types of people of his safety, unavailability and perhaps whereabouts. It may in practical terms be impossible for him to keep many types of important appointments, leaving the other party high & dry or himself at great loss eg missing a viva in the course of a qualifying university exam, not picking up a friend from abroad at the airport as promised, not turning up at an interview for a job—

and perhaps with my tongue in cheek—

> not appearing at his own wedding!

That wouldn't apply of course if, under these laws, he had been cohabiting with his fiancee because she would have been the one that was in his household whom he could

ask to call. The submission ends:

> The police officer detaining him should have wider discretion in making different "legitimate" contacts for him.

That section could benefit from expansion. Since I wrote that, in an effort to be brief, I have thought of another aspect that comes into that. I mentioned in the written submission that the effect on the family should be considered and that the effect on him is to a certain extent, of course, being considered. But quite outside the law is the fact that a lot of other people in the community may be affected, like the person who comes to the airport and finds nobody and knows not what to do next. More serious repercussions could arise.

One of the people that he is allowed to notify is an employer. An employer can notify one employee. I put myself in the shoes of the suspected terrorist, because this law applies to all the people in Australia, not just that suspected terrorist. I had a small business in the form of a medical practice of the simplest kind as far as the organisation was concerned. I had a morning secretary, I had an afternoon secretary and then, in another suburb, I had a part-time secretary.

If I were to notify, through the police officer—and he is the one who would take the call, I expect, and would be there to monitor it—only one, perhaps the morning secretary, and the morning secretary didn't happen to communicate that day with the afternoon secretary and expected her to be notified too, what would happen after that? The morning secretary will do her level best, no doubt, to notify all the patients who are booked in. Others will turn up. That will be a bit of a shemozzle.

In the afternoon, the afternoon secretary will know nothing about it at all. She won't know why. She will be waiting there patiently for the boss, and likewise the patients who turn up. What is going to happen next?

Even the morning secretary will have to cover up or do something funny about how long this is going to be for. When can she arrange another appointment? There needs to be a bit more scope for communication in that situation than just a broad statement that the boss is safe and is unavailable for the time being or the equivalent. Of course the secretary on the other side of town would not normally be communicating with them anyway. She would be in the same situation as the afternoon secretary.

Many small businesses are highly complicated. They have got many employees; they take their directions from a variety of people. Sometimes it is quite impromptu; the boss orders something even the night before for the next morning. In the case of a doctor, he might of course, quite outside of that, have arranged to do an operation or to anaesthetise the next morning. There is no provision for him to get in touch with the other doctor, the hospital, the patient or anything else. They would all be high and dry. I can imagine quite a lot of ructions happening in the community through sheer lack of provision in that way.

In the laws that are put here in this bill, Mr Stanhope's bill, there is that statement that the policeman detaining the suspected terrorist, the person, may contact another person. At least that should be in the plural. If that were in the plural and he was given to understand that he has got a bit of discretion to play with, then some of those difficulties

could be overcome. As it stands at the moment, it does not consider the index figure or the family. It was originally meant to be compassionate towards them.

The question comes up: is that sort of shemozzle worth it? Will this law, for the sake of secrecy, make a great deal of difference to the terrorist gangs' possibilities of doing what they intend to do? I expect, if this is a conspiracy, that the other members will be certainly on the qui vive. They will know what these laws have in them; they will know whom the policeman or the index figure is allowed to notify. They will certainly know that the phrase "he is safe and is unavailable for the time being" means one thing. That means he is in detention under the preventive detention law in the ACT.

His next step would be: I had better get onto one of them. Of course you could imagine all kinds of possibilities in terms of detective stories. The police are already guarding, already monitoring, the home phone. His first thought would be to get in touch with his wife, get in touch with his family.

Unlike the federal law, there is no provision in Mr Stanhope's law which disallows these people, whom he is allowed to notify, notifying somebody else in turn. There are no penalties for them passing it on. Is that meant to be the case? Is that a gap or is that intentional, as being more liberal? I don't know. It seems to me, if you are going to make the law work, that it would be something that a terrorist would intrinsically know. All these other shemozzles and things would be for the birds because he would be right on and know at least that his colleague, if you call him that—his colleague-in-arms or whatever you like to call it—is already in the detention centre, has been taken in under the preventative detention law.

THE CHAIR: That is interesting. Thank you for expanding on your last point. I was going to ask you whether you had gone to that part of the legislation, but you obviously have, where it is different from other laws. I couldn't see anything to stop anyone passing on the information to that wide range of people you mention in your example, which would be innocently passing on so that appointments could be cancelled and things like that.

That is very similar, let me say, to someone who is not given bail but is remanded in custody. They might subsequently be found not guilty at a trial. Let us say someone is charged with murder; they are refused bail. Even in the ACT there is a presumption against bail for murder now; so it is normal for them to be refused bail. They may have a series of appointments, along the lines that you mentioned. Obviously, as you say, if they had a partner or a family member, they would then make sure that those appointments were cancelled because the person was unavailable to attend to them, being in custody.

It is very similar to this situation where someone might be in periodic detention for anything up to 14 days. Correct me if I am wrong, but there is nothing in this legislation to stop a person's wife, mother, father, brother, good friend or a person they nominate looking into that person's affairs. In that respect—again, correct me if I am wrong—those types of inconveniences could be avoided. It is the same situation, basically, as if they were charged with an offence and remanded in custody.

You make a very good point, though—and I would have to check the federal

legislation—that there is some provision there to stop people passing on that type of information so that other terrorists in the cell could be alerted. Obviously, that is for security reasons. We don't seem to have any provision there. Are there penalties in the federal legislation for someone—

Dr Wiles: Indeed, yes.

THE CHAIR: I am sorry; I haven't finished.

Dr Wiles: Exactly the same penalty for passing it on as there is for the individual. Under the ASIO Act, which is current until it is reviewed shortly, perhaps renewed, they can't even pass on information in the first place to a spouse, and they can't pass on the information on what has happened to them for two years. From the point of the legislation, if that is all you are thinking about, it is more effective. You might say it is more draconian. It depends on your point of view.

THE CHAIR: The federal legislation is extraordinary. The current agreement is extraordinary. It is meant to counter what are seen as very real threats or the possibility of threats to the life of Australian citizens. If you look at the acts of terrorism overseas, innocent people are killed. I suppose this measure is to minimise the likelihood of that happening here. These are extraordinary times, and this is an extraordinary measure in our legal history to counter it. Obviously we are dealing with some very serious stuff here. Don't you think it is probably best to err on the side of caution in terms of protecting innocent Australian citizens?

Dr Wiles: This brings me to my final point, really. I would regard, in comparison with the medical model, those sorts of things as the side effects, not the main thing. I would say that, taking the point of view that the federal law, in essence, was a good idea, if you are going to have it, it ought to be effective. But I would at the same time argue more strongly: is it worth it? Is the federal law worth it at all? I regard the federal law as a very bad law.

I think of my aunt and her husband who lived in London at the time of the Blitz in 1940. They could have left London; they were sufficiently elderly. They got their children evacuated, but they not only wanted to save England they wanted to save England from Nazism. They believed very strongly in democracy and all the fundamental freedoms and in fighting for them. They stayed there and withstood the Blitz. When I went to visit them after the war, where they lived, not far away, were blocks that had been demolished. It was the same in the City, where he worked.

Good leadership on the part of the federal government might have been too difficult; we have got to tap the waters. I know the shock of these things. They are still isolated terrorist attacks. The terrible 9/11 attack was enormous but it didn't obliterate America. It didn't take away forever everything that they valued and owned. I think that, like the English, we should have been led into saying, "We will not be intimated."

If we can't make laws that preserve freedoms—they are the important things in the long run—let us stand up to them; let us see what they can do. Certainly give the investigative police, ASIO and the Federal Police–all the police– all the possibilities of improving their intelligence to the hilt, short of bringing in laws that obliterate exactly what we

want to have finally.

THE CHAIR: I hear your point there. You have given the example of the Blitz in World War II. A number of people have made that point in articles. It is an obvious point to make. I ask you to comment on the fact that in that sort of situation you are talking about an actual war, effectively annihilation, between two nation states, however unsavoury one of them might have been.

This seems to me to be a very different situation. Perhaps it is a bit more akin, if we are looking at historical terms, to something like the extraordinary powers which were used during states of emergency such as the Malayan emergency, which you would probably be aware of. It was a guerrilla movement. Thirty per cent of Malaya's population was mostly Chinese based. The then colonial power, followed by the Malayan government after 1957, wanted to carry on as normally as possible but they had to counter the terrorists, as they were called, who were guerrillas.

You had a 12-year period when there were quite extraordinary powers including, I think, detention for certain periods without charge. Villages were moved. There were certainly extraordinary powers which the government had to counter the emergency and to counter the terrorists. They were successful. As you know, it took them 12 years, but that was an undeclared type of war and was a different situation. It is possibly more akin to what the federal government and COAG are trying to do here.

It is a very different situation from a declared war. You are not dealing with a nation state; you are dealing with groups of people who want to cause havoc for their own ends. In Malaya the terrorists wanted to ultimately form a communist state, but they weren't actually another nation. It is very different from that sort of situation. I would ask you to comment on that.

Dr Wiles: I am not fit to comment on the Malayan situation. I am very hazy about what happened there; so I can't say, "Oh, but this or that happened," and, "It wasn't only for this or that." As far as the laws are concerned, these laws are for the whole of Australia. They are not for certain communities. Perhaps that is all I can say in that regard, but it does remind me of something I wanted to say.

I favour Mr Stanhope's approach at this point of introducing this law in the ACT. He is in the situation—and I can put myself in his position for the time being, as it were—where he doesn't have the total say in the ACT now as to what is going through. This will only apply to preventive detention. The other law, the law of the control orders, will be our law in the ACT or for whoever enters the ACT. We will also be under the ASIO laws and we will also be under, until they are reviewed possibly, other sections of the government law such as the sedition laws. So Mr Stanhope is only capable of altering a portion of it.

THE CHAIR: That is right. Yes, you are quite right.

Dr Wiles: All the same, it is important that he takes the correct line according to his views because, as I said somewhere, it is a token. He is showing the nation what could have been done. He is showing the nation in that section what could, on another occasion, be done. With so much of this, it is very hard to get the Australian public,

watching television and seeing images, to get abstract notions.

Even though they were taught at school about the importance of freedom and the importance of freedom of speech, all those things are not concrete enough and they can get frightened by seeing some acts of terrorism which, in the total nation's fortunes, would mean, as one of the university professors thought—as a wild conjecture, I suspect—we might lose 200 Australians a year through deaths from terrorism. Compared with World War II or compared with losing our basic freedoms, I don't think that is too big a price to pay if we are brave enough.

I also have another criticism of the federal laws that makes me much more afraid, and that is that these laws are considered, have been presented and are focused on police powers. I believe the powers that have been accorded to the police are really being accorded to the government itself. This is a government-versus-people situation, not under Mr Stanhope's laws but under the whole thing. In the case of the Attorney-General, it is giving to one man the power to be on top of these police and these ASIO people in exactly the same manner as when Robespierre took over. He grew up in a democratic situation, was a champion of the people, but gradually acquired, bit by bit, more power until he could even get his colleagues' heads cut off if he wanted.

I think they are very dangerous laws that we should do all we can to, within our small scope, to oppose. Mr Stanhope is setting out the principles in his laws with all the, I would say, incompetence of that little section where there can be leaks on the secrecy in such a way as to make that section not very effective. I think it is a good thing.

THE CHAIR: You are saying you think it is a good thing that there can be a gap in the law here where someone can make those leaks?

Dr Wiles: No, I don't really.

THE CHAIR: I accept your point that you believe these laws are totally unnecessary, but I thought you said earlier that if you have to have laws, you might as well have good laws, laws that work. I accept that you don't believe we should have these laws, but I thought you said, if you do have them, you should have laws that work.

Dr Wiles: Perhaps I did. But my real opinion is that it is too difficult to cope with a law of that kind. At least I can't invent a way around it. Somebody might be able to but I think—

THE CHAIR: That is my understanding.

Dr Wiles: It is a minor weakness in the whole approach.

THE CHAIR: That question then went to another part. I will let my colleagues ask some questions. I am sure they have some. I went to a seminar where some professor was quoted as saying that 200 or 300 deaths a year are acceptable rather than curtail some of our freedoms. I put it to you that, while the government tries to minimise the damage to its citizens to ensure that you have as secure a country as possible, you have laws and things in place to try to ensure things like that don't happen and that people aren't victims and are killed. How would people who say those things react if it was their

mother, their sister, their brother, their husband?

I personally would much prefer to be unfairly locked up for 14 days in an Australian detention centre or prison than to have 200 Australians or 100 Australians die a year because our laws weren't sufficient to counter terrorism. You might still have people killed despite any laws. It is probably impossible to completely sanitise the situation with your laws so that nothing can happen. But surely a government's duty is to try to do the best it can to have laws that protect its citizens. It is a balancing act, but personally I would much rather be unfairly locked up for 14 days if I thought these laws acted badly on me but at the end of the day that is far better than having the situation where you might have a couple of hundred innocent victims, Australians, killed each year because we didn't try to do that.

Dr Wiles: I would agree if those were the alternatives. But, once you get to the point of having a government with powers which are verging on totalitarianism, the alternative is not having people locked up for 14 days; it is having people disappear without any possible trace. In Chile there's a lot of secrecy.

THE CHAIR: That was a dictatorship.

Dr Wiles: There are whole populations which are exterminated. There are all kinds of things that a totalitarian head can do that nobody knows which are very much worse than having somebody locked up for 14 days.

THE CHAIR: I agree with that. If the detention were to be for 90 days, it would be starting to get a bit iffy. But we have a democratically elected government which can be thrown out of office every three years, and the situation is very different from the situation in, say, Chile or some of the weaker so-called democracies that are not really democracies. Ours is a very strong democracy. I think that everyone, even the proponents of these laws, accepts that they are extraordinary laws. There are various sunset clauses, ranging from five to 10 years, in the ACT. I would think that it is drawing a very long bow to say that they make us very close to being a dictatorship. I think that they would have to go a hell of a long way further than what is being proposed here to get to that point.

Dr Wiles: It is on that part that I think mostly dictatorships happen. No, I do not know the world's history well enough to say "mostly". There have been some that have been affected by dramatic coups d'etat, but there have been others where there has been fascist creep and, before you know it, you find that the government of the day are not the government that you elected and that they have powers over the courts and they have powers for extending their time in office, all sorts of ways. That is just one of the first steps and I do not believe that that should happen.

THE CHAIR: I suppose we could have historical arguments there. You mentioned that appearance before a court could ruin a suspect's reputation and prospects of employment, just as a well-publicised court case would do. I suppose it would be a bit different if they were found not guilty. Under the proposed system, naturally there would be a lot of publicity concerning someone who had to front a court about being put in detention. Some states probably get away from that as a senior police officer can order a 14-day detention, which certainly does not have any court overview. Some people would

think that there are obvious problems with that, but that would get over the damage to someone's reputation.

Dr Wiles: You are speaking about reputation in general. Where that thought first came to me, I was thinking of the very beginning where the suspected terrorist is taken into detention and he knows that he cannot turn up for work tomorrow, so he is allowed to give a message to his boss to say that he is now in preventive detention. When he comes out, even if he is exonerated, even if he is discharged after a few days, he will not come before the general public, but that boss will think, "I don't want to have anybody on my staff that has been taken in as a suspect." He will see that he gets rid of him. He will find it very hard to get a good reference for another boss.

I know that it applies under the control orders. I am not quite certain where it comes in for preventive detention, but they have an interim control order and if at the outset the court is approached and says that there are not sufficient grounds, that's that and the chap is not going to have his reputation ruined by anybody, he hopes. But it might be that he will be there for months. Very few people are taken in under ASIO in total, but I do not think we get publicity in the press about a single one of them. Why should these get any general publicity either? But for those who are in the know, you have somebody there for months as a suspect who has not had his case properly heard by the court.

Even if he is exonerated at the end of that time, he is never really exonerated; he is only exonerated as not suitable for the laws. He is not exonerated like a criminal who is proven—proven as well as can be—innocent. If he can say to his boss that they found he was not guilty, he is in a much sounder situation than someone who had been a suspect all that time and did not meet up to what they required. They are never exonerated of being a suspect, are they?

THE CHAIR: No, but my understanding of this is that, if someone is to be put under preventive detention under ACT law and federal law, they can do it for 48 hours. That is why all the states and territories have put in some form of extension to up to 14 days, but my understanding is that in the ACT you have to go to the Supreme Court. That probably would be very public. One of two things would happen: either the court would say that it is not going to put that person in preventive detention or the court would say that it is going to put that person in preventive detention. Either way, there would be a lot of publicity, which is I suppose your point.

Let us say that the person is actually put in preventive detention and then it turns out that they are not really involved, there is nothing further that really needs to happen, and that at the end of the 14 days they are released. That would be the end of the matter as far as the authorities are concerned, but that person obviously would have it plastered all over the papers and the TV. I understand that a couple of states—we will be getting a break-up of what is happening interstate from the government officials—do have a senior police officer who is able, just on their say so and subject to those sort of acts, to have someone put in preventive detention for up to 14 days.

That would be more like the ASIO situations, but you would not have the judicial system involved and the checks and balances there. But, as to your concerns, that would probably mean that very few people would ever know that that person had been a suspect, that they had been detained, and therefore your fear of permanent damage would

be alleviated by that. But you may not like the idea of a senior police officer being able to exercise a function whereby they could detain someone for 14 days. That would be the problem with that. I do not know what you think about that. It is all a matter of balance, I suppose, but that would probably be a way of overcoming that fear of yours. Would you see that as being reasonable?

Dr Wiles: You are picturing it as for general publicity. I was only picturing it in the context of the people who are in the know anyway, the patients who are waiting in the waiting room. They are not the whole public, they are not the TV, but they would probably go home and tell the family that there is something fishy going on in that practice and they think that they had better go to somebody else. They would not follow it through and they would not hear whether it had been revoked. Just the very fact of coming under suspicion can ruin a person. Of course, if we are talking about Muslims, some of the young Muslims find it very hard to get a job of any kind or to get a place in the community of any kind, no matter how hard they try. They can be on the outer in a manner and they cannot recover as easily. There are people who would find recovery from that taint on their reputation extremely difficult to counter for quite some time.

DR FOSKEY: First of all, I want to thank you, Dr Wiles. Obviously, you have been reading and thinking about this issue. I just wish everybody was to that extent. You sent the letter that we received initially to Mr Stanhope's office. Was there any response from that office to your questions?

Dr Wiles: It is very recent. According to the *Canberra Times*, we had to submit our submissions by the 20th. I think I did that on the very eve of that, only a few days away. My wretched fax machine was playing up and I thought I had better not risk it and have it tell me the next day that it had erred, so I came in and presented it to a security officer only last week. So Mr Stanhope has not actually received it. Instead, it has been sent to you.

DR FOSKEY: That is appropriate. In your submission you say that you support the intention to bring our version of the terrorism laws into line with the International Covenant on Civil and Political Rights. Most of the submissions that we have received to this point raise the question that this bill just cannot do that, that no bill that purports to be in harmonisation with the federal legislation can. Have you reached any conclusion in your own thinking about whether this bill achieves compliance with the ICCPR?

Dr Wiles: I have not gone into what those provisions are. I have taken them probably from people like Mr Stanhope and from a number of lawyers who presented their cases to the Senate's legal committee inquiry. I read that through and there were quite a few other laws I could not name that I know must be official laws and I would think that all of our laws—I cannot think of an exception—should comply not only with our national laws but also with international laws to which we subscribe. We should not have laws here that do not do that. So, if it does not, I would wipe the whole thing anyway.

DR FOSKEY: Certainly, in the ACT, the government has to comply with our Human Rights Act.

Dr Wiles: Yes. I think that is a tremendous plus.

DR FOSKEY: When this legislation is tabled in the Assembly, we will have a statement of compliance with that act and that will be very interesting. I would hope that the government will actually present the thinking. At the moment, it just gets a bald sentence that this legislation complies with the Human Rights Act. Only in one case that I know of has the government taken the trouble to table the analysis that went into that conclusion. I will be very interested in the government's analysis of how and why it complies. I do agree with you that the commonwealth's control regime and its preventive detention regime are in breach of the ICCPR.

You were talking a little while ago about people being detained and about their reputation. People will not be detained just because of a suspicion that they are about to commit a terrorist act. After that act is committed, in terms of evidence, making sure that evidence is safeguarded, a whole range of people can be detained. In the US, for instance, a whole range of people were detained in a similar instance, just anyone whose name was there. In those cases, while those people may have had no attachment at all with the person, no connection at all, I think that reputation and employability are very relevant to the safeguarding of evidence issue as well. I was just wondering whether you had found out anything more or thought anything more about the ACT government's role in the referral of powers to the commonwealth regarding these laws.

Dr Wiles: What do you mean by the "referral of powers"?

DR FOSKEY: The extra powers that the commonwealth has given itself through its legislation and how much the ACT government has acquiesced in that.

Dr Wiles: Possibly you are on the same theme as I was when I rang the Attorney-General's office. They have a wonderful thing there called an adviser. I spoke with this lady and asked her a number of legal sorts of questions. Hearsay had it to me a little while ago, it might have been a few years ago, that any laws that were enacted in the ACT could be overridden by the commonwealth. She thought that was not the case. She said that in any case as regards these laws there is not the slightest hint in the wind that Mr Stanhope's laws would be subjugated, that they would be respected. That is all I know.

DR FOSKEY: I think that the proof of that will be in the pudding.

Dr Wiles: To go back to Mr Stanhope, he expected that this one detainee would be publicised, it would be in the papers, it would be on the TV. Before the first law was passed in the Reps, Mr Ruddock was asked about the risks and he said, "I've got 11 people waiting in Victoria who I believe are suitable for being admitted, detained or treated under the control orders." They would have gone, if they did, as a batch. It depends on numbers: if it is current coinage, every day of the week somebody is being put in, or if it is a rare occasion. The media is very good at focusing on one person. We might have them day after day, but if it becomes the thing, the norm, and there are lots of them, it will be accepted and it certainly will not be noticed.

DR FOSKEY: Yes, and often the outcomes of those processes are in very tiny print whereas the early parts are in big headlines, so that the public would never actually know the truth.

Dr Wiles: Yes.

DR FOSKEY: I am going to leave it there.

MR GENTLEMAN: Thank you for coming here today, Dr Wiles. The chair mentioned earlier that we need to put in strong laws to prevent terrorism and we have had mention of experts saying that there could be losses of 200 people a year. Are you aware of any event in the past in the ACT where this law could have been used?

Dr Wiles: No.

MR GENTLEMAN: Would you suggest that if we were to look at it historically there would be little evidence to show that we could lose 200 lives a year to terrorism in Australia?

Dr Wiles: That was real conjecture, but it was on the part of a very informed person. Perhaps one should never follow advice that is not sounder than that, but it is a possibility that the number of people affected by terrorism in Australia would never be as high as there would have been in any year in the Second World War, fighting a real war for the whole nation or something like that, or in Britain, as I mentioned, at the time of the Blitz and so on compared with the bombing of the underground, say. That is only loss of life. There are lots of other things involved, aren't there?

MR GENTLEMAN: Just on your submission, you mention that the review processes review could include other ways perhaps of preventing unavoidable burdens on distressed families of suspects. Could you suggest how that review could do that?

Dr Wiles: The idea of review is to see what has happened, so this is conjectural too at this point. One thing that none of the laws seem to mention is compensation. I would think in an traditional Muslim household the mother of the family may not be very educated, may not have very much English, would certainly have not had any training for a job, and would have her hands full in looking after the kids. If she is relying on her spouse, her husband, or even as seen here the boys in the family to bring home the bacon, what is going to happen to her in the meantime? Isn't it possible that that period could be extended? They have not seemed to provide for compensation. That is only from an economic point of view. Of course, there are other aspects where the husband might have been sharing important responsibilities and she has got to take on extra ones which she is not capable of.

THE CHAIR: There are compensation provisions.

MR GENTLEMAN: Finally, you made a point about children needing to be defined as to age. How would you wish to see children defined? In what age bracket do you think children should be defined in this law?

Dr Wiles: You have got me there; I have not really given that any thought at all. I suppose I would just say offhand under 16, but on further thought I might say under 18; I do not know.

DR FOSKEY: This legislation is different from the federal legislation in that—

Dr Wiles: I thought "children" in the law of the land might have a legal meaning. You never know what the law is.

THE CHAIR: It is anyone under 18.

DR FOSKEY: It is under 18; that is the legal definition.

Dr Wiles: In that case, leave it at that, yes.

MR GENTLEMAN: Dr Wiles, in relation to your comments about the police being able to have discretion as to contacts for detainees, the ACT bill is designed to be initiated from the Supreme Court. Would you suggest that perhaps the Supreme Court should have more discretion as to what contacts a detainee can have, rather than the police?

Dr Wiles: It is a difficult situation, as I said. It is unworkable probably because of its difficulty. I imagine that when they first come in off the street, as it were, and have been detained and soon after are allowed to notify somebody, it might be any old police officer who is there and he might not have any special training for that kind of thing and might not know much about the laws even, but you cannot suddenly rustle up a judge to decide who should be notified. I do not know how you get around that one as the difficulty is immense but I would err because of my general slant, as you have got by now, on the side of allowing whoever it is more discretion than the way it is set down at the present time.

THE CHAIR: There being no further questions, I thank you very much for your submission and for coming here today and discussing in detail the points you have raised. You have been of great assistance to the committee.

Meeting adjourned from 11.05 to 11.20 am.

BILL ROWLINGS and

ANTHONY WILLIAMSON

were called.

THE CHAIR: Thank you, gentlemen. Before we start, would you identify yourselves and state the capacity in which you appear in front of the committee?

Mr Rowlings: I am the Secretary of Civil Liberties Australia (ACT) Inc A04043. We are a registered association in the Australian Capital Territory.

Mr Williamson: I am a director of Civil Liberties Australia (ACT).

THE CHAIR: Thank you both. You have both given evidence before Assembly committees before, but I have to read this statement to witnesses. You should understand that these hearings are legal proceedings of the Assembly protected by parliamentary privilege. That gives you certain protections but also certain responsibilities. It means you are protected from certain legal action, such as being sued for defamation, for what you say at this public hearing. It also means you have a responsibility to tell the committee the truth. Giving false or misleading evidence will be treated by the Assembly as a serious matter. Do you both understand that?

Mr Rowlings: Yes.

Mr Williamson: Of course.

THE CHAIR: Thank you for your appearance and thank you for your submission. Do you have any comments you wish to make before the committee asks you questions?

Mr Rowlings: We thank the committee for the chance to appear. We acknowledge that this opportunity does not happen in every state and territory in Australia and we would like to congratulate the Legislative Assembly on allowing the community's voice to be represented before you make the final decision on this legislation.

I think everybody knows the background to the legislation, that it is federally imposed. It has been forgotten in the process of this legislation that less than a year ago—it was nine months ago—the head of ASIO said that he was satisfied that their existing powers were enough. He said that before a Senate inquiry. Then, in September, Queensland Premier Beattie said that the Queensland police had advised him that they did not need any extra powers. That is the position that we would take, that this legislation is disproportionate, that there were existing powers before this legislation was passed and that these powers are excessive and not needed. We do not need this excess legislation. However, we are aware that it has been passed federally and that this is mirror legislation, if you like.

We are surprised that it has been passed federally because the Prime Minister himself said, "We have to live our lives. We can't be frightened to live. Otherwise the terrorists win." To a certain extent I think that is where we are getting to with this legislation. So we are concerned about that. We are concerned that we are changing the face of

Australian society by this legislation. I think that before we agree to do that we should all take a long hard look at how we can best safeguard everybody's interests. That is why we want to stress during our appearance here today that we think that the ACT should enact the public interest monitor provisions that are in force in Queensland.

Queensland is the only state that has the safeguard of the public interest monitor. That is an independent person or authority that looks at what is going on in society and acts as a representative between the people and the police force or the secret security force, as in this case. Our submission argues for that. We would like to put quite strongly that a public interest monitor is needed in the ACT. It would go with the way the ACT has approached this legislation. From the outset it has been open. The legislation has been put on the web to let the community consider it. We think that is necessary as we go down the track and that whatever legislation comes out is actually implemented.

In that regard we are concerned that one of the safeguards that exist in the legislation so far passed is that there will be annual reports by the Attorney-General, and presumably by the Inspector-General of Intelligence and Security and by the Ombudsman. At the very best, those annual reports will be 12 months after whatever event occurs. They may well be 23 months after whatever event occurs. We think that 23 months or even 12 months is far too long for the community to know what is going on.

I would remind you—and in a media release we have issued today we talk about it—that the history of security and police forces in Australia is not very good when it comes to secret information. Whenever you give people secret powers, you need to watch them like a hawk. That has been proved in Australia. It is not a statement of claim. It is fact.

When the communist papers of ASIO were revealed after 30 years in the 1980s, it was quite obvious that the security forces and police special branch forces had more than 50 per cent of their facts wrong. There were wrong names, wrong people, wrong places, wrong dates, wrong addresses and the circumstances that they were describing were wrong. Anyone who looks over that material will see how badly the material was actually gathered and how wrong people can be. These were simple errors of fact. We suggest that there is not going to be much change to that with this legislation.

When you have anything in secret, you have nobody doing reviews of the quality. You have nobody checking. People will be severely affected. Their lives will be absolutely ruined. In fact, they might be the wrong people or they are absolutely innocent or the name is the wrong one or it is a wrong address, which has already happened in Australia. Last year there was a raid on a wrong address in Melbourne. That was a mistake by ASIO. So these are the concerns.

The other concern that we have, and this is covered particularly in our media release, of which I have given you a copy, is that the innocent people affected by this have not been considered in the legislation. The legislation is very strong on protection against terrorists, assuming that there are terrorists. But terrorists have families who are not terrorists. They have wives and children. Suddenly the breadwinner is taken away. In most cases the breadwinner will be male and it will result in a situation where the wife is unable to have an income or pay the rent, feed the family or send the children to school because she cannot afford the school costs.

All of this is done in secret. Nobody knows about it. We believe very strongly that we need somebody acting in the public interest to make sure that errors of fact are not made and that errors of excessive zeal do not inflict damage, in most cases on innocent women and children. Those are the main points we would like to put to you.

The legislation is disproportionate in terms of the curtailment of freedoms and so on. The powers already exist to handle these issues. We believe that a public interest monitor is needed in the ACT to mirror what is done in Queensland. Anthony would like to mention a few particular things in relation to the legislation.

THE CHAIR: Perhaps before we do that, I will ask you a few questions on what you have said to date and then hand over to my colleagues. Then we can go to Anthony. Thank you for the copy of the media release.

You mentioned that Queensland has a public interest monitor. Because you suggest that one should be set up here, I would ask you to just describe how that actually operates. My understanding of the draft bill is that the Assembly would have a review role and I think there this is some further provision for the Ombudsman to conduct reviews. Is there anything else? There is a public interest monitor in there as well. Lawyers clear the security clearances of people going to hearings. What difference is there in the Queensland model? Why do you see that as being better?

Mr Rowlings: We believe that a public interest monitor should stand independent of any authority of the community from which we all derive our powers, including the Legislative Assembly, separate from the police and separate from the Legislative Assembly, and be a person who can look at this legislation on a week by week or month by month basis and report.

The difficulty with all the other ways of reporting is that there is nobody actually monitoring this process. The Legislative Assembly may well look at it, but it will look at it once every three months or once every six months. The Ombudsman and the other people that you mentioned, the Inspector-General of Intelligence and Security and the federal Attorney-General, are only covering it in their annual reports.

The difficulty is that the damage that can be caused is very immediate damage. If you take somebody out of their environment and they are only allowed to talk to one or two people and they cannot explain why they cannot go to work or explain why they cannot turn up at their football club or their cricket team or whatever—

THE CHAIR: That does not seem to be the case in the ACT legislation. They can only tell a few people, but there is nothing, it seems, in there to stop those people saying, "Fred won't be able to go to work for the next 14 days." I understand that under the commonwealth legislation that is an offence. But that is not in the ACT legislation so there may not be the same concern.

Obviously there is some dislocation of people who would be detained for 14 days. Let us take the example that I mentioned to Dr Wiles of the person who is charged with murder. Even in the ACT we now have a presumption against bail for murder so that that person stays remanded in custody. Let us say that person is subsequently acquitted of that offence. That person may well be in custody for some months, much longer than 14

days, and obviously those dislocations occur.

Those things happen fairly regularly in Canberra, indeed throughout Australia, and a person charged in that way is in a very similar situation to someone who is detained. In the ACT that person has to go through the rigors of our Supreme Court before they are actually detained. There would have to be some pretty strong evidence, I suggest, before that actually occurs.

We are talking about extraordinary legislation, both federal and local, to counter or try to counter fairly extraordinary times. People are killed by terrorist acts and that would appear to be the justification for these rather extraordinary laws. Surely that makes it somewhat akin to the situation of someone remanded in custody for a very serious offence that may be subsequently acquitted. Obviously wives and children and other people are going to be badly affected by that, but that is something we have worn probably for centuries, certainly for decades. What really is the difference here? Why is that situation okay and this situation not okay? There is an obvious problem that affects the families of all persons remanded in custody or detained. Why is that any different from the situation I have described?

Mr Rowlings: The reason for the difference is the fundamental objection to the legislation. When somebody is charged with murder, there is an entirely open process throughout from the initial charging, arraignment before a magistrate, appearance before a court and so on. The other is a secret process. The detention starts out in secret. It may have to be reviewed, but the immediate detention is absolutely secret. It may have to be reviewed, but that itself is a more secret process than any murder inquiry is a secret process.

THE CHAIR: Correct me if I am wrong, but I did not read the legislation to intend that the Supreme Court would operate in camera with restrictions on its deliberations being public. I would have thought that—

Mr Rowlings: If we are unclear about that, I would like to see it written into the legislation. Let us make it quite clear because your presumption is that the court is open. Let us specifically put that in the legislation, that it is open. But the difference is that fundamental difference. One is a closed, secret, behind closed doors process and the other one is an open process.

THE CHAIR: It is an open process. I am told that in the interests of national security there can be some restrictions on evidence in court. But that is actually a restriction on the giving of evidence, and I am advised that that is apparently very rare. So it would seem that the process proposed here is an open process where the media will be allowed into the court. Again, correct me if that is a wrong interpretation.

Mr Rowlings: Well, I suggest that it might be. In every case that has come up so far—

THE CHAIR: We can clarify that with the government officials anyway.

Mr Williamson: Detention can be initially ordered, although it is subject to review on an ex parte basis. Under normal criminal procedures a magistrate may issue a warrant ex parte, but a person will not be detained until they have had a bail hearing. From the

outset the bail hearing is not ex parte. The bail hearing will be in full open court. Here the detention will be initiated on an ex parte basis. Unlike a bail hearing, there will be no public scrutiny in that initial process.

THE CHAIR: But that is only for 24 hours, or 48 at the most if you use the commonwealth legislation. Even then I think for the last 24 hours you have to go before a federal magistrate. I do not know if that is public or not. It seems to me that at most you have got 48 hours that is not public. Then, once you go before the ACT Supreme Court, to extend it to seven days or 14 or whatever, it would be public.

Mr Rowlings: We quite agree with you that being public is the most important part of this. That is why we want a public interest monitor. If what you are saying is that you believe it is in the legislation, let us write it specifically into the legislation that this is an open process where the exception is that evidence is not presented, rather than the other way around. The way the police and security forces operate is that everything is closed unless they decide to open it up. They inevitably ask for secret, in-camera hearings. It happens every time. Are you confident that the Supreme Court process will be open? It is highly likely that it will be far less open than you are indicating.

THE CHAIR: I can actually see some very strong justification for it not to be open. I have personally been involved in some matters where it was not open for publication, for obvious reasons. When you are dealing with children especially, there are certain restrictions. In respect of certain other offences, the court is not open in the accused's interest or the victim's interest. You regularly see that. That is a part of our law, too. For something as important as this there might well be very strong reasons, crucially important reasons not to have matters publicised.

It seems to me from looking at the legislation that an application would have to be made. It would not necessarily follow. You highlight the effect on families. My question, which I think you have answered anyway, is: what is the difference between that and the situation of someone being remanded in custody and subsequently being acquitted? I think you have probably answered that. If you want to expand, please do so.

Mr Rowlings: The difference is openness against closed systems, an open public procedure against a closed, secret, hidden, in-camera process. There is no doubt that the terrorism legislation, which is closed, secret, in-camera legislation, leads to that process.

THE CHAIR: Dr Foskey?

DR FOSKEY: I do have a few questions, but first of all I would like to explore CLA's idea of a public interest monitor, and you can expand on that in a minute, but I am getting the impression from your submission and from your media release that you are talking about appointing a person to that role who remains in that role from case to case. Even though it is very unlikely that there will be a reason for that person in the territory—we hope that terrorism is not going to happen here—you are suggesting that there be a person who has that role from the instigation of the legislation? How does that differ from the ACT legislation's concept of public interest monitors?

Mr Rowlings: I am enamoured of the idea of a public interest monitor that looks at this process, but also looks across police activities in general. That would be my meaning on

this. We believe that if you take something away from the community, and this legislation will certainly take away liberties and freedoms that have been traditional in our society, there should be greater checks and balances in place across the society. The best way to do that is by monitoring as much as we possibly can the way police forces and security forces are operating, knowing that there are difficulties in terms of disclosing information.

The problem with this type of legislation and where this country is headed is that we are turning into a repressive society. Undoubtedly we are more at that end of the spectrum than we were a year ago. It goes without saying. The problem is that there has to be some public process to get that pendulum back towards the centre.

We think that a public interest monitor is very necessary for this. We see this as an opportunity to introduce the idea that came out of Queensland into this legislation. You will note that the federal legislation makes specific reference to the Queensland public interest monitor. It states that the public interest monitor will fulfil a role in Queensland, which means that they do not have to worry about it in Queensland.

DR FOSKEY: Does Queensland appoint a public interest monitor or does the legislation have that role enshrined in it?

Mr Rowlings: Yes.

DR FOSKEY: To your knowledge it does?

Mr Rowlings: Yes. It has been there for a while. This is not new.

DR FOSKEY: It does not go with their legislation? It pre-exists it?

Mr Rowlings: It predates this legislation for quite some time. It was not set up for this legislation. It is a position that has been there for a while.

DR FOSKEY: That is something I would like to look into. If you can assist—

Mr Rowlings: We can give you some further information on it. I would think that you would draw on the example of Queensland and see if you can possibly improve it a bit. Undoubtedly it is a fairly good template to start with.

DR FOSKEY: On page 4 of your submission you talk about the offences of conspiracy and complicity. Do you feel that, as they are covered in the commonwealth Criminal Code, along with similar common law offences, we already have what is needed to cover all the scenarios which you have heard being put forward to justify these laws? Anthony, I know that you have not had a chance to do your presentation yet and I am concerned that I am pre-empting what you might say.

Mr Williamson: No. The commonwealth provisions on conspiracy are contained in the commonwealth Criminal Code, which is part of the model Criminal Code push. The ACT has implemented identical provisions in the ACT Criminal Code Act 2002. It is our submission that those provisions are adequate to deal with the actions that would be involved in persons engaging in terrorist offences. For example, section 48 of the

ACT Criminal Code, which deals with conspiracy, states that if two or more people conspire to commit an offence punishable by more than one year's imprisonment, they have committed the offence of conspiracy, and the penalty for that offence is the same as the offence that they have conspired to commit.

If they have planned to blow up a bus, to kill people, to murder, they have conspired to commit murder. The penalty is life imprisonment. That is already on the books and that enables law enforcement officials to arrest people and charge them with an offence that has occurred in the preliminary and the planning stages of an offence. They do not have to sit by and wait for the terrorist to walk up to the bus. If they have got the components at their house and they are in the process of assembling bombs or whatever, then under existing territory law that is sufficient to make out the offence of conspiracy and to charge them with that.

We would want to see why or how these provisions in the ACT Criminal Code and the identical provisions in the commonwealth Code are inadequate. That is a question and until that is answered, it follows that these provisions are redundant.

DR FOSKEY: How effective do you think a provision would be specifying that sections 118 and 119 of the Evidence Act apply to evidence obtained through monitoring lawyer/client communications?

Mr Williamson: From memory, clause 53 of the territory anti-terror bill provides that, in some limited circumstances, the Australian Federal Police can monitor conversations between an accused person and his lawyer. Although it does not explicitly overturn the legal privilege provided for in the commonwealth Evidence Act, which people have to remember is also applicable to proceedings in ACT courts, the provision in the bill would potentially undermine it because people normally function with a lawyer on the basis, the understanding or the premise that what they say is strictly in confidence, and that is essential for people to be able to effectively communicate with their lawyers.

Knowing that there is a prospect that the police are listening in, a lawyer would be negligent if he did not say to the client accused of a terrorist offence, "Be mindful that the police could be listening in." That is going to severely affect what information that accused person is going to disclose to the lawyer.

As we pointed out in our submission, it gives rise to an interesting paradox in that people who might be arrested because they have come to the attention of the police for some type of wrongdoing, perhaps a minor offence, will not communicate with their lawyer on the assumption that the police might be listening. Although they have not committed the more serious offence that the police might be alleging, they have committed a less serious offence and, in order not to incriminate themselves for the less serious offence, they will say nothing. The lawyer will not be able to effectively protect them and they potentially may be wrongly convicted of the more serious offence.

This provision will really completely change the way people communicate with lawyers. The comfort that people might previously have been able to take from sections 118 and 119 of the Evidence Act will not be possible while there is the prospect that police are listening in to conversations.

DR FOSKEY: It is quite a large concern that the ACT legislation does not overcome. I have a couple more questions. Referring to page 7, I need a little bit of explanation about the eggshell principle. I guess it is something to do with stepping on eggshells. I do not know.

Mr Williamson: No. That was an example used to illustrate a potential interpretation of the compensation provisions in this bill. I will explain it this way. Clause 85 of the bill provides that the Supreme Court can award damages or compensation for loss sustained in the exercise of the special provisions put forward in this bill. But in clause 85 (3) the bill goes on to say that a court may order the payment of reasonable compensation for loss or expense only if it is satisfied that it is just and reasonable to make the order in the circumstances.

There are areas of tort law that do not include that threshold question: is it just and reasonable? They run on different legal concepts ingrained in tort law, the eggshell principle being one of them.

THE CHAIR: What clause of the bill is that, Anthony?

Mr Williamson: It is clause 85. If you damage someone or cause injury to someone and it was foreseeable that you might cause injury to someone, then you are liable for the full extent of that injury, even though you might not have foreseen the full extent of that injury. That is a well-settled, well-established principle of tort law. If someone was to bring an action in tort against the police for damages they have suffered, it might be a possible construction of this section to say that it has to be just and reasonable.

You are putting an additional burden on the plaintiff to prove his case. The plaintiff would have to prove arguably the ordinary requirements for a tort law action and that it is just and reasonable. That is not the only way of interpreting clause 85, but it is certainly an interpretation that, on its face, seems available. We would submit that, to remove any confusion, an additional subclause be added to make it clear that this does not affect people's ordinary rights and remedies at civil law.

DR FOSKEY: You suggest that at the beginning of that clause there is a drafting error or really just not enough information?

Mr Williamson: The scenario I put forward might not be that which is settled upon by the Supreme Court but certainly, on the face of this provision, it looks to be open for a lawyer, for example, someone defending the AFP in an actions claim, to say that, in addition to the normal requirements of a common law action, the plaintiff also now has to prove by way of clause 85 (3) this additional threshold that it is just and reasonable, which would not normally be a requirement in tort law action.

THE CHAIR: That is the difference between the civil law and the criminal law, is it not? I have seen the wording "satisfied it is just to make an order" in a number of statutes in terms of orders for compensation costs.

Mr Williamson: It is a test used in some areas. But in a personal injury claim, for example, that is not a test that is used in tort law.

THE CHAIR: No, not in tort law. In tort law, civil law costs follow the event. Anyone can bring a civil action. In negligence actions in relation to personal injuries, a person can be charged with negligent driving, and there are some very different laws that might not apply there in terms of what expenses they might get under, effectively, the criminal law, where that has to be proved beyond a reasonable doubt, and the civil law on the balance of probabilities, where it is a civil action. They will get damages if they win. There will be costs in the matter, of course. That does not necessarily follow in the criminal law.

I have certainly seen a number of sections in interstate laws, and certainly here, where the wording is something similar to the court being satisfied it is just to make the order. It is in the Emergencies Act, too, I am told. I just think you are talking about two different types of law there. I do not think there is anything to stop someone who might seek compensation under this legislation from also taking out an action and probably getting a much better compensation through the tort law, the civil law.

Mr Williamson: Our view is that this provision would circumscribe someone's action in tort law. It is saying that a court may only order in respect of compensation for the purported exercise of a special power. Say, for example, you took a tort law action for assault against a police officer because he has exercised a special power in this bill. Subclause (3) provides that compensation may be ordered where a special power has been exercised if it is just and reasonable. There is nothing in this subclause that limits it, that has a limitation. It is an open-ended provision. There is nothing that says it has to be read only within the terms of this bill.

THE CHAIR: We can follow that up with the government officials. You mentioned also existing laws and the offence of conspiracy. This probably applies throughout Australia, but certainly in the ACT conspiracy has always been a fairly difficult offence to prove. I am aware of one Supreme Court case—I think it was R v. Bell—in the mid 1980s where the defendant was convicted of conspiracy. He made a classic comment:"Jesus, I got nine months and all I was doing was talking about doing something. I managed to get off the armed robbery charge they had on me last year." He could not quite work out how you can go to jail for just talking about committing an offence when you can get off when you have actually done one. He did not really understand the system. But it was a case where the conspiracy was found and proved in a superior court.

Historically here at least it is pretty rare to actually have those types of charges. They seem to be difficult ones, simply because of the nature of the offence, to prove. That might make it somewhat difficult to adjust an adjusting an existing law to address the situation that COAG is trying to address.

Mr Williamson: It is difficult because it is often hard to get evidence that would support the conspiracy charge. But if you could get the evidence to support a preventative detention order, that same evidence, should you be able to get it, should be sufficient to support a conspiracy charge. Bear in mind also the conspiracy law in the ACT has been dramatically reformed under the code so that the common law cases and tests you were talking about probably have not applied since 2002.

THE CHAIR: Finally, you mentioned clause 52 (3), which reads:

> A senior police officer may direct, in writing, that contact between the detained person and a lawyer named in the direction be monitored by a police officer, if the senior police officer believes, on reasonable grounds, that 1 or more of the following consequences may happen if the contact between them is not monitored.

There is then a list of things like interference with or harm to evidence, interference with or physical harm to a person and alerting another person who is suspected of having committed a serious offence and not been arrested. They seem to be reasonable conditions that, in the public interest, you would want to ensure were followed. There seems to be some fairly significant restrictions and checks in relation to a police officer doing that. I think it is a balancing act, is it not, between the normal rights of a solicitor and client and an attempt to stop very serious offences occurring before they actually occur and ensuring that, if there is a real danger of evidence being tampered with or people being interfered with physically, et cetera, there is a reason to monitor that conversation.

Mr Williamson: There are two points that arise. One is as a lawyer advising your client, you are not going to know when such a directive has been issued, so you are going to have to advise your client, "Look the police may be listening." You do not know. It is more likely than not that the client, having heard that the police may be listening—they may not be—will proceed on the assumption that they are listening and not communicate valuable information.

The other point is that in subclause (2) there are considerations that lead toward the public interest that would allow police to listen to a conversation. For example, clause 53 (2) (b) allows police to listen in if they suspect they could gather evidence about interference with or serious physical harm to a person. Why is it that under current provisions we do not allow police to listen in to such evidence?

Aside from terrorist offences, there is no exception even if it would be in the public interest for the police to listen in, for example, when it is a murder suspect who is not a terrorist murder suspect or someone suspected of kidnapping who might know where the victim is. There is no exception at present for police to listen in because it is well settled that it is in the public interest for them not to do so because it would have such a massive effect on the lawyer/client relationship.

THE CHAIR: I have represented people and no doubt you will have, too. I do not think I have ever had anyone say to me, "Look, go and tell Fred that I've been dobbed in by X." I doubt whether any self-respecting lawyer would do that if they were interviewing a client. I cannot actually think of that occurring. That would be an absolute breach of any professional standards set down by the law society and the bar association. Also I note that, under subclause (11), if the police abuse this power, they will be subject to 100 penalty units and/or imprisonment for one year. So there is a very strong deterrent to abuse.

Mr Williamson: That is a very strong deterrent for the police and we are glad it is in there, but it does not alleviate the fact that people are still going to be reluctant to talk with their lawyers because there is the prospect that the police are listening in.

Mr Rowlings: How would we know whether the police had done it? How would we

know they had breached the requirement? It is in there, but it has no practical effect whatsoever. How would you know that the police had done something they should not have done? It is a value judgement on whether somebody may or may not do something. It is jumping at shadows legislation. How would we ever convict a policeman of that? There is no way in the world you would ever convict a policeman.

THE CHAIR: I do not necessarily agree with you. I would have to go through the legislation to see whether this is referred back, say, through the courts. The huge majority of police officers are scrupulously honest in their dealings with each other and in the public sector, these days at least. Certainly in the past, and probably occasionally still, there are police officers doing the wrong thing and exceeding, deliberately or negligently, their authority. Certainly situations crop up—rarely, thank God, which speaks highly of the professionalism of the police—of police being convicted of doing the wrong thing.

There are police who, quite clearly, if they think something is wrong, effectively prosecute their own colleagues. That has certainly happened in the ACT. It certainly happens in the New South Wales and the larger states where there have been significant issues in the past in relation to police doing the wrong thing. But even in the ACT there are situations where other police will monitor and make sure that colleagues are disciplined and, if need be—and I have seen it—police thrown out.

Mr Rowlings: I think perhaps we could have a little bet and call it in 10 years from now at sunset time to see whether that clause has ever been invoked.

THE CHAIR: It is a bit hard to say, is it not? We are being a bit subjective there.

Mr Rowlings: The problem is that the legislation in every clause leans towards closing down society, repressing society. It is far different from normal legislation, and that is the concern that we opened with. Every time you peruse a clause, you see that the police have got more powers; the lawyers do not. You say we can trust the police and in general I agree with you. Well, why cannot we trust the lawyers? We trust them in every other part of the law not to do the wrong thing.

THE CHAIR: We do not trust only the police. There is a penalty clause there.

Mr Rowlings: Right. Well, put a penalty clause in for lawyers; that would be a fair response. But this isn't that way; this is a penalty clause that takes away all the normal rights of lawyers, which are all the normal rights of a person charged with anything. That's how it's changing society, and it gives all the powers to the police.

DR FOSKEY: Can I just raise something that was raised with us yesterday. There is the added complication on this of the industrial relations reform in terms of police functions in the individual enterprise agreements and the new way that negotiations will occur in the future in organisations like the police as elsewhere. The concern raised by the police association, which is equivalent to its union, is that there is the potential—I can give you more information about this later—for more government control in a sense; that is the way that certain behaviours can be rewarded if it suits the powers that be that are conducting those negotiations. So, in the context of talking about this legislation, we need to be mindful of the framework in which this legislation will now be operating and

that perhaps some of the things that we've relied upon to reinforce the values that we would like have been relaxed.

Mr Rowlings: I think that's very true. The point that I was about to make is allied to that, and that is that I can't see—perhaps somebody with legal training can correct me—how the Australian Federal Police would use these ACT laws. Why wouldn't they just apply federal laws in the ACT?

THE CHAIR: We went into that a little bit with the officials yesterday. It was an informal briefing but fundamentally they said that the AFP here—they might well do it Australia-wide—might well initially apply the commonwealth law, which is 24 hours detention before you go before a federal magistrate or a retired judge, where you can get another 24 hours, which would make 48 hours, but they would then have to, if the offence was likely to happen here, go before the ACT Supreme Court. If it were in Queensland, it would be the Queensland Supreme Court or whatever because they are state authorities. I think there are a couple of states where a senior police officer can do it anyway if they want to extend that period to up to 14 days.

Mr Rowlings: I think that is the particular danger here. You alluded earlier to the fact that in other states there are good police people who keep an eye out and won't do excessive things. But here we don't have any check and balance; we don't have two different police forces operating, which is a check and balance on how things go. We've only got one police force operating here effectively because it's the same police force. I would like to see somewhere in this legislation a rule that this legislation will apply to anyone arrested in the ACT.

THE CHAIR: If, say, you've got two police forces operating, how do you get a check and a balance?

Mr Rowlings: You do get a check and a balance because one police force might be doing something excessive and the other one will see that it's excessive and say, "Hang on; you can't do that," whereas the culture is that you do not correct somebody within your own brotherhood.

THE CHAIR: But, as I mentioned earlier, I was involved in a case which grieved me somewhat because I liked the officer concerned. It was a sergeant of police who had perjured himself and certainly hadn't assisted the situation in the internal affairs inquiry. It just got worse for him, and he was ultimately thrown out of the police force. His indiscretion was, in the great scheme of things, probably relatively minor, but it just showed how meticulous and scrupulous the AFP and their management were in terms of punishing police officers who did the wrong thing. That was in the AFP. I would think, out of all our police forces in the country—for instance, the New South Wales police force, going back to the Rum Corps, has gone through all sorts of traumas and it's obviously a much better police force as a result of the various inquiries that have cleaned up New South Wales—

Mr Rowlings: New South Wales is—and I suggest to you that the Australian Federal Police would be better for some inquiries too. What you are saying is not borne out by the evidence of the annual reports of either ACT Policing or the Australian Federal Police. This myth that the Australian Federal Police is an elite police force, different

from the way the others operate, is just that: a myth. There is no difference in the potential for excessive behaviour—

THE CHAIR: There's always a potential for that, and there are usually checks and balances. It seems to me that there has been some attempt to put those in here, but what I'm saying is that, certainly from my experience, the AFP has always been and still is a very professional police force; it has had fewer of the problems that state police forces have had. Might I say that the New South Wales Police, from my initial observations of them in the late seventies when I was in practice in New South Wales to substantial improvements made in the eighties, is a far better police force now.

Mr Rowlings: Absolutely; I agree with you.

THE CHAIR: It is very much more akin to the AFP that I knew when I was a prosecutor, in terms of just civility, politeness and adherence to rigorous principles of honesty. Some of the state police forces have certainly been cleaned up, but my observation over probably 25 years of the AFP hasn't changed. You have a couple of people who do the wrong thing, and that's why you have provisions like the penalty clause and 52, 53 or whatever it is.

Mr Rowlings: Of course. Given that, why can't we have something written into the legislation that says that in all cases of these terrorism laws the laws of the ACT will apply, and make it that the federal laws can only be implemented in the ACT for the first 48 hours? Let's write it in and make sure that what we're talking about is absolutely rock solid.

THE CHAIR: The secretary has told me you can't oust the commonwealth law because of the constitution and that's obviously a fact.

Mr Rowlings: Our intention is that this ACT law should operate in the ACT.

THE CHAIR: Obviously it's a matter of practice. If the commonwealth law isn't there to cover a situation, the state or territory law clicks in. That is, as I understand it, the reason why the Attorney-General has introduced this particular legislation, and other attorney-generals have done so interstate, to cover that gap where the federal law simply can't click in.

Mr Rowlings: It's to extend beyond 48 hours, as I understand it.

THE CHAIR: Basically.

Mr Rowlings: So what I'm suggesting is that we make it quite clear that after that 48 hours ACT law will apply.

THE CHAIR: But it does—it would have to—because otherwise the federal law lapses.

Mr Rowlings: But why can't we have all of the ACT law apply; it's only that provision that clicks in. The only reason for this mirror legislation—

THE CHAIR: Because I think the commonwealth laws override the ACT ones where

that applies—

Mr Rowlings: Exactly.

THE CHAIR: and that's in the constitution, the self-government act—

Mr Rowlings: So what will happen in the ACT is that federal law will be effused in absolutely every single case except where they must use ACT law. We would suggest to you that a better outcome is that ACT law should apply in the ACT.

THE CHAIR: I don't think you can force that to happen.

Mr Rowlings: Well, we could try.

THE CHAIR: I think it's unconstitutional.

Mr Rowlings: We could certainly try; it's mirror legislation.

THE CHAIR: I don't necessarily think it's a good idea either, but we'll be debating the issue very shortly. There may be legal constitutional problems with that, but, Bill, I hear what you are saying.

Mr Rowlings: The intention of everybody associated with this legislation in the ACT is that it be the best legislation in Australia that, if possible, softens some of the impact of the federal legislation. That's a generic statement. Let us try to achieve that outcome is what I'm saying.

THE CHAIR: I take that point, and with the doctor who gave evidence before we had some discussion on that very point too. I accept what you say: you basically think federal law, this law and the other state laws are unnecessary. You made it crystal clear that that's your position and I accept that that's your position. The federal government has passed its law—you might think unfortunately perhaps—most of the states have, and the attorney is going to do so here. The Northern Territory is the only one that hasn't. Everyone is obviously going to bring in some laws in relation to this, although there will be differences in them. So, given that that's going to happen, why should the ACT be substantially different from other states or territories? The argument obviously put out there is that if we are substantially different that makes us much more of a target; if we have laxer laws that makes it far more attractive for a would-be terrorist to commit their offences here, because of those loopholes, rather than interstate where they might have more rigorous rules. If you are going to have these sort of laws, why shouldn't they be consistent and why shouldn't they be as effective as possible, putting aside the argument of whether you need them or not?

Mr Williamson: The answer is pretty simple: we take a cynical view of the need for the laws.

THE CHAIR: I appreciate that.

Mr Williamson: We think the commonwealth and the states are acting out of improper motives. We don't believe they are necessary; we think they're bad law. To say that

because they've got bad law we should have it too so we're consistent doesn't follow. Essentially, that is the logic of two wrongs make a right. Just because they've got bad law doesn't make it right for us to enact it too. We think theirs is bad. The ACT, should a view similar to ours prevail, should buck that trend.

Mr Rowlings: That I agree with, but nevertheless the pragmatic answer is that we are going to have law; we are going to have this law in some form. We can argue that we shouldn't have it, but we're going to get it. So what we want to have is the best law we can possibly have in the ACT. We think that the laws that the ACT government wants to apply should apply in the ACT as much as possible. If that is a difficulty with the federal law, and I understand that, that is not really what this Legislative Assembly wants. We want the ACT law to apply, because we have made some tweaks and changes to it, so that should apply.

The other point that is relevant is that, if there is good law in other states in association with this, the ACT should have it. That's where we come back to the public interest monitor. If there's good law elsewhere, let's have it in here as well. We see that as a very strong argument for having a public interest monitor.

Mr Williamson: But we don't think we should have uniformity for uniformity's sake when to have it would mean that we incorporate some of the less desirable aspects of interstate law.

Mr Rowlings: To argue that out fully we would see—

THE CHAIR: What—even at the risk of making us potentially a greater target?

Mr Rowlings: I don't think anybody believes that the terrorists would sit down with the laws of each state and say, "Where are we going to go in here?" It's a nice legal argument, but it's not exactly how I think they do their strategic planning. Considering that most of them are suicide bombers, it's not terribly relevant to them. So that's the issue. I come back briefly to the Federal Police. What we're saying is that, if you give people secret powers, powers that are not in the public arena, you have to watch them like a hawk. That is our statement. You say that the Federal Police are a very good police force and so on. I just point you to the Bali nine—people who are now accused of murder and are facing the death penalty by firing squad because of a deliberate decision by the Australian Federal Police to do what they did in relation to the Bali nine. It was an active decision; it wasn't an inactive one. They actively decided to work in a way that these people would be arrested in a place where they could be charged and given the death penalty. That is the police force we're dealing with.

THE CHAIR: But they've got the evidence. I thought that was rejected; that what the police did was vindicated by the Federal Court recently, the other day.

Mr Rowlings: No.

THE CHAIR: There was a Federal Court case which clearly sort of upheld the actions of the AFP.

Mr Rowlings: What it said was that the actions were not illegal. But the actions were

absolutely, totally, against the formal advice of the federal government of the day, which through its department of foreign affairs has said, "We should not do this to a police force." But the written law, the written protocols of the police force, still allow it to happen. They need to be changed. But you cannot say that the police should have done it. There's no way in the world they should have done it. Yes, they were permitted to do it.

THE CHAIR: They do cooperate with other countries and other countries, although we might not like their laws and don't apply them here, are sovereign states. It does seem a bit of neo-colonialism almost, I suppose, to—

Mr Williamson: Another example of the AFP's attitude to scrutiny, which is much closer to home, is their approach to the territory piece of legislation, the Public Interest Disclosure Act. That act, in combination with the annual reports act, requires them to report to this Assembly instances of wrongdoing, corruption et cetera. It's essentially an anti-corruption act. The AFP refuse point-blank to adhere to that piece of legislation.

THE CHAIR: Okay. I note the time. I understand your points of view in relation to the AFP and the need for additional checks and safeguards in relation to that; I think you've made that very clear.

MR GENTLEMAN: I've got a couple of questions for you. Earlier on, the chair made a statement that these measures are needed in these extraordinary times and in your submission on page 2 in paragraph 2 you've said that in 2005 there were no terrorist attacks in Australia. To your knowledge has there ever been an event in Canberra where these laws could have been used?

Mr Rowlings: Not to my knowledge. The closest would be somebody ram-raiding Parliament House in a Pajero—

MR GENTLEMAN: Would you see that as a terrorist attack, though?

Mr Rowlings: It could be interpreted that way, and I would imagine that in this climate if it was now to happen it would be interpreted that way, and that all this legislation would jump on somebody who was obviously mentally unstable. That's a case in point where the whole weight of this law would go crunch on somebody who needs mental help.

THE CHAIR: No.

Mr Rowlings: It wouldn't apply?

THE CHAIR: Don't worry about it. We will get too subjective.

Mr Rowlings: Of course it would apply.

Mr Williamson: Further to your point, Mr Gentleman, under the section 6 definition of a terrorist act, if that person that rammed that Pajero had had the right intention as prescribed here, his actions probably would be a terrorist act.

MR GENTLEMAN: On page 1 in paragraph 2 you made the comment that

fundamentally you question the necessity for such laws. Do you believe that there will ever be a situation where this legislation would be necessary?

Mr Rowlings: No, and the reason is that we believe that there is already existing legislation that does this. The whole argument is that this is a fear-heightened climate introduced for purposes other than legislative. When we had the head of ASIO say in May that we don't need extra laws and the Queensland police say to their premier in September that we don't need extra laws, then in November or October the federal parliament introduce extra laws, you have to wonder why. The head of ASIO said we didn't need them in May, in September the Queensland police said we didn't need them, and then suddenly we got these extra laws.

Mr Williamson: We accept that there might be a need for law enforcement to take action to prevent a terrorist act from occurring in the territory. We're not saying there will never be an attack here; we're just saying that we believe the laws are sufficient, without this bill, to protect the citizens of the ACT from an attack should one be on the horizon.

MR GENTLEMAN: I'll delve further into that: why do you think these laws have been created?

Mr Rowlings: We think these laws have been created because it is in the interests of some people, security forces, police forces and some politicians, to raise the fear level in the community with a view to using that raised fear level either to gain extra power—in the case of police and security forces, which obviously this does; it gives them more power—or to create a climate that possibly could be exploited later on in terms of perhaps elections.

Mr Williamson: To be blunt, it fits in with a theme that a number of politicians take: it's good to be tough on crime, tough on bad guys. This type of legislation feeds into that type of mentality. It's that simple.

Mr Rowlings: The amount of money that will be spent on this, and has been spent over the past 4½ years, in terms of beefing up the police force, trebling the size of ASIO, trebling the budgets and so on, which has all happened in the past 4½ years—

DR FOSKEY: And we could add, feeding into the security industry, extra security in public buildings—it's a whole industry.

Mr Rowlings: It's ramping up the fear level, and it's changing our society because of that. It's changing what our society is. The danger of that is that you end up with a fear in society and then all those other things can come into play that can be exploited. There are examples where politicians have exploited situations that they've virtually created. The danger is that we end up with a society like that. This changes us dramatically. This type of legislation changes our traditional society and our rights and so on. It is very dangerous legislation.

THE CHAIR: Quite clearly you don't believe there's a need for this. But there are a lot of things that happen in Australia now, and indeed throughout the world, that would not have happened 30 or 40 years ago. You wouldn't have had terrorist acts like we've seen

in London. That's the first time something like that has happened. Here we've had—

DR FOSKEY: Yet they had equivalent laws.

THE CHAIR: Did they? Maybe not; I think they changed the laws after that.

Mr Rowlings: You're right; things have changed.

THE CHAIR: Law evolves and laws actually change, and new laws are introduced to counter certain situations. In terms of this also there seems to be not completely unified but very much bipartisan support. The federal Labor Party supported most of what went through in federal parliament. A bipartisan committee looked at it and some changes were made. Certainly our Attorney-General has a different view from some his state colleagues but, putting him to one side, there seems to be a fair degree of uniformity within the coalition and the ALP, certainly at a national level, that something like this is very much needed.

Mr Rowlings: I think there is, and the reason for that is that tactically the opposition can't oppose it. How do you oppose motherhood? How do you oppose antiterrorism? That's the reality of politics, which you know very well.

Mr Williamson: There's such hysteria over this issue that we suggest it's very difficult for the ALP to buck against that trend. Some members have; I know a number of members of the federal Labor caucus were not happy at all, but they were told at the end of the day by Kim Beazley that they would be supporting this law because that was what their pollsters tell them they need to do.

Mr Rowlings: The people who did most to bring in better law—this is bad law, but better law than it would have been—were actually Liberal lawyers on the backbench committee; that's where the safeguards of the federal Parliament House were. That's exactly who pulled this law back.

THE CHAIR: Like I said, it was bipartisan.

Mr Rowlings: No, I didn't say "bipartisan". I said that on the backbench committee, which is a Liberal Party committee, as you would know, it was the Liberal lawyers, people with legal training, who said, "This has gone too far." They've ramped it back as much as they were able, but they're subject to party discipline. So I wouldn't really call this bipartisan; this has been rammed through by a government that controls the Senate, for goodness sake. There's no way in the world this would have occurred in the time frame it occurred if the Senate was not controlled by the Liberal Party. It would have been put to Senate hearings, it would have gone on for months, and there would have been proper time to reflect. There would have been years of debate. We had one week's debate on this. When you change the laws that govern society in such a fundamental way, you shouldn't do it in a week. There should be community debate, which wasn't allowed to happen in this case.

THE CHAIR: In response to one of my colleagues—I forget if it was Dr Foskey or Mr Gentleman—you referred to clause 6 and I think you were talking about terrorists attacking the ACT. You mentioned that one fellow drove his four-wheel drive into

federal parliament, and I'll come back to that. Certainly it's true to say there has been very little in Australia in recent times. Ananda Marga was obviously—

Mr Rowlings: Thirty years ago.

THE CHAIR: That was in 1978 and I suppose that was a terrorist attack. But, thankfully, we haven't had much in our history. In relation to proposed section 6, although, as you said, the fellow at Parliament House had mental health problems, he had a point, too, when he drove his car into federal parliament. Just have a look at proposed section 6. I think this bill is fairly restrictive in what it does. Proposed section 6(1)(a) says quite clearly that an act is a terrorist act if someone "does any of the following", which includes serious damage to property. He certainly did that to federal parliament, plus to his own property. Under proposed section 6(1)(b) an act is a terrorist act if it is done with the intention of advancing a political, religious or ideological cause. I think he wanted to advance some political, ideological or religious cause. There was certainly a point he wanted to make. I think it was to do with the family law act or whatever, but that's political. But under 6(1)(c) an act is a terrorist act if it is done with the intention of coercing, or influencing by intimidation, a government, commonwealth or state, or intimidating the public. I wonder whether driving a car into federal parliament is coercive.

Mr Rowlings: It's a fairly intimidatory act, I would have thought.

Mr Williamson: Why would you pick on the parliament? You could pick any target out there. But he chose the parliament, the law-makers. One could certainly infer that he had that intention.

Mr Rowlings: I am certain that what would happen would be that the heaviest weight of the heaviest law would come down on that man immediately. In the light of day and so on, a week later or something, there might be some sensible treatment of someone like that. But in the first case the heaviest weight—

THE CHAIR: Would that necessarily be such a bad thing, though? You mentioned treatment. If it stopped him from doing it and then he got treatment, he'd probably be in a much better position than he is now.

Mr Rowlings: But the answer to you is that that's where our society has gone. We've gone to the fact that this law exists which can ramp down on somebody like that instantly, whereas the laws that we have could deal with somebody like that—dangerous driving; a whole heap of them could—

THE CHAIR: After the event.

Mr Rowlings: Yes, but how are you going to stop someone like that? This law won't stop that.

THE CHAIR: You're probably not. Okay, they've got extra security there.

Mr Rowlings: You have raised a very good point. Every time you look at that hill, at Parliament House, you see what Australia is. That hill represents our country—and do

you remember that five years ago there were no barriers? People could walk up and down that hill. You could drive or walk around it. You could do what you liked. You could get up on top in the lift at any time and do all of those things. But you can't do it now because it is surrounded by barriers. That is exactly representative of what this law is doing to us.

THE CHAIR: Yes, but, if you don't have those barriers, some lunatic could go up there and detonate a bomb and kill innocent people.

Mr Rowlings: Exactly. They could have done it before. What's going to stop a lunatic or a madman now doing what they want?

Mr Williamson: They could, but I could get killed in my car. There's a higher chance of my getting killed in the car coming here to give evidence than from someone going up to that hill and blowing it up. We don't have massive draconian laws to cover all that. There are so many possibilities in our society for us to die at any time. Terrorist actions are one way, but one of millions. Why have we got such draconian laws in this one area?

THE CHAIR: Surely the vast majority of Australians would expect their government to take appropriate steps—it's always a balancing act in terms of personal freedoms et cetera—to protect them from emerging dangers, whatever they may be. I don't know if you were here when the doctor and I had a brief discussion about, say, the Blitz in London in World War II, which was a war between nations. There were certainly security laws there, but different sorts of laws were used. You probably didn't need these types of laws then because the threat was from a lunatic, running a country, who was dead set on world domination and would stop at nothing to do it, and a democracy was fighting that. You can peg it down a bit more to, say, the Malayan emergency or an insurgency where it's not a country fighting but guerrillas, and you can peg it down even further to the type of situation that it is envisaged that these laws are to protect us from. They're very different scenarios and they require, it would seem, very different approaches to try to protect your community as much as we can.

Sure, these are quite draconian laws compared with what we've had, but COAG seems to have accepted that there is a very real threat and a very real need for these types of laws. I accept your point of view—you don't believe that—and you've made that very strongly and very forcefully and with some excellent points. But—

Mr Rowlings: To answer your question: this is about stopping terrorist acts before they happen. That's what this is about. We're not about punishing people, because it's too late then, for goodness sake. The way to stop this happening is by heavy intelligence; by changing the racial profile of our police forces and our security agencies, which have been, neglectfully, left to be the way they are; by heavily drawing in the communities where the danger comes from; by engaging them and not by pushing them aside and punishing them. These laws will undoubtedly target Muslims; there is no doubt about that. That's what the legislation is all about. We need to embrace those communities. We need greater intelligence. We need to involve them. This legislation does none of that. This legislation is exactly the wrong way to go about safeguarding Australia in a better way. That's our argument: if you want to really safeguard Australia, this is totally unnecessary. Our existing laws will do that.

We need to do a whole lot of other things, yes. We need to beef up ASIO, which has been done, three times the number of police forces, put up their budgets et cetera—increase the number of police. But we aren't encouraging Muslims to become police, encouraging Vietnamese to become police, or encouraging the Lebanese in Sydney to join the New South Wales police force so that Lebanese can talk to Lebanese on Cronulla Beach. The responses are police responses: "Give us more power. We need more power, more police and more money and we'll fix it." This isn't a police power or money issue; it's an intelligence issue.

THE CHAIR: I hear what you're saying, but I actually thought some of those things were happening; that there were attempts to try to get a much greater diversity of people into police forces. For example, I thought that in New South Wales they were trying to recruit police of various backgrounds, including Lebanese Muslims.

Mr Rowlings: Imagine the amount of time and effort that we've spent on this federally, and are now spending on it here. If we were putting that effort into doing the sorts of things that we all agree are necessary, we would be in a much better situation. What we're doing is going down the power extreme, the power dominance—the "hit it over the head" issue—and you will never stop this problem by that approach. That isn't the way to go.

THE CHAIR: On that note, if there are no further questions and unless you've got something else, I thank you very much for your submission, for your very forceful and well-thought-out answers to questions and for comments you've made before the committee today. If there are any other points you need to raise or you think of afterwards, please let us know.

Mr Williamson: Could I just very briefly summarise our recommendations?

THE CHAIR: Sure.

Mr Williamson: We do not believe that clause 53, the lawyer monitoring provision, is necessary, but in the event that the committee recommends that it be retained we would recommend that an additional subclause be put in, just to reiterate that it will not intrude on the legal client privilege in section 117 of the Evidence Act; just a clause that would say something to the effect of "nothing in this section undermines section 117 or 118"—it might be 118 and 119—"of the Evidence Act." With regard to the compensation provisions, we would add a subclause to reiterate that nothing in this section will affect a person's rights and remedies at law, just to eliminate any potential confusion that might arise.

THE CHAIR: Thank you both very much. Thank you for those recommendations, and those technical legal questions we'll also run past our government advisers.

Mr Rowlings: Thank you for the opportunity to appear, and the last thing we'd say is that the public interest monitor is a very good template to have a look at.

THE CHAIR: Thanks for that.

Meeting adjourned from 12.31 to 2.05 pm.

SUSAN HARRIS RIMMER and

AMY KILPATRICK

were called.

THE CHAIR: Thank you very much for attending. For the record, please state your names and the capacity in which you are appearing before the committee.

Ms Harris Rimmer: My name is Susan Harris Rimmer. I am the ACT-based national committee member of Australian Lawyers for Human Rights.

Ms Kilpatrick: My name is Amy Kilpatrick. I am the ACT convener of Australian Lawyers for Human Rights.

THE CHAIR: I need to read something to you to start with. It is probably rather irrelevant for an inquiry like this one, but I have to read it to everyone anyway. You need to understand that these hearings are legal proceedings of the Assembly and that they are protected by parliamentary privilege. That gives you certain protections but also certain responsibilities. It means that you are protected from certain legal action, such as being sued for defamation, for what you say. It also means that you have a responsibility to tell the committee the truth, because giving false or misleading evidence will be treated by the Assembly as a serious matter. That is hardly relevant for most inquiries, but occasionally we do have instances where someone makes defamatory comments. Obviously, we want people to tell the truth. A lot of it is opinion. It probably is not of great relevance to an inquiry like this one, but do you both clearly understand the caution?

Ms Harris Rimmer: We do.

Ms Kilpatrick: Yes.

THE CHAIR: Would either of you like to make any opening comments or address your submission?

Ms Harris Rimmer: We certainly will.

THE CHAIR: Just before you do, I should say that after you make your comments I will ask Mr Gentleman, who, whilst not a committee member, is sitting in today, to ask the first lot of questions as he has to leave at 2.25 pm.

Ms Harris Rimmer: We will be quite brief. Just to refresh your memory on the main points made in our submission, Australian Lawyers for Human Rights welcome the opportunity to make submissions on the exposure draft. We had previously made submissions on the federal bill, the equivalent, and to the New South and Queensland governments on their complementary counter-terrorism legislation.

We were established in 1993 and have over 1,200 members and we are growing all the time. Our main expertise is in international human rights law and Australia's

implementation of human rights law. Overall, we oppose the passing of this bill, the Terrorism (Extraordinary Temporary Powers) Bill, on the basis that it permits the removal of a person's liberty without criminal charge, which we think is inconsistent with Australia's obligations as a party to the International Covenant on Civil and Political Rights. We believe basically that a case has not been made out for this bill.

We acknowledge the great care that the ACT government has taken in incorporating into the bill important human rights safeguards that are not found in any other jurisdiction. We particularly welcome the prohibition on the detention of children and a range of other measures. However, we basically disagree on whether it is a proportionate response to the situation in which the ACT currently finds itself and we would note that, under international law, that response has to be founded on a set of facts, not a basic idea of what might happen in the future or future speculation.

We will get right into it. Because we would like to be constructive, even though we generally oppose the bill, we are ready to make comments about how to tighten up further the human rights safeguards in the bill. I would just say that our main argument for opposing the bill is on international human rights grounds, but we also think as lawyers that it is not an effective response to terrorism. We believe that a prosecution-led response to terrorism is far more effective than an intelligence policing-led response. We think that convicting people of terrorist acts is preferable to locking them up without convicting them, basically.

We have a problem with the element of the offence where you can put a preventative detention order on a person who has the capacity to carry out a terrorist act. We just think that is far too wide-ranging, much too broad a definition. We think it will be very unhelpful in practice. Almost anybody has the capacity to carry out a terrorist act. It is just not defined what that capacity might mean. The other limbs of the test have a much clearer connection to carrying out an act and the imminence of a terrorist act.

The problem we have with the other provisions is that we do not see how the police could have a reasonable suspicion that someone has done an act in preparation for a terrorist act and not be charged with a crime. Preparation and planning for a terrorist act is already a crime under the commonwealth Criminal Code, very clearly, and police have to have reasonable suspicion to arrest someone under the commonwealth Criminal Code. It is the same test that they would need here to put a preventative detention order on them. We think that is quite odd. Possession of anything connected to a terrorist act, again, is already an offence under the commonwealth Criminal Code.

The other recommendation we would make in this area of the bill is that, at the moment, an attack must be expected to occur within 14 days. We would prefer that to be reasonably expected so that some measure of the intelligence can be tested by a court. We think the onus of proof at the moment is too low. If you are putting someone behind bars for 14 days, effectively, there should be at least something like the Briginshaw test, which is a test usually used in disciplinary proceedings. It means that, if you are going to take away a person's rights, the test is flexible to allow the court to take into account what is fair in their particular circumstance. We think that is a more appropriate test. We also think a higher standard of proof should apply to prohibited contact orders.

Next, we raise concerns about the constitutional issues in the bill. At the commonwealth

level there was clearly a constitutional ban on a court ordering a preventative detention order. They can review it but they could not issue it. That is why a prescribed authority issues a preventative detention order at the commonwealth level. It is not clear to us, admittedly not constitutional law experts, why the ACT is in a constitutional position to do something that the commonwealth cannot when the ACT is a creation of the commonwealth. That is just something that we think that the ACT Legislative Assembly should seek further advice on before the bill is passed. We think it is a lovely idea in human rights terms to have a court issue a preventative detention order, but it is simply not clear to us.

The reason that there is a constitutional ban at the federal level is that basically a court should not be putting people behind bars without an adjudgment of criminal guilt. That is the main test in constitutional jurisprudence. It is an infringement of the separation of powers principle. So there are good reasons at the commonwealth level why a court cannot issue a preventative detention order even though it might be preferable from the public view of level of scrutiny. So we would get you to seek further advice on why the ACT can do it, given that it is a creature of the commonwealth.

We would also say that the thing we probably dislike most about the bill is that it maintains the monitoring by senior police officers of lawyer-client communications. We think this is wrong for both practical and human rights-related reasons. Basically, privileged communication with lawyers is a basic element of a fair trial. Every person has the right to be represented and we think that representation will be severely compromised if the person knows that the AFP is listening to every word they say. They will simply not be free to tell the lawyer what they need to tell them in order to be properly represented. We would say there should be no monitoring of communications whatsoever, but if there has to be monitoring of communications it should be by order of the court. So we would like to see that section changed.

We think it is odd that detainees who have not committed a crime have a lower level there of rights than someone who has. That is simply illogical. We also think it is probably a good idea for the ACT to seek some sort of review of how it is going to interact with commonwealth legislation because the regimes are quite different and the person will be shuttling between them. So it is very important to see how those two pieces of legislation will interact. Also, it will be interesting to see how it interacts with the Human Rights Act, which has quite a clear prohibition on arbitrary detention, although we note that the Human Rights Office is probably in the best position to do that.

In conclusion, while we appreciate that the ACT government has taken great care to construct this legislation in regard to human rights principles, we simply cannot support the detention of a person without a proper criminal trial, especially when we think it is in the best interests of everybody for terrorists to be prosecuted rather than simply detained for intelligence and let go.

As to the factual case for the introduction of such an extreme measure, we are talking here of a measure of Magna Carta proportions. The basis of our Westminster system and the basis of human rights law is that a person should not be detained without trial. We do not think that a factual case has been made out. If the bill does go ahead, we would strongly urge those six recommendations: that you raise the onus of proof for the issuing of a preventative detention order and a prohibited contact order, preferably to the

Briginshaw level at least; that you tighten the definition of capacity to commit a terrorist act; that you add a reasonableness requirement to an expectation that a terrorist act will take place within 14 days; that you do not allow the monitoring of lawyer-client communications or, if you must, then it should be on ex parte application by the ACT Supreme Court; and that there should be a one year sunset clause, not five, even though I know it is a big difference to the 10-year sunset clause in other jurisdictions, but really a sunset clause is meaningless if it is for a very long period, especially when this is a very extreme measure that we are taking. Also, we would recommend a review of the interaction between the commonwealth legislation and the ACT legislation and this bill and its operation with the Human Rights Act.

THE CHAIR: Thanks for that. I will ask Mr Gentleman to ask a few questions as he has indicated that he has to leave at about 2.25 pm.

MR GENTLEMAN: Thank you, chair, and thanks for coming in this afternoon. You have actually answered quite a few of my questions in your overview, which was good. If I could just get you to elaborate on the comment you made in your submission at page 9, section 32, that the use of preventative detention orders where there is insufficient evidence to bring a criminal charge or as an alternative to prosecution is a fundamental change to Australia's criminal justice system. Could you elaborate on that for us?

Ms Harris Rimmer: Yes. Basically, the onus has been on police to make out a case to arrest somebody in the past and what we are doing is, basically, creating an alternative to the criminal justice system for somebody who may not have sufficient evidence or, for some reason, does not want to bring someone before a court on formal charges or wants to get them somewhere where they know where they are for 14 days. There might be all kinds of reasons why the government wants to detain somebody but, whatever the reasons, we have to acknowledge that that is quite a big step away from the way we currently do business when it comes to criminal justice. Normally, we wait until somebody does something wrong before we lock them up, not where they might have the potential to do something wrong based on their belief system, some sort of profile. It is quite a conceptual change that we are getting up to.

Ms Kilpatrick: If I could just raise the issue of search warrants being issued. It seems to me that we already have sufficient powers to gather the information that we would require by the use of search warrants being issued under the Crimes Act. To me, this just seems, to share Susan's thoughts, a step in a completely different direction, where we are going away from the Crimes Act, away from the issuing of search warrants on reasonable grounds, under oath, applied for by police officers, to something which is totally different.

Ms Harris Rimmer: You are not allowed to question someone while they are in preventative detention. The purpose of preventative detention is not to allow you to get that person on a criminal charge. The purpose is quite different. It is to remove them from society for a period of time. It is just a very clear change.

MR GENTLEMAN: With the intention of preventing a terrorist act.

Ms Harris Rimmer: If you really think that this person is going to launch a terrorist act,

why would you want to put them off the street for 14 days rather than putting them in jail for a long period of time?

Ms Kilpatrick: Or only 24 hours, or the 48 hours allowed in some interim orders.

Ms Harris Rimmer: I think this is designed more to get people who might be in some way on the very margins and maybe—I don't know—to send a message, to appear tough. I am not sure what is the purpose of it, and I suppose that is the point. We cannot figure it out. It does not seem to be a logical response to the problem of terrorism, I suppose. We would say that if someone is committing a terrorist act, or planning, or in possession, they are crimes under the commonwealth Crimes Act. Prosecute them, put them away.

Ms Kilpatrick: Use the sufficient powers that we currently have.

MR GENTLEMAN: You touched earlier on the capacity to carry out a terrorist act. As a practitioner of law, what is your definition of the capacity to carry out a terrorist act.

Ms Kilpatrick: As someone who used to be a prosecutor for the territory, I do not recall any sections off the top of my head that said someone had the capacity to steal a car or the capacity to commit a break and enter. I do not recall having to use that word to prove an offence as a prosecutor. I am very uncertain about how that would be described or interpreted by a magistrate or a judge of this territory.

Ms Harris Rimmer: Again, it is really thought crime stuff. Any one of us has the capacity to commit a terrorist act. It is a question of how that is defined. If it is a question of capacity because they are a member of a group, again we have proscription provisions already under the commonwealth code where membership of an organisation is a crime. There just does not seem to be anything not covered that that does cover. The general concept of criminal law is that, because it imposes some sort of penalty, the language has to be sufficiently certain. That is the principle and we feel that this language is uncertain.

Ms Kilpatrick: For example, I could have the capacity to commit a terrorist act just by the use of the products that I would have in my kitchen cupboard to clean things. I could perhaps figure out a way to make an explosive device with that or I could do all manner of things with my garden mower. I just think that "capacity" is far too broad.

THE CHAIR: Where are you working now? You have been a prosecutor.

Ms Kilpatrick: I have been in the past, yes. I currently work for a non-government organisation in Canberra.

THE CHAIR: Were you with the DPP?

Ms Kilpatrick: Yes, I was.

THE CHAIR: When were you there?

Ms Kilpatrick: I was there for a couple of years.

THE CHAIR: When was that?

Ms Kilpatrick: I left there in November of last year.

THE CHAIR: So you have recent experience of the judicial system in the ACT.

Ms Kilpatrick: Yes, I do.

THE CHAIR: I will have a couple of questions for you on that shortly. In paragraph 30.28 of your submission you talk about the Briginshaw test and comfortable satisfaction. To refresh my memory, what is that actually used for?

Ms Harris Rimmer: It is usually used for disciplinary proceedings or things where a magistrate is going to do something like take away someone's drivers licence or something that is going to impact on their rights.

THE CHAIR: In terms of a bail application, in general, I do not think that there are too many rules there. Certainly, a magistrate or judge does not have to be satisfied beyond reasonable doubt.

Ms Harris Rimmer: The presumption there is for bail unless certain things are made out.

THE CHAIR: True. This is extraordinary law to counter extraordinary circumstances for which we simply did not have the need to have laws in the past or previous laws were supposed to cover. The proposition I have put to other people who have appeared is that this is terribly different from the situation of someone who is charged with murder. In the ACT there is now a presumption against bail and one would normally expect someone charged with murder to be locked up as a result and remanded in custody until going to trial—it does not matter if it is by jury or judge alone—and being acquitted. Let's face it: in the ACT there is a reasonable chance of that. I do not think we have had a murder conviction that has not been overturned or a charge that has gone past first base since 1998. Anyway, the person probably spends two to three months in custody and ultimately is acquitted.

Here we have a situation where they would have to go before the Supreme Court. Let's say that the Supreme Court actually grants the detention order and the person goes in for 14 days and that subsequently that person is released and nothing further is done, either that stops them doing something or they were not all that involved anyway and perhaps should not have been detained in the first place—for this example it does not particularly matter. What sort of difference is there really between the murder example and the situation here? I know that the concept is different but in practical terms the tests are probably fairly similar. There is a presumption against bail for murder. Here, a series of provisions has to be satisfied before the Supreme Court. The person probably would be in custody for a shorter time, 14 days, than they would be if they had to go through a trial. It seems to me that the concepts are not all that dissimilar.

Ms Kilpatrick: I hear your point absolutely, but it is my respectful view that there is a significant difference in that people who are charged with murder are actually given more rights than someone who is suspected of possibly going to do something that could

be a criminal act, that is, procedurally a police officer should be applying for bail not to be granted and evidence would be given on oath. Even in cases of murder, unless the person has an atrocious criminal record, a police officer would be called to give evidence before a magistrate in the first instance. The police officer has to hold reasonable beliefs that the person would not comply with bail conditions and those reasonable beliefs are based on a whole series of grounds: this person has failure to appear convictions on four previous occasions in the last two years or this person has several other convictions for the exact same offence.

THE CHAIR: That is for a normal bail application, but for murder there is a presumption against bail. For example, under a law I introduced, 9D, if someone is already before the court on charges or summonses for serious offences, mainly for repeat burglaries, there is a presumption against bail and they only get bail in exceptional circumstances for that one. The idea basically is to stop repeat offenders from going out and committing more offences before the first ones are dealt with. So you have bail situations where there are certainly strong presumptions against bail, but I hear your point in relation to the more normal offences where there is certainly a fairly high test for the prosecution to establish to get someone remanded in custody whereas normally there is either no presumption or a presumption in favour of bail. But we do have situations now where there is a presumption against bail and it just seems to me that that is a similar situation.

Ms Harris Rimmer: There is still a presumption of innocence about the offence.

THE CHAIR: There is.

Ms Harris Rimmer: That is a massive difference. Here there is no presumption of innocence. How can you presume someone is innocent when it is about their intent? The police are forming a view that someone has an intent, right?

THE CHAIR: Yes.

Ms Harris Rimmer: How is that compatible with the presumption of innocence? How can someone be innocent? Either someone has an intent or not. The only way a policeman or policewoman is going to know that is by some sort of manifestation of that intent in some sort of action.

THE CHAIR: But there are clauses and subclauses of this bill of the Attorney-General's whereby the Supreme Court has to be satisfied that there are reasonable grounds.

Ms Harris Rimmer: They have to be satisfied that the police hold reasonable grounds.

THE CHAIR: That's right.

Ms Kilpatrick: Which is very different.

Ms Harris Rimmer: Which is quite a different thing. The police might have reasonable grounds. It is not hard to think of reasonable grounds.

THE CHAIR: What happens when they have a reasonable suspicion, for example? I

think that currently it is reasonable suspicion rather than reasonable belief.

Ms Harris Rimmer: You need reasonable suspicion before you arrest someone.

THE CHAIR: That's right, yes.

Ms Harris Rimmer: On factual grounds. Here, you need reasonable grounds to suspect that a subject intends or has the capacity to carry out a terrorist act. Where is the basic fact situation that that is going to be based on? For a murder, someone has killed someone or not, or has killed someone with mens rea or not. If someone here has intended to carry out, how on earth do you prove that?

THE CHAIR: It is a bit like conspiracy, isn't it? Okay, you have conspiracy laws, but my experience in the ACT has been that it is fairly rare that you get those charges and that they are difficult to prove.

Ms Harris Rimmer: As is perjury.

THE CHAIR: We had one trial in the 1980s where someone actually was convicted, but it was an area which was not touched much because it was difficult to get sufficient proof.

Ms Harris Rimmer: They are not very good conspirators, I suppose, if you have sufficient proof. Partly there is the presumption of innocence, which is really quite a massive difference. The second is some sort of imperative basis, some sort of factual basis, which is different. Here, the police just have to convince the court that they hold on reasonable grounds, because of intelligence information probably, that this person has some sort of capacity, intent or profile, not that they are actually going to carry out a terrorist act.

THE CHAIR: It is not dissimilar to a conspiracy or the earlier stages of a crime. It is like the police saying they have a reasonable suspicion before they arrest.

Ms Harris Rimmer: There are quite a lot of inchoate offences in the commonwealth Criminal Code for acts of planning or preparation, but there is still an act there, there is still some sort of manifestation of intent, not just intent. I could intend to kill Amy right now, but if I never act on that intent I have never committed a crime. There is quite a difference.

THE CHAIR: I understand what you are saying. You mentioned that convicting people of committing offences in preferable to locking them up prior to the committal of an offence. I suppose the rationale for this law, and it is different, is that by having preventive detention you are actually stopping them committing the most serious of offences, that is, killing lots of people. There is a real threat of that. Therefore, there is a justification for these extraordinary laws because of the extraordinary nature of the crime these people are likely to commit. We have heard a few people say today that it is probably better not to have laws like this, even at the risk of having innocent people die, than to compromise. It is always a classic balancing act. I was interested in what one of you said about its being far better to convict people basically of an offence rather than locking them up prior to the committing of the offence. You have since talked about

having laws already which might cover that. I take it that you were putting the earlier comment in the context of already having laws to counter that.

Ms Harris Rimmer: We do. But also we think that there might be a margin of cases that this would cover that the police couldn't currently arrest people for and a lot of that I think is going to be where there's intelligence that can't be tested. That's probably the most likely area: there's a whiff of something that ASIO has got, and just on the whiff of that we will do this to be careful. I understand the policy arguments of why we do that. But let's take your example. There is a possibility at any one time that there will be a serial killer lurking who will kill lots of people. If we could do a sort of sociological profile of people and say that people like Martin Bryant might snap and kill people, does that mean we lock those people up? Maybe it does, maybe it doesn't, but it's a big ethical shift in the way we currently approach crime. We should not treat terrorism as a different ethical or moral situation from the way we ordinarily would approach crime. Killing people is wrong. Having a terrorist intent is—

THE CHAIR: I hear what you say. Serial killers tend to kill quite a few people. What if some person is suspected of killing about three or four, and there's fairly strong evidence, but probably not enough, and real grounds to suspect a few more might be vulnerable, and something like this was used then? You can't do that at present.

Ms Kilpatrick: I would say that a search warrant should be able to be reasonably obtained to gather more evidence.

THE CHAIR: On the constitutional issues—I've read your brief—the first thing I marked was where you talk about the Kable doctrine and say that, because the government has involved the Supreme Court here, it's possible that, in ordering the detention of a person without the proper judgment of criminal guilt, that would be found by the High Court to be incompatible with the proper judicial function as set out in Kable's case.

Ms Harris Rimmer: It's because it's an act of executive detention that we're doing here.

THE CHAIR: Yes. I know that in some jurisdictions they actually have a senior police officer, rather than the judiciary, who has the power under their acts to order a detention for up to 14 days. That obviously wouldn't offend Kable and that would get around the point you've raised.

Ms Harris Rimmer: They're part of the executive. I suppose the idea is that in human rights terms it's preferable to have a court, but in constitutional terms it may infringe, because the whole concept is that courts should decide to do a proper adjudgment of criminal guilt; that is the way that the High Court has phrased it. They're not doing that here. There is no question of criminal guilt here because this is a threshold lower than criminal guilt.

THE CHAIR: Yes, I understand.

Ms Harris Rimmer: In other jurisdictions, such as New South Wales, the senior police officer, as the arm of the executive, is the issuing authority for a preventative detention order and it's reviewable by a court. The difference here is that it's the ACT Supreme

Court that is issuing the preventative detention order.

THE CHAIR: It just seems to me to be a very valid point.

Ms Harris Rimmer: There is no point passing something that's unconstitutional. What the ACT can do as a creature of the commonwealth has never been very clear, it appears to me, but there is some stuff in Stephen Gageler's advice to that effect.

THE CHAIR: We got advice from our government officials that probably under commonwealth law they would lock them up for the first 48 hours, including the last 24 would be going before a federal magistrate. Then, if the offence was in the ACT, they'd go to the ACT Supreme Court to try to get the remainder of the 14 days or seven days or whatever. But, once the court's involved, Kable kicks in, and it may well kick in, in that—

Ms Harris Rimmer: And they may say that, because here there are quite a lot of things that the court has to decide, maybe there is some sort of a judgment which is enough but it's not of criminal guilt.

THE CHAIR: No, and, even though it's preferable to use a court, if you have a police officer doing it, which is then reviewable, that certainly doesn't affect Kable.

Ms Harris Rimmer: No.

THE CHAIR: The third point is on the monitoring of communications between lawyers and their clients, proposed section 53 (2). Civil Liberties Australia also had a problem with that. I do note that again the police have to satisfy some tests there, and the only way a senior officer could do that would be if they believed on reasonable grounds "one or more of the following". The following seemed to be fairly reasonable things like interfering with evidence, physical harm to a person, alerting another suspect—the sort of things which obviously you would want to not have a suspected terrorist's colleagues find out.

Ms Harris Rimmer: Yes, but we're talking about client-lawyer communications here. You're really making a lot of judgments about what lawyers do on behalf of their clients—that lawyers are prepared to commit offences on behalf of their clients—which I think is not a valid assumption to make for a start.

THE CHAIR: I wouldn't think that happens terribly often.

Ms Harris Rimmer: No.

Ms Kilpatrick: Speaking as a lawyer, I think it's an insulting provision, in that there are professional conduct rules—

Ms Harris Rimmer: Yes, it's extremely insulting.

Ms Kilpatrick: that require disclosure and I think this is absolutely extraordinary.

THE CHAIR: Yes. I've certainly interviewed people in jails as a defence counsel and,

yes, if someone wanted you to pass on some information, you would just say, "No, I can't do that" and, depending on what they say, you might actually have to even take that up further.

Ms Harris Rimmer: It's just redundant.

THE CHAIR: We had an argument with the CLA about how can you trust the police, but they have a lot of codes, as do lawyers, and, whilst you can never be 100 per cent sure that you mightn't have a crooked lawyer who might be in cahoots, it would be incredibly rare, I would think.

Ms Harris Rimmer: And then you can prosecute them. Whatever use you could get out of the evidence that you would gain by monitoring is not worth—

THE CHAIR: Yes, I understand your point there, and we're going to take that up further, as to the genesis of that and the rationale, with both the government officials. We'll ask the AFP too.

Ms Harris Rimmer: It's in the commonwealth bill, so I think they've just reproduced it. It's in the commonwealth bill because it's in the ASIO Act, when they brought in the questioning and detention powers.

THE CHAIR: Do you know if that has been used—if under those powers conversations have been monitored? Do you know what effect that's had, if any?

Ms Harris Rimmer: No.

THE CHAIR: Okay. I was going to say that, if you did, you could pass that on.

Ms Harris Rimmer: It's in the inspector-general's report, but as far as I can tell it says that communications can be monitored but legal professional privilege is not affected, and I don't really see how that can be. But then they're talking more about visual communication; they're sort of making sure that it's videoed but not aurally, so you can't hear what they're saying but the communication is monitored.

THE CHAIR: You also mention later on in your submission that this is very different from the commonwealth law and somewhat different from other interstate laws, and you see problems with how it interacts with the commonwealth law. Could you elaborate on that? What are the particular issues that cause you concern?

Ms Harris Rimmer: They're not necessarily problems, but they are different. I think it will need to be clear. There's not really anything much in the ACT bill about ASIO questioning people and how that's going to work. I don't really see the added human rights safeguards as being problematic, but it would be interesting to see how they work together, because they are quite different, in the disclosure particularly—what people can disclose and how. It's going to be very confusing.

THE CHAIR: It concerns me now. Everyone so far today has basically said, "Look, there's no need for this legislation, commonwealth or territory." That's an issue, but people have also said, "Okay, but, given that we are going to have the legislation—it's

either passed federally or we are going to have some legislation here—we accept that." A valid point was raised, although she didn't ultimately support it, by our first witness today that the laws are very different. There was an argument that, if you have to have laws, they should work and that there should be as much consistency between us and the commonwealth and other states as possible. As I said, I don't necessarily think she ultimately supported that. Certainly, the CLA said that it's good that we have different laws because they're better laws.

Putting aside whether you need these laws, given that they're there and they're going to happen, wouldn't it be a bit problematic if our laws were perhaps so much more lenient or so much more human right observant that it meant we had less effective laws than New South Wales or the commonwealth? There's a danger there that we might be more open to these types of actions, whether or not they happen. The point is that our laws don't cover as much and are far more liberal. There are far more checks and balances, but basically there is a problem because of their incompatibility.

Ms Harris Rimmer: There are only a few fundamental parts that are incompatible. If the commonwealth detains someone under 18, they won't be able to be detained in the ACT. That's an incompatibility. The rest are more procedural safeguards for when someone is going through the ACT process. I don't see that that would impact particularly. But it's going to be exceptionally confusing for someone when they are told they are going to be taken into preventative detention. The police have a whole range of things they have to tell them under the commonwealth act. They have to tell them all their rights and that they can go to the Ombudsman or go here or there. When they're detained by ASIO for questioning, they've got another set of people they can go to and another set of rights in relation to that questioning, and then they're bundled off to the ACT and they say, "Well, you've got this public advocate and you can do this and you can do that."

It's an exceptionally confusing thing for someone who, remember, hasn't done anything yet. That is part and parcel of what we're doing here; we are envisaging by necessity that someone's going to be detained in two different jurisdictions, probably also with intelligence questioning thrown in. That's confusing for anybody, and that's going to happen wherever they are. In Queensland they'll have the public interest monitor, in New South Wales they'll have the police commissioner—there will be all these different range of mechanisms. As long as they are somehow vaguely coordinated, it should be all right. A person is detained for 14 days in the ACT. That's the thing that needs to be compatible with the commonwealth, as far as I can see, and that's compatible.

THE CHAIR: It is, because it seems that we have here provisions where fairly stringent tests have to be satisfied before the Supreme Court remands someone effectively in custody. You can't accuse our superior court of not absolutely dotting i's and crossing t's when it comes to the human rights of accused persons. It's a pretty high test for the authorities to succeed, I would think, from a human rights perspective and a practical perspective. The high-jump bar is at a fairly high level.

Ms Harris Rimmer: The test is slightly different, yes. But there's no constitutional difficulty to courts in the states issuing preventative detention orders. All of them do have courts reviewing things and issuing things, or most of them do; Victoria does, Queensland does. So, as far as I can tell, that won't be different. I suppose the question you're asking me is: are the judiciary different in different places?

THE CHAIR: It would seem that the bar has been set fairly high for the prosecution and in reality there are probably very significant safeguards for any person that had to go through this.

Ms Kilpatrick: In my humble experience, there certainly are a variety of tests in practice that are used by the different magistrates and judges. It's well know in that regard that some judges are a bit harder than others in terms of bail and some apply different standards. That's certainly well known. But, going back to what you were saying earlier, though, about the ACT maybe having the weakest laws and exposing us to a greater risk, if you start from the position, which I'm starting from, that we already have sufficient powers to prevent and to stop things from happening, we don't need to go down this path at all. From ALHR's perspective, the commonwealth legislation is completely repugnant, and the ACT has done a decent job of trying to minimise the most repugnant aspects of the commonwealth legislation. Unfortunately, our neighbours in New South Wales—and we are an island surrounded by them—haven't done the same in our view. I just wanted to go back to your earlier point. I am sorry to have interrupted your train of thought.

THE CHAIR: That's okay. But this bill does put the bar at a fairly high level.

Ms Kilpatrick: Higher than others.

Ms Harris Rimmer: You're assuming that a commonwealth issuing authority necessarily will be more deferential to the exercise of the commonwealth executive power. I don't necessarily think that's true. The issuing authorities at the commonwealth level act with consent in their personal capacity. They're not acting as judges. It's up to them to basically use their—

THE CHAIR: No, I'm talking about here you have to go before the Supreme Court.

Ms Harris Rimmer: Yes, but you're assuming that it's easier at the commonwealth level to put someone under preventative detention. I'm not necessarily certain you can prove that. Issuing authorities may be harder to convince because they've got all the intelligence in front of them, but you never know. Courts are usually pretty deferential to security issues that states face. If you look at terrorism jurisprudence around the world, courts are extremely deferential to the needs of the state and are very cognisant of the separation of powers—that's usually the way I see it—and they have an enormous sense of responsibility when they're dealing with intelligence information.

THE CHAIR: I agree with you.

Ms Harris Rimmer: Hopefully, our judges will just be very good at deciding. They're being asked to do something they're not used to doing, though, and the police are being asked to do something they're not used to doing. So it's absolutely an experiment and we'll just have to see what happens.

Ms Kilpatrick: Whether or not it will be easier for someone to not have a prevention order imposed upon them in the ACT—what I'm gleaning from your question is that perhaps the ACT is a bit light-handed in terms of bail, sentencing and criminal matters generally—I don't know for certain. I don't know and I think I would have to agree with

Susan that—

THE CHAIR: We will wait and see. Susan raised a very valid comment. I'm sorry; I've dominated some of the proceedings for 20 minutes. Deb, over to you.

DR FOSKEY: First of all, thank you, not just for the submission but for a very comprehensive overview and for exploring some issues and putting some points of view that are going to be very helpful to us. You've answered a lot of my questions and I think you've also set some more work that the committee needs to do, or to ask the government to do. You suggest that we need a full examination on how the ACT bill will interact with the commonwealth legislation. That's really a bit like asking, "Will I get Alzheimer's when I'm old?"

Ms Harris Rimmer: It might have to be part of the annual report. It might have to be built into the bill as part of the annual report. Maybe that's the way to answer your question; that's the way for the Legislative Assembly to know—

DR FOSKEY: Okay, so the annual report to the Assembly. That reminds me of something I was going to ask. You suggested that the sunset clause should operate after one year. So what do you suggest should happen? What does that mean then? I'm not really sure what we mean when we invoke a sunset clause.

Ms Harris Rimmer: It means that the whole piece of legislation ceases and you have to re-enact it.

DR FOSKEY: Yes—review it and fix it up.

Ms Kilpatrick: Justify it.

Ms Harris Rimmer: It has to go through as an act of parliament all over again, and I suppose the merit to that is that, if it's extraordinary legislation for extraordinary times, it's probably a good idea for that to be reviewed regularly. So, when the Chief Minister or the Attorney-General put out the annual report, it's time to go back and ask, "Has this legislation proved itself to be necessary this past year?" If so, do we need it next year? If not, let's not have it, because we all acknowledge that detaining somebody without criminal charge is not an ultimate great idea—not something for ordinary times and ordinary measures.

DR FOSKEY: Which I hope we live in. A couple of submissions have made comments about the public interest monitor. One submission suggested that we have a look at the Queensland model—

Ms Harris Rimmer: That's quite good.

DR FOSKEY: Yes, it is. I hope that submitter does a bit more work. At the moment in the legislation we have public interest monitors for specific cases, but having someone who just does that work and overviews police actions in general seemed to be the idea. It does seem to me that the public interest monitor has scope, and I'm not sure that you commented on that in your submission. Do you have any comments now?

Ms Harris Rimmer: No, we haven't. We did, in our Queensland submission, quite extensively, saying that the Public Interest Monitor is a great idea. The only thing that has been raised is that the Public Interest Monitor in Queensland is designed to be a sort of police ombudsman. The issue with this terrorism legislation is that it's not just ordinary policing that we're dealing with; we're dealing with intelligence agencies, intelligence work. So that person, whoever it is, has to be security cleared to the highest level and has to have access to the intelligence agencies in their work, which probably means that they can't report in as public a way as someone who is just a police ombudsman, if you know what I mean. If they are going to do their job properly, they need to have access to all that intelligence information. That's basically the fuel for what's happening, and that's something the Queensland Public Interest Monitor is going to have to grapple with, because it was originally designed to deal with police, doing ordinary police stuff. That's not what this is about.

DR FOSKEY: That's really useful, and I think we need to explore that more. Yesterday, we had a briefing with JACS officers and I suggested there that this bill was in breach of Australia's obligations under article 4 of the ICCPR. In response, it was suggested that the bill is compliant with our obligations under the ICCPR because article 4 is only invoked if there's a breach of the rights contained in the ICCPR. I'm paraphrasing here and I hope I've got the sense of that answer, if not the exact words. I'm just wondering if you feel that there's been a breach of the rights contained in the ICCPR.

Ms Harris Rimmer: There won't technically be a breach of the rights until someone is detained—that's the problem—because under international human rights law, as most laws, something has to happen before there's a response. So I suppose that's technically correct, but it's not very helpful. The first time someone is detained under this act, the question will be: have we breached our obligations? And the answer will be: "Was there a permissible derogation because we're in a state of emergency" or "There's something threatening the life of our nation"—

Ms Kilpatrick: And we've taken a proportionate response.

Ms Harris Rimmer: and we've taken a proportionate response. A proportionate response is not usually something that lasts for 10 years or five years, just lurking out there waiting for something to threaten the life of the nation. Usually, it's got to be based on some sort of fact situation. For example, the London police detaining a whole lot of people directly after the London bombings is a proportionate response; having permanent legislation on their books is not—and that's why their act lapses after a year. So that would be seen under the European Court of Human Rights as a proportionate response to a set of facts. The argument to that is that something horrible has to happen before you're allowed to derogate from human rights. That's right: something bad has to happen, or be about to happen, before you're allowed to derogate from human rights.

DR FOSKEY: So how would you be then, Ms Harris Rimmer and Ms Kilpatrick, if you were charged with the job of issuing a statement of compatibility for this legislation with our human rights act? Would you issue such a certificate, such a statement?

Ms Harris Rimmer: It's about the fact situation on which it's based. Obviously, when the state and territory leaders went to the COAG meeting, and afterwards, they were given a briefing by the intelligence agencies and they all said, "This then is the response

we need." That was a secret briefing. They have never shared that with us, for reasons that might be valid—might be, might not be. But they then passed legislation for 10 years based on that briefing. So it must have been a pretty interesting briefing, frankly, to be a proportionate response. I'm sure the government—and probably you as members—have access to information that the general public does not have, so you have a strong responsibility to decide what is a proportionate response to the situation we are facing. If you want to share that information with the general public, that would be quite nice.

DR FOSKEY: I am not privy to that, unfortunately; otherwise I would be inclined to.

Ms Harris Rimmer: If we're reacting to what's happening overseas, or to September 11, the London bombings or whatever, I don't think we can do that. We have to take into consideration what Australia, what the ACT, is facing now. Without the knowledge, obviously, that Mr Stanhope had, we're not in a position to make that judgment. But it doesn't seem that way to us. So, no, we wouldn't be issuing a statement of compatibility.

DR FOSKEY: Knowledge or politics.

Ms Kilpatrick: With a 10-year clause, it certainly seems like some people have been scared to death by the things that they've heard. It has been however many months—and I don't want to be cursing anything—and we're still here.

DR FOSKEY: They might invoke the precautionary principle I guess.

Ms Kilpatrick: Could be.

THE CHAIR: I would like to thank you both very much, for your submission, your appearance here today and your assistance to the committee. I think you've raised some very good points and some interesting legal points too.

Ms Kilpatrick: Thank you. Good luck with your work.

Meeting adjourned from 2.59 to 3.18 pm.

ANITA PHILLIPS and

BRIAN McLEOD were called.

THE CHAIR: Thank you for appearing. Firstly, would you state your full name and the capacity in which you appear before the committee.

Ms Phillips: My name is Anita Phillips. I am the Community Advocate.

Mr McLeod: I am Brian McLeod, Deputy Community Advocate.

THE CHAIR: I need to read this to you, which you are probably well aware of. It is the normal caution we give at Assembly committee hearings. You should understand that these hearings are legal proceedings of the Assembly, protected by parliamentary privilege. It gives you certain protections and also certain responsibilities. It means you are protected from certain legal action such as being sued for defamation for what you say at the public hearing. It also means you have got a responsibility to tell the committee the truth because giving false or misleading evidence will be treated by the Assembly as a serious matter. Do you both understand that?

Ms Phillips: Thank you.

Mr McLeod: Yes.

THE CHAIR: It is probably highly unlikely in these types of proceedings. Would you like to address any comments to the committee? I note you have just given us a submission which is now written submission No 14. If you would like to talk to that perhaps or make any comments you wish to make.

Ms Phillips: Thank you. I would like to take the opportunity to address the issues that are highlighted in our submission. Since its inception in 1991, the Office of the Community Advocate has had, as one of its functions, to protect certain particularly vulnerable citizens from abuse, exploitation and neglect. That is outlined in the Community Advocate Act.

The Terrorism (Extraordinary Temporary Powers) Bill includes reference to the Public Advocate. The Public Advocate Act, as you are probably aware, was passed last year and is to commence shortly. The terrorism bill refers to the Public Advocate, which is the correct title for the position in the future.

It includes reference to continuing this role, that is, to protect vulnerable citizens in relation particularly to certain groups of people who might be detained under this act and who require protection. The act says "because of their impaired decision-making abilities". Impaired decision-making is defined in the Guardian and Management of Property Act in this way:

> … a person has impaired decision-making ability if the person's decision-making ability is impaired because of a physical, mental, psychological or intellectual condition or state, whether or not the condition or state is a diagnosable illness".

So the role for the Public Advocate is set out under proposed sections 50 and 51 of the new bill. Proposed section 50 is headed "Special contact rules for people with impaired decision-making ability". It states that a person with impaired decision-making ability is to be contacted by the Public Advocate. It means the Public Advocate is to be contacted. While the Human Rights Office has the responsibility for the protection of rights of all the community, the Public Advocate has statutory responsibility for a specific client group, those people who are particularly vulnerable because they have impaired intellectual functioning and therefore are in need of protection from abuse or exploitation.

The ACT government, in enacting these extraordinary temporary measures in accordance with the COAG agreement on counter-terrorism, has demonstrated a commitment, I believe, to the rights of all ACT residents and has made particular reference to those members of our community who might be more vulnerable.

Briefly, in practical terms what this legislation requires is that, when an application which relates to a preventative detention order is proposed to be made or is made for a person who is suspected of, or there are grounds to suspect that the person has, impaired decision-making ability, the applicant must give the Public Advocate a copy of the application and a written notice of the place, date and time that the application is to be heard. Secondly, the Public Advocate is then entitled to be present at the hearing of the application to ask questions of anyone giving evidence to the court and to make submissions to the court. Further, the legislation requires that, when such a person is detained under a preventative detention order, the Public Advocate must be notified about the person's detention within 24 hours so that the Public Advocate may have contact with that person to ensure that they understand the effect of the order and to check on the welfare of that person.

The legislation does provide, however, that, under certain circumstances, the Supreme Court may make an order, at the time of the preventative detention order, of no contact. That would apply to contact with the Public Advocate, as it does to contact with anyone else. The Supreme Court has that right to do that. The provisions within the bill say that it must state the reasons for this decision. In the case of people with impaired decision-making, that decision must go to the Public Advocate. It must also give a time period within which the contact can be made. If it is within 24 hours, after 24 hours; within seven days, after seven days.

In summary: the Office of the Community Advocate wants to congratulate the legislators who, in making the provision for the protection of a particularly vulnerable client group in our community, have allowed the Public Advocate to have a very responsible role. Because we are already responsible for these people, it is consistent with our functions. As a consequence, we are pleased to take on this additional monitoring role.

THE CHAIR: You have of course a precedent to deal with many people who are mentally impaired, who need your protection and who are involved in significant serious legal actions. Is there much of that occurring currently in the ACT? Do you have a number of people whom you have to monitor and who are involved in the legal system?

Ms Phillips: Yes, we do. I will ask Mr McLeod to give you more detail, but the group that you are referring to is one of our significant client groups and is what we term forensic clients, that is, clients who have a mental illness but have contact with the justice system.

Mr McLeod: In terms of the Community Advocate's responsibility to forensic patients, as they are referred to at law, the office visits the Belconnen Remand Centre on a weekly basis. We do that so that we can be apprised of anyone who is currently in custody, for example, and who has a mental health impairment that could require our assistance. We will see that person and review with the forensic staff and the correctional staff the circumstances of that person and whether or not we need to become involved.

We would normally do that for between 10 and 20 individuals on a weekly basis. They may be the same individuals each week for a period of time, but we would primarily review the circumstances, as I said, of 20 individuals there. If necessary, we would also see them and review with them what their circumstances are and what the issues are. We are very clear to them that we are not solicitors, we are not their legal practitioner, but that we have a statutory role to protect their interests and will facilitate legal representation on their part.

Often it is the case that the Community Advocate would consider taking out a guardianship order to act on that person's behalf because they are unable to understand the nature of their circumstances or the nature of the proceedings they are facing. The Community Advocate would be appointed their guardian and act on their behalf within the legal system.

The Magistrates Court and the Supreme Court, on occasion also, will often contact our office and ask us to assist people before the court where the judiciary has felt that the person is not really understanding of the process or the circumstances they are in and will call us over at very short notice, on occasion, to become involved with that person before the court and hopefully resolve it.

We are also often involved in very complex legal matters for people under guardianship as a result of, for example, a medical reason such as a stroke or if they are suffering a dementia condition such as Alzheimer's and who may be involved in a compensation matter, a Family Court matter or a matter before any of the courts of the territory. At times they are quite complex and protracted matters, and we will deal with those cases on their behalf.

DR FOSKEY: Thank you very much for coming in. Your initial letter says that you didn't think you needed to. I refer to that first letter that you sent us. You might say that what is in there doesn't apply anymore. I note that in your submission there are some differences. The first is that in the letter you indicate that you would like a change made as the language has changed. Another is that, as the Office of the Community Advocate only operates Monday to Friday, provision of advice to and/or contact with the Public Advocate within 24 hours needs to become one working day. Would you still like us to take that as a view that you hold?

Ms Phillips: Yes. Because we are not a 24-7 operation, although many of the other organisations know how to get in touch with me after hours, it means that, if somebody

were detained and not able to contact our office within 24 hours, we would like some provision for that contact to be made as soon as possible. Therefore, it might need to have "a working day" included there. It might be that we have a discussion with the people drafting the final act to be able to put a form of words in that that might be better.

The reason for that, as I said, is that if it were just seven days there would be no problem. But the act very definitely says that the Public Advocate should be contacted within 24 hours. Sometimes that is not going to be possible because there won't be anybody in there. It should happen as soon as possible.

DR FOSKEY: If that wording were to become "one working day", that would cover the issue of weekends, Easter and so on.

Ms Phillips: Yes.

DR FOSKEY: That seems to me to be quite important.

Ms Phillips: Yes. That is so that, if somebody were detained on a Saturday and they couldn't contact us within 24 hours, I would want it to be mandatory that they do contact us as soon as possible.

THE CHAIR: On the Monday.

Ms Phillips: Exactly, yes.

Mr McLeod: There are similar provisions, for example, under the Mental Health (Treatment and Care) Act in the territory where the Community Advocate has to be notified if someone's civil liberty is removed and they are detained against their will. Once again, the Community Advocate has to be notified and it is within one working day so that those weekends and public holidays are taken into account and we can visit within the prescribed time.

DR FOSKEY: You refer in the submission to the fact that the Supreme Court may make an order, at the time of the preventative detention order, of no contact to be made with the Public Advocate within 24 hours. Fortunately that is somewhat ameliorated by the fact that a time period must be stated within which contact can be made. I am concerned as to how we then know that that person's interests are represented if they are a person that falls into the category for which you are concerned. For instance, are we sure that there are going to be people who are good judges of that? To me, this is an issue of concern, and I would like you to comment.

Ms Phillips: Under the section—sorry, I can't find it now, but I am looking for it—the bill does state why they would not be contacting the Public Advocate or any other person.

Mr McLeod: Can I indicate that, in regard to the question you asked, under section 17 of the terrorism act, where there is an application for a detention order made and the court makes that order, because we have been notified of the application for the detention order, in the application for that order they must also state at that time if they are making an application for no contact. That gives the Community Advocate the opportunity to

review with the persons why that order is being made and, if she is concerned, she has the ability to question that person or cross-examine them during that hearing and to make a submission to the court on the concerns that she may have at that time.

Ms Phillips: Can I add that the section I was looking for is section 22 subsection (9). Subsections (7) and (8) say that the Supreme Court can in fact decide that the person may not be contacted under section 51, which is the Public Advocate. It says:

> The only basis for a decision under subsection (7) or (8) is that preventing the contact is necessary because the contact would significantly increase the risk of a terrorist act happening or seriously undermine the effectiveness of the preventative detention order.

It is a very serious decision that would be made by the Supreme Court to prevent or to not allow contact under section 51 with us or with any other person, not just for people with impaired decision-making but where there might be, as it says, significant risk. While I understand the need for protection for people, there also probably is a need for such a clause to give the Supreme Court the capacity to make those decisions over and above other decisions.

DR FOSKEY: I would hope that that one, if it remains in the act, isn't invoked very often.

Ms Phillips: I agree.

DR FOSKEY: I would not see how contact with the Public Advocate could be a security risk.

THE CHAIR: What sort of contact would you have with someone in that situation anyway?

Ms Phillips: It would be very similar to the contact that we have with our forensic patients, as has already been outlined by Mr McLeod, and that is to ensure that the person understands the implications of the order, that their welfare is being protected and that they are not being subjected to abuse or exploitation.

The reason for our involvement with people with impaired decision-making is that sometimes that group of people are more vulnerable to being treated in a manner that might alienate their rights. As we have said, that is how we treat people who are in the remand centre or have had contact with the justice system. We are there, not to give legal advice and not to pursue their innocence or guilt, but to advocate on their behalf because they have already been identified as people who can't advocate on their own behalf.

DR FOSKEY: A corollary of that is that I am concerned about the people who are detained and are being dealt with under the commonwealth law in comparison with the ACT law. Do they have access to the Public Advocate? Will you know about them? Is there some way that we can invoke your role if it is not covered, which I suppose it isn't, in the commonwealth legislation?

Ms Phillips: No. To my understanding, it is not covered by the commonwealth legislation. That is why I am particularly supportive of the extent of the reference in this

ACT legislation because it is very important that there be not only our role of Public Advocate but also of the public interest monitoring, which allows for quite a degree of scrutiny of the circumstances of people detained under such orders. While we are just subject to the ACT legislation, I agree that it would be a very important thing to pursue. I believe that anyone who is detained within our jurisdiction should have access to the services and the support that they require, particularly the group of people that we are responsible for.

THE CHAIR: In terms of the role of the Community Advocate: when you say they can't be an advocate for themselves and you would ensure that their voice is heard, does that mean that, if need be, you would appear in court proceedings on their behalf? Is it more that you ensure they have proper legal representation? What exactly do you mean by advocating for them? What would it be in this context? What would you have to do if someone perhaps didn't understand something?

Ms Phillips: I will let Mr McLeod answer because he is daily dealing with situations like this and probably can give you an example that can illustrate it more clearly.

Mr McLeod: To focus on the individual, in what you are asking: when our office is notified that there is to be an application made or the person has been detained, our responsibility first of all is to go and see that person and make sure that they are very aware of the applications or the circumstances they are under; their understanding of the reasons for that; at law, what are the options available to them to protect their legal rights; and, if necessary, facilitate contact with a legal representative to deal with those matters before the court.

If in the process of that we find out that the person is clearly unable to articulate or understand those issues we would review that with the Community Advocate and give consideration to making an application to the Guardianship Tribunal to be appointed guardian, to represent them legally on their behalf. That is where we would give the legal instruction on their behalf to their legal counsel.

It may be necessary to have a mental health assessment because there were concerns about their impaired decision-making that were based from a mental heath perspective. If that is the case, we would seek the involvement of mental health, either directly through the people who they are in the care of or through the court, so that that person's clear state of understanding of what is occurring is made clear before the court.

Once again, if necessary—and often it is the case—after that assessment, if we find out or we are informed by the clinician, because we are not the clinicians in those circumstances, that there is a concern about their understanding due to a mental health disorder or condition, in those circumstance we would then seek an application before the Mental Health Tribunal or before the court to refer it to the Mental Health Tribunal for that to be ascertained, assessed and clarified so that the person's circumstances can be clearly put before the court and the person's view, regardless of what it is, is put before the court.

Also, the Community Advocate takes the best-interest perspective particularly under guardianship law. So we would consider what is in the person's best interests. That is based upon what is the most respectful, the most dignified response in these

circumstances that protects the person's rights, protects the person's interests, but is also in line with community expectations put to the Assembly in considering an act and then implementing it. We use that as our guide and, on that basis, then make a decision that we put towards the appropriate body. In this instance it would be the Supreme Court. Does that clarify that?

THE CHAIR: Yes, it does.

Mr McLeod: If I could add: if there is an issue—and I am aware that Dr Foskey raised the issue before about the assessment of the person or determining if they have an impaired decision-making ability—that is at the discretion of the police, the person making the application or carrying out the order of detainment. The Community Advocate has already indicated that we need to liaise with the police when this act is coming into force so that we set in place a range of administrative arrangements that ensure as much as possible the interests and the welfare of those people are taken into account by the police.

DR FOSKEY: One more corollary to the 24-hour or one-working-day provision: what does happen if something occurs on Good Friday, for instance? If somebody is detained and a police officer decides that they require the services of your office, how do you deal with that?

Ms Phillips: What we have said is that we can be contacted immediately. As we were just saying, we can develop an MOU that gives my contact number at any time. So we can be contacted. But it is our ability to then contact the person that we want to have flexible so that it can be when we return to a working situation. If someone were detained on Good Friday and I was notified, I personally would make every endeavour to see that person as soon as possible. That is what I would do because of my professional acceptance of my role. However, if it wasn't possible for me to be able to do that, I would want the act to allow us to then see that person as soon as possible, which might be the Monday or the Tuesday.

As it is at the moment, the act says that we will be notified and we will contact the person within 24 hours. I am just saying that, where that is not possible, we would like the act to be a little bit more flexible. We would hate the situation to arise where someone says, "We tried to contact you and we couldn't get onto you." The 24 hours are up and you don't get to see the person. It is just the wording.

DR FOSKEY: But it could be all over by the time you get back, if it is 24 hours or 48 hours detention. That doesn't necessarily solve the problem.

Ms Phillips: It would only be all over if it has been to court and those sorts of provisions have occurred, and that would only be if the court is able to sit on those days as well. That, again, is not likely. But if it were that the court was convened for a hearing, then we would obviously be involved and somebody from our office would certainly be able to attend. As I said, there is also the provision for an interim order after the 24 hours. If somebody is only detained for 24 hours and then released, and therefore we don't get the chance to see them, then we can follow that up later anyway; the person is no longer in detention.

DR FOSKEY: Do you think you would?

Ms Phillips: We would. As we have said, we are notified of every person who is detained under the Mental Health Act, that is, under a 3 or 7-day order. Often those people are admitted to hospital over a weekend and they fax us. We get the fax fairly soon and then we contact as soon as we can. If by the end of the weekend the person is no longer in hospital it is probably a good thing. It means that they are well enough to be out. As with this group of people, it would mean that the order or the detention is not being pursued. It is for the protection of people who are detained; so it is important that we are able to see them and be involved in the court proceedings as soon as possible.

THE CHAIR: The Ombudsman's submission suggested there should be coordination and cooperation amongst oversight agencies and requested an amendment for preparing consolidated information of rights sheets. I think that is what they are called. Do you agree with that? Would you like to comment on that suggestion by them, because obviously you are one of the agencies involved?

Ms Phillips: Certainly. Of course I think that we would all want to share our resources and support. I have talked with the Human Rights Office about both our roles. The Ombudsman of course would be the other. To some extent, as I said, we have a responsibility for a unique group of particular people who might be detained under these orders. It would be good to have contact with the other agencies, but sometimes it is our unique role, particularly as we have said, with somebody who might have an intellectual disability, for example, who certainly needs the support and understanding of human rights and the Ombudsman, et cetera. We have the resources, the facilities and the experience to be able to deal uniquely with that person's particular issues.

Mr McLeod: Can I also add that, in regard to those issues raised by the Community Advocate, in terms of the different agencies it needs to be borne in mind that the Ombudsman's Office, the Human Rights Commission, et cetera, are in fact complaint bodies and are quite impartial in the way issues brought before them are dealt with. The Community Advocate is not impartial; we are there to advocate on behalf of the person with the impairment.

THE CHAIR: Yes, you are different.

Mr McLeod: We have to, and we do, fearlessly act on their behalf. It makes us quite different. It doesn't necessarily mean that we can't use, for example, the same information kit, but certainly not the same information sheet.

THE CHAIR: That is a good point. Thank you both very much for your assistance to the committee and for your submission.

DR FOSKEY: Thank you very much. That was very helpful.

The committee adjourned at 3.53 pm.